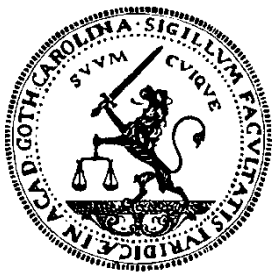

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Parallel Trade in the European Union: Competition Law Aspects

JAEM01 Master Thesis

European Business Law
15 higher education credits

Supervisor: Björn Lundqvist

Term: Spring 2013

Contents

Summary

This thesis is devoted to competition law aspects of parallel trade regulation in the European Union. The long line of case law of the European Court of Justice and the European Commission reflects the changes of the approaches towards the problem of parallel trade restrictions, where the very first cases establish the fundamental framework and policies for development of the internal market through the free movement of goods, and the most recent jurisprudence aims to review those approaches in the light of the rule of reason and efficiency gains policy with the focus on welfare of final consumers.

This paper conducts a comprehensive analysis of the long-term development of parallel trade in the European Union. In that regard, special attention is paid to the fundamental approaches to the freedom of parallel trade elaborated in Consten and Grundig case and their further development into the "restrictions by object" policy. The last is subject to critical assessment in context with its application in pharmaceutical sector. The recent judgements of the ECJ in the GSK Greece and GSK Spain cases open a new page in the history of parallel trade in Europe, and their evaluation is therefore of very big importance for this research.

Another point of interest concerns the comparison of the European experience on parallel trade regulation with the respective approaches elaborated in the newly established Common Economic Space (CES), the free-trade area of Russia, Belarus and Kazakhstan.

1 Introduction

1.1 Research Background

This Master thesis concerns one of the most crucial aspects of the European Union competition law, namely – the agreements and concerted practices, which impede parallel trade between Member States. As the Treaty on the Functioning of the European Union[1] aims first and foremost at establishment and development of the internal market, the European Court of Justice has interpreted those provisions in the light of their application to the problems of parallel trade restrictions, which makes its jurisprudence the principal source for analysis in this research. Beginning with the fundamental judgements in Dassonville[2] and Consten and Grundig[3], and ending with the most recent cases of GSK Spain[4] and Greece[5], the Court has consistently developed its policy and approaches to the restrictions of parallel trade, reflecting the necessary changes arising in context of single market development.

Thus, the recent changes to the policy of "restrictions by object" in context of anti-competitive agreements and the policy of "per se abuse" of dominant position have resulted in re-assessment of the fundamental framework of competition enforcement and its transformation in favour of the rule of reason and efficiency gains approach, where consumer welfare alongside with the establishment of the internal market is regarded as one of the fundamental goals of the TFEU.

While the policy on parallel trade has traditionally been implemented by means of the respective case law, it is also important to assess the relevant regulatory framework (e.g. Block Exemption Regulations, Guidelines on Vertical Restrains), which is of great value for practical application.

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[1] Consolidated Version of the Treaty on the Functioning of the European Union as of 9 May 2008, OJ C115/47;

[2] Case 8-74, *Procureur du Roi v Benoît and Gustave Dassonville,* ECR 1974/837 [1974];

[3] Joined cases 56 and 58-64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community,* ECR 1966/299 [1966];

[4] Case C-501/06P, *GlaxoSmithKline Services Unlimited v Commission of the European Communities,* ECR I-09291 [2009];

[5] Case C-468/06, *Sot Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton,* ECR I-07139 [2008];

Although the main point of interest of this paper concerns the experience of parallel trade development in the European Union, its comparison with the relevant problems of parallel trade in the newly established Common Economic Space (CES) free-trade area of Russia, Belarus and Kazakhstan is another point of interest[6]. This issue is very relevant to the discussed above as the fundamental principles of CES functioning are almost equal to those which are effective in the European Union.

1.2 Purpose

The purpose of this thesis can be formulated as follows. First it aims to review the theoretical, legal and historical background of parallel trade development in context of competition law of the European Union. Secondly, this paper is mainly dedicated to the analysis and assessment of the recent case law of the ECJ, which introduced significant changes into competition law policy on parallel trade in pharmaceutical products. Finally, a comparative analysis between the EU and CES approaches towards parallel trade is of special interest for this research.

1.3 Method

The methods to be used during this research are the traditional legal dogmatic, comparative legal and historical method. The traditional legal dogmatic method is applicable for the analysis of the existing legislative material, case law and respective doctrinal studies in order to reveal both the required information concerning the development of parallel trade and doctrinal points of view on the respective problem areas. The historical method shall be used in order to assess the development of the policy in historical context, taking into account the objectives of European competition and judicial authorities at the certain period of time. The comparative method will be applied both in order to compare the novels in parallel trade regulation introduced by the European Court of Justice to the established policy, and for comparison of European experience with the rules of the new free-trade area of Eurasian Economic Community.

[6] "Russia, Belarus, Kazakhstan are launching common economic space Jan. 1", RiaNovosti [web page] (2013) <http://en.rian.ru/russia/20120101/170583110-print.html>, accessed May 13, 2013;

1.4 Material

Provided that the nature of parallel trade regulation in the European Union is very case-law oriented, this research is to significant extent based on the analysis of the jurisprudence of the ECJ and the Commission, namely the following cases: Consten and Grundig, GSK Spain, Syfait[7] and Sot Lélos (Syfait II). Respective doctrinal studies, articles and researches constitute the basis for critical analysis of the case law and regulatory framework.

1.5 Delimitation

This paper is primarily aimed at assessment of competition law aspects of parallel trade in the European Union. Provided that parallel trade also concerns a number of intellectual property rights aspects, those aspects will be discussed only to the extent necessary to achieve the main goal of the research.

1.6 Outline

This thesis consists of six chapters; the first and the last are the introduction and the conclusion. The second chapter concerns the notion of parallel trade and provides the necessary theoretical background. The third chapter covers the most fundamental aspects of development of parallel trade in the European Union, while the fourth deals with the new developments and challenges in that area. The fifth chapter examines the current situation with parallel trade in the CES free-trade area.

[7] Case C-53/03, *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v. Glaxosmithkline AEVE,* ECR I-04609 [2005];

2 The Notion of Parallel Trade

To analyse parallel trade issues first and foremost definitely requires understanding of what parallel trade is and how it works. In that regard it seems reasonable to review the very basic theoretical and historical background in order to provide the basis for further research.

Thus, once goods are produced they are introduced into certain markets by their manufacturer through distribution, agency, licensing and other kinds of agreements or even by the manufacturer itself through establishing its own retail networks. Controversially, parallel trade occurs when the party to the above listed agreements or any third party, who has no direct relation to the manufacturer, subsequently re-sells those products from their original market to the consumers on the market of any third country, which means that those products end up at the market other than originally intended by the manufacturer. "Such practice has been described as "parallel trade" to the extent that it takes place outside and – in most cases – in parallel with the distribution network that the manufacturers or original suppliers have established for their products"[8].

The main and possibly the only reason why parallel trade has emerged is price differentials between the same products sold in different markets. Thus, for example, manufacturer might sell its products both to A and B countries, but due to several reasons the price in country A would be much lower. Hence, business units would try to make profits by exporting cheaper products from country A and selling them at a higher price in country B. Moreover, there could also arise cases of parallel trade if the manufacturer does not sell its products in country B at all or does it on the terms different from those applied to country A[9].

2.1 Parallel Trade Origins

Therefore, it is obvious that the reason why parallel trade does exist and what makes it so attractive for merchants is the price differentials between various markets. However, in order to conduct a comprehensive analysis it is also crucial to understand

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[8] Commission Communication "On parallel imports of proprietary medicinal products for which marketing authorisations have already been granted", Brussels, COM(2003) 839 as of 30 December 2003, p. 6;

[9] Christopher Stothers, *Parallel trade in Europe: Intellectual Property, Competition and Regulatory Law* (Oxford : Hart, 2008), p. 2;

their nature. According to the doctrinal studies, there can be a variety of reasons for such price differentials as described above[10]. Those are some of them[11]:

a) Price regulation: respective national authorities can legislatively fix price on certain kinds of goods. For example, price on pharmaceuticals is controlled by some Member States of the European Union;
b) Product regulation: some jurisdictions may impose regulatory requirements on certain types of products, which would increase producer's costs and therefore the final product's price;
c) Distribution costs: it is obvious that distribution costs may widely vary from country to country. For example, transportation and labour expenditures would be lower in Eastern Europe and much higher in Scandinavian countries;
d) Manufacturer's pricing policy: due to different level of welfare in different countries in order to achieve better sales performance and business results manufacturers might adopt the price of its products to the certain country specifics;
e) Currency exchange rates: taking into account that national currencies have fluctuating exchange rates, manufacturers, as well as potential parallel traders may take advantage of it.

Moreover, price differential is the main but no the sole factor which facilitates parallel trade. It is worth mentioning that as opposed to official full-service distributors, parallel importers are free to choose their business strategies and therefore are independent of manufacturers when it comes to the way the product is marketed.[12] Thus, unlike official retailers they do not have to incur additional expenses of promoting or after-sale servicing of the product, what lets them be more efficient and maintain consumer-friendly level of pricing.

[10] Richard M. Andrade, "The Parallel Importation of Unauthorized Genuine Goods: Analysis and Observations of the Gray Market", *U. Pa. J. Int'l Bus. L.,* 1993, Vol. 14:3, p.p. 413-417;

[11] Stothers, Op. Cit., p. 3;

[12] Ibid.;

2.2 Intellectual Property And Competition Law Collision

Approaches to such business practice are different in different jurisdictions and depend both on national competition and intellectual property rights policies. Thus, the main and the most efficient instrument used for parallel trade regulation on national level is the doctrine of IPR exhaustion, depending on which parallel trade can be both legal and illegal. Exhaustion doctrine presumes that once a product protected by intellectual property right has been marketed with consent of intellectual property rights owner, those rights of commercial exploitation over this given product can no longer be exercised, as they are "exhausted"[13].

National exhaustion principle makes parallel trade illegal, as it would infringe rights of trade mark owners (or licensees) who are in that case the sole entities authorised to import and market products on the territory of the respective country. Consequently, international or regional doctrines open possibilities for parallel trade either on international or regional level.

Within the context of intellectual property law it should be mentioned that markets of goods, which have been imported by parallel traders are commonly referred to as "grey markets" and the goods are consequently called "grey market goods". Despite such terminology has slightly negative meaning describing the "unofficial" channels of importation of those goods, they shall not be regarded as counterfeits as long as parallel trade is legal (otherwise, they are treated as counterfeits). Products brought into a market by parallel traders are still manufactured by their trademark owners or authorised entities and therefore there are no reasons to treat them differently from the "officially" imported[14].

However, intellectual property law as such shall not be regarded as the sole regulator of parallel trade. The dispute whether limitation of parallel trade by means of trademark law is justified seems to be one of the most ambiguous issues discussed by the researchers. One way or another, there exists a very tight bound between intellectual property and competition law, which demonstrate totally different approaches to the issue in question. Thus, while the purpose of IP law is to protect intellectual property and

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[13] "International Exhaustion and Parallel Importation", *World Intellectual Property Organization* [web page] (2013), <http://www.wipo.int/sme/en/ip_business/export/international_exhaustion.htm> accessed 19 April 2013;

[14] Andrade, Op. Cit., p. 411;

exclude any third parties from unlawful use of trademarks, producers take advantage of it and use it in order to restrict parallel trade, as described above. Depending on the exhaustion doctrine applicable, as soon as such restrictions begin distorting competition, they might fall in breach with competition law. This clearly indicates that concerning the issue of parallel trade those two branches of law are principally in conflict. The solution in this case is rather simple: either to acknowledge parallel trade as a legal practice and introduce regional or international IPR exhaustion principle, or controversially restrict it by means of national exhaustion principle, excluding any legal possibilities of parallel imports. Both of the described approaches are nowadays presented in different jurisdictions around the world. It is therefore hardly possible to clearly answer, which one is more advantageous, as both of them pursue different objectives that are of importance for a particular situation.

2.3 Parallel Trade: Positive Effects And Drawbacks

Therefore, assessment of positive effects and drawbacks of parallel trade on a doctrinal level would provide an objective understanding of all the necessary aspects concerning the way it influences trade and affects both manufacturers of the products and consumers.

2.3.1 Free-Rider Problem

It seems reasonable to begin with possible drawbacks, which are commonly referred to by the opponents of parallel trade freedom. It is very a widespread contemplation that parallel trade facilitates free riding on investments into trademark development made by its owner, which can be described as follows. There exist certain types of products, especially those for which brand name is of special importance, that require considerable efforts from the trademark owner dedicated towards creation of demand for it, what also includes building of a trademark integrity[15]. Therefore, it seems "undesirable to allow an unauthorised importer to reap the benefits of the trademark's goodwill without contributing to mark holder's investment"[16]. Hence, a parallel importer might make its benefits from the third party's trademark (which is its property) depriving it of some share of revenues.

[15] Ibid., p. 428;

[16] Ibid.;

In addition to trademark free riding, several authors claim that both manufacturers and distributors incur costs of building their territorial markets through advertising, discounting, and post-sale service maintenance and therefore prefer protection from competition by parallel importers who can simply buy the goods abroad without incurring similar costs[17].

However, those arguments are in fact not convincing enough and can definitely be overcome. It is clear that the conclusion that parallel traders do not contribute into creation of a brand image and have nothing to do with maintaining trademark's goodwill is more than inaccurate and unfounded. Thus, exactly like manufacturer's authorised resellers, actors on the parallel trade market have to compete with each other and therefore need to promote and support image of the products in question, which means that they actually do invest their efforts into the image of the brand[18]. This argument may however not work for luxury goods, where marketing manner may be of a superior importance, but such cases are additionally covered by the specifics of exclusive or selective distribution systems, which aim to minimise possibilities of free riding.

From the average consumer's prospective what really matters is the quality of the product in question and its special features, which have generally nothing to do with the way this product is marketed – through official distribution channels or by parallel traders. In this context parallel trade does not facilitate free riding but on the contrary creates additional benefits for the manufacturer through increasing of sales volumes and providing additional promotion to the brand[19].

The next counter-argument to the free-riding problem concerns the fact that, despite distributors usually participate in advertising of the product, promotion and maintenance of the brand goodwill is to large extent funded by the manufacturer itself[20]. Thus, manufacturers usually reasonably aim to exercise full control over advertising activities of their product in order to ensure the integral approach to its market positioning in all the markets concerned. This means that on the strategic level it is the producer who

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[17] Keith E. Maskus, "Parallel Imports In Pharmaceuticals: Implications For Competition And Prices In Developing Countries" [web document] (2001), World Intellectual Property Organization <http://www.wipo.int/export/sites/www/about-ip/en/studies/pdf/ssa_maskus_pi.pdf>, p. 21;

[18] Andrade, Op. Cit., p. 428;

[19] Ibid.;

[20] Ibid., p. 429;

makes biggest investments into the trademark, which to a greater extent affect its value. Hence, "the unauthorized importer contributes to the costs of trademark capital indirectly through the manufacturer's pricing mechanism, even if it spends less money on independent goodwill"[21].

All those considerations are persuasive enough to indicate that the problem of free riding on the goodwill of a trademark may in most cases not create any negative effects on its owner, unless it concerns luxury products as mentioned before. Hence, the argument stating that free riding infringes intellectual property rights of the manufacturers should be treated very critically.

2.3.2 Trademark Erosion Problem

It is very commonly argued that parallel trade negatively affects the perception of a trademark, which finally results in trademark erosion and decrease of its value[22]. This argument is very relevant to the one discussed above and actually is its logical consequence. Therefore, in line with previous reasoning, real negative effects in that case may arise just to the products belonging to luxury sector of the market. When it comes to mass-market products, parallel trade does not foster trademark erosion and does not generally lead to infringement of its owner's intellectual property rights. On the other hand, presence of parallel importation channels may increase competitiveness of the market in question and encourage investments into the trademark development[23]. However, taking the aforementioned into consideration, going too much into detailed analysis of this argument does not seem reasonable for the purposes of this research.

2.3.3 The Problem Of Consumer Deception

The problem of consumer deception consists in the assumption that parallel traders mislead their customers by selling unofficially imported goods as if they were distributed through authorised channels. Thus, it is argued that as trademarks are usually regarded as indicators of products quality, buying them from unauthorised resellers would confuse the customer as he or she does not know what quality to expect[24].

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[21] Ibid.;

[22] Ibid., p. 431;

[23] Ibid.;

[24] Maskus, Op. Cit., p. 4;

This argument sounds very sophisticated and is not justified at least due to the sole fact that grey market goods are not fakes or simulations, but genuine products. This being so, it is obvious that for the average customer it is of minor importance how the product is marketed, but the brand of the product and its quality are decisive. As those criteria are equivalent for the authorised and unauthorised products, there exists nothing to be treated as a deceit. Consumer deception would only occur if lower-quality parallel imports were marketed as legitimate versions of higher-quality products[25].

It also might be stated that during their distribution from the producer to the final consumer some kinds of products require special treatment, such as special transportation conditions or permanent quality control[26]. It may be relevant, for example for foodstuff or hi-end fragile equipment, which may lose their consumer characteristics because of wrong transportation or storage. Hence, opponents of parallel trade claim that, unlike official distributors, parallel traders usually neglect special safety and quality control requirements and therefore gray market goods may be of lower quality than authorised imports. To some extent this argument is legit and it is true that parallel traders do not have any legal obligations towards the manufacturer concerning products treatment, while official distributors always have the risk of being rejected because of improper performance.

However, one shall always bear in mind that even though producer does not exercise any control over parallel traders, they still have to compete with each other and official dealers, and therefore they will do their best in order to provide products of the genuine quality. As long as parallel importers want to stay on the market and win as much consumers as possible, it is not in their interest to sell goods of lower quality and undermine their reputation. Moreover, it is also important to remember that in order to obtain market authorization, products are always subject to control by competent authorities, which ensure compliance of the goods with statutory requirements. Thus, alike the two previous cases, the assumption that parallel trade engenders the problem of consumer deception is definitely outweighed by the objections stated above.

2.3.4 What Are The Consumer Benefits?

One shall summarise that as it appears from the analysis of the most commonly referred possible parallel trade disadvantages, even if they do negatively affect producers

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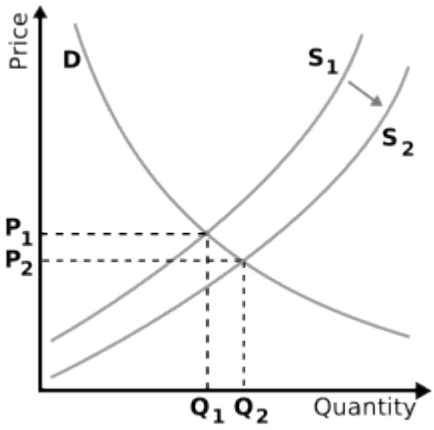
[25] Ibid.;

[26] Andrade, Op. Cit., p. 430;

or final customers, the losses for them would obviously be minimal. In that regard, it is important to assess whether consumer benefits of parallel trade can outweigh the drawbacks and evaluate the overall effects.

The predominant positive effect originating from parallel trade concerns the issue of market competitiveness. Thus, it has been multiply repeated earlier that parallel trade dramatically encourages intra-brand competition, defined as competition among distributors or retailers of the products marketed under the same trademark. Parallel import is regarded as the most efficient instrument, which ensures effective competition between gray market goods and those imported through official channels, as a result forcing the importers to improve their market performance and increasing overall market effectiveness. The very basic economic supply-demand theory perfectly illustrates that parallel import as an additional supply channel results in price reductions and provides consumers with additional range of choices.



Graph. 1

Therefore, parallel trade also aims to adjust the level of prices on the basis of competitive market concept, excluding possibilities of price discrimination between different markets, as excessively high or low prices would result in loss of customers and market share, which will be immediately taken over by parallel traders. In other words, parallel trade provides an important degree of arbitrage between the price levels in different countries, which "helps to ensure that prevailing price levels between different national markets can not differ more than a margin representing the parallel trader's transaction costs"[27].

In that respect one shall summarise that "the customer loss from restricted competition that results if parallel imports are restricted is greater that the loss caused by confusion when parallel goods are allowed to enter the market"[28]. This seems to be the most balanced and justified approach towards the problem of parallel trade, which in the context of global trade gives priority to the doctrine of free trade leaving protectionist measures behind as having anti-competitive and anti-integration character.

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[27] Van Bael & Bellis (eds.), *Competition Law of the European Community, 5th Edition* (Alphen aan den Rijn : Kluwer Law International, 2010), p. 212;

[28] Andrade, Op. Cit., p. 435;

2.3.5 Total Welfare Concept and Parallel trade

Provided that parallel trade in line with the consumer welfare concept is obviously beneficial for final consumers, it is however arguable that manufacturers gain the same substantial advantages from it. In that respect one shall refer to the total welfare concept, which reflects "the combined welfare of the consumer and producer, that is, consumer surplus plus producers' gross profit on the product"[29]. From that prospective it is clear that manufacturers generally disfavour opening markets to parallel importation because this limits their capacity to charge different prices in different markets and therefore to increase the producer's surplus[30].

When it comes to economical assessment of parallel trade effects on total welfare, it is hardly possible to provide a blanket answer to the question whether it contributes to its improvement or not. The case-by-case analysis shall be undertaken in order to compare possible drawbacks associated with lower price discrimination (such as lower incomes) and positive effects originating from the increased competition faced by the monopoly producer in the importing country[31].

Several economic-oriented researches in that regard have been conducted in order to assess comprehensive effects of parallel trade from various prospects, clearly showing that those effects fully depend on a huge variety of factors, such as the product in question, the size of a respective market, competitiveness of the sector as such, etc.[32] Nevertheless, the recent findings have demonstrated that there are two cases where the effect on the total welfare of allowing parallel trade can be stated unambiguously[33]. Those cases concern the nature of the differences between national markets where parallel trade occurs. Thus, "parallel trade might increase total welfare when it takes place between two countries with the same level of income and patient co-payments, and different drug needs … in some countries than in others. On the other hand, parallel trade between

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[29] Pieter Kalbfleisch, "Aiming for Alliance: Competition Law and Consumer Welfare", *Journal of European Competition Law & Practice*, 2011, Vol. 2, No. 2, p. 111;

[30] Frederick M. Abbott, "Parallel Importation: Economic and social welfare dimensions" [web document] (2007) <http://www.iisd.org/pdf/2007/parallel_importation.pdf>, accessed 6 May 2013;

[31] Panos Kanavos, et al., *The Economic Impact of Pharmaceutical Parallel Trade in European Union Member States: A Stakeholder Analysis* (London ; LSE Health and Social Care, London School of Economics and Political Science, 2004), p. 33;

[32] See e.g. Frank Müller-Langer, "Parallel Trade and its Ambiguous Effects on Global Welfare", *Review of International Economics*, 2012, Vol. 20, No. 1, 177-185;

[33] Kanavos, Op. Cit., p. 34;

industrialised countries, characterised by similar high-income levels and epidemiological conditions, and different drug reimbursement levels, might decrease total welfare"[34].

One way or another, one shall admit that the concept of total welfare is rather complicated when the question of its practical implication arises, as it requires the clear and correct understanding on the way in which the interests of consumers and producers (distributors) shall be balanced. In context of parallel trade the total welfare approach is misleading, as it will always result in a situation, where the manufacturers will try to increase their welfare by preventing parallel trade, and by doing so, they will affect the welfare of final consumers, and the other way around. Thus, it is quite difficult to reach a conclusion whether from the prospective of total welfare policy parallel trade may produce any positive economical effects, such as ensuring lower prices on the market and enhancing competition. Taking the above mentioned into consideration, one may reasonably assume that the total welfare doctrine may be inconsistent with the objective of market integration, where free movement of goods and parallel trade development are of crucial importance, since it creates incentives for partitioning of the market and impedes intra-brand competition.

Therefore, in the light of market integration goal competition authorities are in general reluctant to accept the total welfare standard as a guiding principle and apply instead the doctrine of consumer welfare, which expressly encourages parallel trade as an instrument facilitating intra-brand competition and therefore contributing to the welfare of ultimate consumers[35]. This does not however mean that the consumer-oriented competition policy therefore completely ignores the interests of manufacturers. A good example of interaction between those two approaches has been demonstrated by the ECJ in its recent judgments on parallel trade in pharmaceuticals, which will be subject to further analysis.

[34] Ibid.;

[35] Kalbfleisch, Op. Cit., p. 111;

3 Parallel trade in the European Union

Looking back into the history of the European Union establishment one shall keep in mind that it was created in the aftermath of the Second World War with the sole purpose of fostering economic integration between the counties of Europe, which at that time had to face serious challenges. Thus, back in 1958 the fundamental idea of the organization called European Economic Community (EEC) was to create the single market for all its members, which would ensure sustainable development of the region.

Nowadays, when the EEC has evolved into the European Union pursuing not merely economical aims, but being also a powerful political institution, establishment and functioning of the internal market still remains its primary goal. Thus, Article 26 of the Treaty on the Functioning of the European Union (hereinafter referred to as "TFEU" or "Treaty") manifestly stipulates that "internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties" [36].

3.1 Free Movement of Goods

The background described above is crucial for understanding of the approaches towards parallel trade elaborated by the executive and judicial authorities of the European Union. Despite there are no references to parallel trade as such in the Treaty and consequently there are no fundamental provisions of secondary legislation, it is clear from the well established case law of the European Commission and the European Court of Justice (hereinafter referred to as "the ECJ") that the Community law nevertheless implicitly encourages parallel trade in the internal market.

In that respect it is necessary to focus on the principle of the free movement of goods, which being the basic framework for trade between Member States, has huge potential when it comes to its practical implication. According to Article 28 TFEU, "the Union shall comprise a customs Union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect".

[36] Consolidated Version of the Treaty on the Functioning of the European Union as of 9 May 2008, OJ C115/47;

Thus, the basic framework for enforcement of the free movement of goods principle is laid down in Article 34 TFEU, which prohibits both Member States and the Union itself[37] from adopting any quantitative restrictions on imports and all measures having equivalent effect within the internal market. This concept has been further developed by the early case law of the ECJ, which defined what exactly "measures having equivalent effect" should mean. In the *Dassonville* case from 1974 the ECJ ruled that "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions"[38]. Such a broad interpretation of the Treaty provisions which is commonly referred to as "Dassonville formula" "tends to support an approach to Article 34 as the basis for an economic constitution for EU: maximizing the right for individuals to participate on the market on whatever terms they choose, and providing them with a vehicle to challenge any national rule which – even potentially and indirectly – stands in their way"[39]. This abstract clearly illustrates that the authorities of the European Union have made a lot of efforts towards harmonization of the single market, which definitely includes freedom of parallel trade, a derivative from free movement of goods principle.

However, effectiveness of all the Treaty provisions, as well as the respective case law, prohibiting Member States from "applying measures hindering free circulation of goods would be undermined if businesses could simply re-erect barriers to intra-Community trade through the imposition of vertical restrains inhibiting parallel imports"[40]. In other words, private parties would make useless the "free movement" policy by simply restricting their business activities to certain territories and excluding any possibilities of free movement by contractual terms.

3.2 Territorial restrictions: competition law and parallel trade

Due to the reason mentioned above the authorities of the European Union have always demonstrated a hostile approach to territorial restrictions and other ways of

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[37] Case C-114/96, *Criminal proceedings against René Kieffer and Romain Thill,* ECR I-03629 [1997];

[38] Case 8-74, *Procureur du Roi v Benoît and Gustave Dassonville,* ECR 1974/837 [1974];

[39] Catherine Bernard, *The substantive law of the EU: the four freedoms* (New York: Oxford University Press, 2010), p. 74;

[40] Van Bael & Bellis, Op.Cit., p. 210;

impeding trade (including parallel trade) between Member States, especially those attempted by private parties. In order to address such attempts the Commission and the ECJ have to invoke competition provisions of the TFEU, especially those on the prohibition of absolute territorial protection and other types of vertical restrains.

According to Article 101 TFEU, "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction distortion of competition within the internal market shall be prohibited as incompatible with the internal market".

3.2.1 Consten and Grundig Case

The first fundamental case to deal with the problem of parallel trade restrictions under Article 101 TFEU was *Consten and Grundig*[41], which arose before the ECJ as early as 1966. The Court had to assess the exclusive distribution agreement, where Consten, a French company, was appointed as the sole representative of Grundig, a German supplier, in France. Thus, Consten undertook to exclusively purchase electronic household appliances from Grundig and to sell them on the French market under the contractual obligation not to resell them directly or indirectly to other countries. Similar was used for the whole distribution network around Europe.

In order to make such restrictions legit distributors in different countries were granted the exclusive right to use the "Grundig" trademark, excluding any third parties from legal possibilities of re-selling branded products. Moreover, national distributors undertook to register under national law their own trademark "GINT" as the appliances supplied by Grundig were branded as "GINT".

The case arose when a third-party company UNEF succeeded to purchase Grundig appliances from German traders who delivered them in spite of the export prohibition imposed by Grundig and resell them on the French market at more favourable prices. Consten found such practice illegal due to the trademark infringement and unfair competition reasons and filed an action against UNEF, which ended up before the Commission and has been subsequently challenged before the ECJ.

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[41] Joined cases 56 and 58-64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community,* ECR 1966/299 [1966];

Therefore, there were several issues to be solved by the Court. As it follows from the definition of an anti-competitive agreement, in order to determine its anti-competitive nature it is necessary to establish two principal facts – whether it affects trade between Member States and whether distortion of competition constitutes its object or effect.

Hence, it is important to assess the notion of agreements "which may affect trade between Member States". In line with the doctrine of free movement of goods, the ECJ noticed that the agreement falls under the prohibition of EU competition law only to the extent when such agreement may affect trade between Member States. Hence, "what is particularly important is whether the agreement is capable of constituting a threat, *either direct or indirect, actual or potential*, to the freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market"[42]. This approach led the Court to the landmark conclusion that agreements imposing territorial restrictions or other limitations on freedom of trade and limiting possibilities of parallel trade in the internal market indisputably affect trade between Member States and therefore satisfy the requirement laid down in the Treaty.

Another fact that requires assessment for legal qualification of an anti-competitive agreement is its influence on the competition itself. As follows from the afore-mentioned definition, the Treaty prohibits agreements, which have the *"object" or "effect"* of competition restriction. In that regard one shall bear in mind that European competition law treats the principle of freedom of competition as having various stages and manifestations, namely – inter- and intra-brand competition. The Commission and European Courts' condemnation of restrictions on parallel trade is essentially motivated by the promotion of intra-brand competition[43].

Thus, the second landmark conclusion delivered by the Court in Consten and Grundig made it clear that restrictions to parallel trade shall be regarded as restrictions "by object" and therefore they are "automatically" caught by Article 101 TFEU even without any economic analysis and assessment of actual or potential negative effect[44]. The court stated that for the purpose of Article 101 TFEU there is no need to take account of concrete effects of an agreement once it appears that is has as its object restriction of competition. When entering into contractual relations, which impose territorial restrictions

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[42] Ibid., p. 341;

[43] Van Bael & Bellis, Op.Cit., p. 209;

[44] Christopher Stothes, "ECJ Rules on GSK's "Dual Pricing" of Pharmaceuticals in Spain", *Journal of European Competition Law & Practice*, 2010, Vol. 1, No. 2, p.p.123;

aiming to impede free movement of goods through partitioning of the internal market, the parties obviously intend to shelter respective national markets from possible effective competition.

Moreover, the decision in question explicitly declared that any further considerations of possible positive effects of such agreements on inter-brand competition or other economic benefits should not be regarded as reasonable justifications for escaping from Article 101 TFEU.

3.2.2 Hardcore Restrictions and Block Exemption Regulation

In the assessed judgement of Consten and Grundig the ECJ demonstrated an extremely hostile approach to any vertical restrictions, which have the potential of impeding competition, by declaring them incompatible with Union law as anti-competitive by object and leaving no possibilities for their justification under article 101(3) TFEU.

Despite being inspired by pro-competitive intentions and aiming to create benefits for the consumers, such kind of policy obviously deteriorated the position of businesses. Thus, in some cases by imposing vertical restrains a company has the only reasonable way of marketing its products. For example, it can be absolutely true for producers of luxury goods where the way of product marketing is crucial for the brand image.

In order to mitigate the consequences of Consten and Grundig ruling, in 1967 the Commission introduced the so-called "Distribution Regulation"[45], which aimed to exclude certain kinds of anti-competitive vertical agreements from the scope of Article 101 TFEU.

The current version of Vertical Block Exemption Regulation (hereinafter referred to as "VBER") revised in 2010[46] provides a "safe harbour" for the parties to the vertical agreement[47] in case they hold market share not exceeding 30% of the relevant market each, and the agreement does not contain so called "hardcore" restrictions. The latter are of special interest for this research.

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[45] Commission Regulation No 67/67/EEC "On the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreements" of 22 March 1967, OJ 57/849;

[46] Commission Regulation (EU) No 330/2010 "On the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices" as of 20 April 2010, OJ L102/1;

[47] As defined in Article 1 VBER, "vertical agreement" means an agreement or concerted practice entered into between two or more undertakings each of which operates, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services;

Thus, VBER contains a list of hardcore restrictions – the restrictions, which preclude the benefit of exemption of a vertical agreement from the rules of Article 101 TFEU under this regulation. Where such a hardcore restriction is included in an agreement, that agreement is presumed to fall within Article 101(1)[48]. Despite the regulation does not explicitly provide any guidelines on parallel trade restrictions as such, it does however deal with the issue of territorial restrictions. As follows from Article 4 VBER, the exemption shall not apply to such vertical agreements, which have as their object the restriction of the territory into which a buyer party to the agreement may sell the contract goods or services. In other words, restriction on passive sales and parallel trade as such constitute the hardcore restriction and in no way can benefit from the VBER.

Territorial restrictions as described in the VBER have further on been subject to detailed review in the Guidelines on Vertical Restrains issued by the Commission. Thus, territorial restrictions depending on the way they are implemented in the vertical agreement can take both direct and indirect forms.

a) Direct Territorial Restrictions

The situation when provisions of a vertical agreement explicitly limit distributor's activity (including advertising activities, etc.) with its contractual territory and directly preclude the possibility of reselling products to other markets within the internal market has already been assessed in Consten and Grundig case and therefore there is no need to go much into details of this kind of restriction. However, further development of the case law made it clear that territorial restrictions fall in breach with Article 101 TFEU even if they are implemented in a way not formally binding for the parties concerned[49]. The fact of their actual observance by the parties is also irrelevant to find an anti-competitive nature of an agreement, due to the assumption that the mere potential existence of such restrictions "may create a "visual and psychological" effect, which contributes to a partitioning of the market"[50].

In that regard, it is necessary to make an emphasis on the fact that the Commission and the ECJ have traditionally considered such restrictions as having the object of

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[48] Commission Notice "Guidelines on Vertical Restraints" (2010/C 130/01) as of 19 May 2010, OJ C130/1, para. 47;

[49] See e.g. Commission Decision 82/853/EEC *National Panasonic,* OJ L-354/28 [1982];

[50] See e.g. Case T-66/92, *Herlitz AG v Commission of the European Communities,* ECR II-00531 [1994];

restricting competition and therefore falling within the scope of Article 101 TFEU even without the assessment of potential or actual negative effects on competition[51].

b) Indirect Territorial Restrictions

Alongside with direct forms of export prohibition, there also exist a variety of other indirect means to restrict parallel trade on the internal market, which are generally caught by Article 101 TFEU. Despite some of the practices to be discussed further may be regarded as both legal or illegal depending on various circumstances, it is still necessary to assess the general approach towards the most common forms of indirect territorial restrictions.

1. *Refusal to supply* concerns the agreements where the supplies are geared to distributor's obligation of not engaging into export outside its contractual territory and parallel trade activities. "Accordingly, refusals to supply, limitations of supply or even threats to refuse or to limit supply may infringe Article 101(1) where the reseller's conduct suggests an "understanding" on his part that it will lose supplies if resells product outside its territory"[52].

   A derivation from refusal to supply policy, the so-called "*referral policy"*, may also fall within the scope of Article 101 TFEU. Thus, the supplier may impose an obligation on the distributor to refer any potential customers outside its territory to the respective distributor in such customers' home region.

2. *Product differentiation* as a practice falling in breach with 101 TFEU occurs when parties enter into a vertical agreement aiming to preserve differences between national markets and therefore restrict parallel trade. Among other ways, most commonly differentiation is carried through the trademarks, under which the same products are marketed in different countries. Such kinds of restrictive measures implemented in the vertical agreements have been subject to the assessment by the Commission and the ECJ in *Zera/Montedison*[53] and *Dunlop Slazenger*[54] cases[55].

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[51] See e.g. Case C-277/87*, Sandoz prodotti farmaceutici SpA v Commission of the European Communities,* ECR I-00045 [1990];

[52] Van Bael & Bellis, Op. Cit., p. 224;

[53] Commission Decision 93/554/EEC *Zera/Montedison,* OJ-L272/28 [1993];

[54]Case T-43/92, *Dunlop Slazenger International Ltd v Commission of the European Communities*, ECR II-00441 [1994];

3. *Differential pricing* is a pricing policy, where prices for the equal products supplied to the distributors may vary depending on the market, which is known to be intended for their sale. Thus, the manufacturer aims to charge higher prices for products intended for export in order to make parallel trade less favourable for its distributors. Alongside with direct differential pricing policy, Article 101 TFEU is generally applicable to the cases where the supplier provides discounts, bonuses and other incentive measures for the suppliers not engaged in parallel trade.

4. *Warranty restrictions* take place when the manufacturer discriminates against products purchased through parallel distribution channels by refusing their after-sales services. Such practice as tending to limit distribution to official channels only is generally regarded illegal by the Commission and the ECJ[56].

5. In line with the concept of agreements having the object of restricting competition introduced by the decision in Consten and Grundig and developed by further case law and VBER, indirect territorial restrictions also fall within this category and therefore generally cannot be exempted from Article 101 TFEU.

Summarizing the discussed above, one shall admit that the Commission and European judicial authorities have always treated parallel trade as an effective tool for internal market harmonization, while Article 101 TFEU has traditionally served as an excellent instrument for the market-integration policy enforcement. This being so, it appears reasonable that any justifications of parallel trade restrictions under Article 101(3) TFEU based on "price differences due to differing transportation costs, customs duties, currency exchange costs and fluctuations, overheads, or governmental price regulation"[57] have been consistently rejected. This well-established approach in its turn has led to the legitimate presumption that parallel trade restrictions are in principle non-justifiable.

However, the most recent development of case law has indicated some on-going revolutionary changes in the fundamental policy of parallel trade enforcement. Thus, the Commission and the ECJ have recently demonstrated an intention to review their policy towards this issue and delivered a number of landmark cases, which overturned their

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[55] However, if a product differentiation occurs as a unilateral act of the supplier, it falls outside the scope of Article 101(1) TFEU;

[56] See e.g. Case 86/82, *Hasselblad (GB) Limited v Commission of the European Communities*, ECR-00883 [1984];

[57] Van Bael & Bellis, Op. Cit., p. 211;

approaches to parallel trade in pharmaceutical sector. Those cases will be subject to further assessment in this research.

4 Parallel Trade in Pharmaceuticals

Parallel trade in pharmaceutical market is very different from all other sectors due to the fact that it is to large extent shielded from the regular market economy way of functioning. On one hand, it concerns the prices of pharmaceutical products, which are commonly established by the national authorities of Member States. As there is nothing to harmonise prices for equal products between national markets[58], emerging price differentials create distinct opportunities for parallel imports and foster exportation of medicines from the "low-price" to the "high-price" countries. On the other hand, being responsible for health-care programmes Member States, directly or indirectly, also act as the biggest consumers of pharmaceuticals.

This being so, the support of the Commission and the ECJ given to the freedom of parallel trade in the single market resulted in a situation, when the "low-price" countries had to face shortages of healthcare products, while pharmaceutical companies kept supplying their national markets with the volumes several times exceeding regular national consumption[59].

Consequently, pharmaceutical companies reasonably found such manifestation of parallel trade inacceptable and "sought to argue that since normal conditions of competition are distorted by national regulation, parallel trade should not result in imposing one Member State's pricing policies over the other Member States"[60]. Moreover, uncontrolled supplies of cheap pharmaceutical products through parallel channels to the entire of internal market would definitely undermine the financial welfare of pharmaceutical companies, which would lose their profits in "high-price" markets. Taking into account the highly innovative nature of pharmaceutical business, which requires a lot of investments in research and development, lower profits will negatively affect the development of new healthcare products. Therefore, a few cases arose before the Commission already in the mid-1990's, when pharmaceutical companies started taking measures aimed to parallel trade limitation.

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[58] Commission Communication "On parallel imports of proprietary medicinal products for which marketing authorisations have already been granted", Brussels, COM(2003) 839 as of 30 December 2003, p. 6;

[59] I. Lianos & I. Kokoris (eds.), *The Reform of EC Competition Law* (Alphen aan den Rijn : Kluwer Law International, 2010), p. 380;

[60] Ibid., p. 377;

Prior to the analysis of the relevant case law, it seems reasonable to devote a few paragraphs to the specifics of parallel trade in pharmaceuticals, which is not as obvious as it might seem to be.

4.1 Specifics of Parallel Trade in Pharmaceuticals

The first distinctive feature of the pharmaceutical sector is the so-called public service obligation, under which the manufacturers and distributors of medical products must "ensure appropriate and continued supplies of that medicinal product to pharmacies and persons authorised to supply medicinal products so that the needs of patients in the Member State in question are covered"[61]. Such an obligation in fact requires the manufacturer to organise the long-term planning of their supply chains in order to ensure sustainable production of medicines. Despite the public service obligation does not expressly declare that the manufacturer must supply as much products as its distributors require, the reality is different. Even though the supplies may be enough to cover the local demand, parallel traders permanently undertake to export their substantial part, leaving hardly any stock for local consumption and therefore creating deficiency on the market. In the absence of supplies prioritization requirement, pharmaceutical company ends up again under the obligation to recover that deficit, and while doing so contributing to the never-ending circle of supplies and exports by its wholesalers.

This being so, the manufacturer on one hand has to plan its production and constantly supply its distributors in "low-price" markets, while on the other hand, has no legal way to limit parallel trade and ensure that consumers' needs are covered.

Another specific aspect of parallel trade in the pharmaceutical sector concerns its modest pro-competitive effects. Thus, unlike other markets, parallel trade in pharmaceuticals cannot be presumed to create any substantial benefits for final consumers. As follows from the research of economic effects of pharmaceutical parallel trade conducted by the LSE, it is rather obvious that neither final consumers (patients), nor health insurance organizations do accrue any material benefits from parallel trade, while at the same time the only real beneficiaries are the parallel traders and to a much smaller

[61] Directive 2001/83/EC of the European Parliament and of The Council "On the Community code relating to medicinal products for human use" as of 6 November 2001, OJ L 311/67;

extent – the retailers[62]. The reason why patients do not win because of the lower prices on the grey market medicines is the sole fact that those prices are actually as high as those for officially imported products are.

Due to special requirements to the distribution of medical products, parallel traders themselves usually are not engaged in the retail business and therefore limit their activities to the re-selling of cheap medicines to authorised pharmacies. The latter in their turn sell those products at the price, which is established by the Member State in question, and final customers eventually "pay the same amount for the product whether or not it was parallel-imported"[63]. The same situation occurs in public healthcare sector, where the savings of national healthcare funds from purchasing of parallel-imported medicines do not generally exceed 1% of total pharmaceutical expenditures[64].

Those facts clearly demonstrate that unlike other markets, parallel trade in pharmaceuticals does not result in substantial (if any) growth of intra-brand competition and fostering the development of the sector. On the contrary, it negatively affects the possibilities of investments into research and development and therefore tends to reduce the overall competitiveness of the respective market. Those arguments were introduced by the Spanish subsidiary of GlaxoSmithKline pharmaceutical giant, when the case on the restrictions of parallel trade in Spain arose before the Commission.

4.2 The Glaxo Saga: GSK Spain

In the middle 1990-s the pharmaceutical market in the European Community suffered from parallel imports originating mainly from two countries with the prices for pharmaceuticals fixed at a substantially low level, namely – Spain and Greece. Pharmaceutical companies operating in this low-priced segment of internal market were affected by the growing scope of parallel trade and sought therefore to restrict it by the available contractual means. The first landmark case to be analysed in that regard is the so-called *GlaxoSmithKline Spain*, where the ECJ had to answer whether and under which

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[62] Panos Kanavos, et al., *The Economic Impact of Pharmaceutical Parallel Trade in European Union Member States: A Stakeholder Analysis* (London ; LSE Health and Social Care, London School of Economics and Political Science, 2004), p. 135;

[63] I. Lianos & I. Kokoris, Op.Cit., p. 385;

[64] Ibid.;

circumstances manufacturers of medical products can legitimately restrict parallel trade in the internal market.

4.2.1 The Case Background

In 1998, GlaxoSmithKline Service Unlimited (formerly Glaxo Wellcome SA, hereinafter referred to as "GSK"), the Spanish subsidiary of GlaxoSmithKline group, one of the world's largest pharmaceuticals producers, introduced the new General sales conditions for its wholesalers in Spain. According to Article 4 of these General conditions, GSK established 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 prices for medicines distributed to pharmacies and hospitals located in Spain shall not exceed the maximum level set out by health care authorities. However, in case of supplies for export GSK decided that sales prices should be determined according to real, objective and non-discriminatory economic criteria, which would make them far higher and consequently eliminate parallel trade expediency. "In so doing, GSK aimed 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"[65].

The Commission's Decision

In order to seek an individual exemption of such a provision from being caught by Article 101(1) TFEU, GSK notified the European Commission of the new General terms. At the same time, the "dual pricing" provision was challenged by a number of wholesalers before national competition authorities.

In 2001, the Commission delivered the Decision on GSK's exemption request, where it found that the new terms did fall within the scope of Article 101(1) and could not be exempted from it under Article 101(3) TFEU due to the fact that "such conditions have as their *object* and effect restriction competition and affect trade between Member States to an appreciable extent within the meaning of Article 101(1)"[66]. This conclusion was made both on the basis of the existing case law and the economic analysis made by the Commission, which let it come up with the opinion that "dual pricing" clause "produced

[65] "Commission must re-examine GSK's Spanish sales conditions", *EU Focus*, 2009, 263, p. 7;

[66] Commission Decision 2001/791/EC *GSK Spain*, OJ L302/1 [2001], para. 189;

an effect tantamount to that of an export ban in a considerable number of cases…"[67]. That decision was appealed by GSK before the Court of First Instance (the General Court).

Court of the First Instance Judgment

In 2006, the CFI completely overturned Commission's decision by first declaring that the clause restricting parallel trade did not have an anti-competitive object per se but only had anti-competitive effect. This statement amounted to the reconsidering of the well-established policy described above. The Court consistently held that the Commission was wrong finding the restrictive object of the agreement in question due to several grounds. The most ambiguous and revolutionary issue, which would let it reach that decision, was the assumption that the ultimate purpose of Article 101(1) TFEU was protection of interests of final customers, i.e. consumer welfare. This lead to the conclusion that an agreement limiting parallel trade has the object of restricting competition in so far as it deprives final customers of effective competition[68].

Having analysed the relevant market the CFI found that unlike other sectors of economy, state regulation of prices on pharmaceutical products makes this market to some extent shielded from "regular" supply-demand system of price determination. Consequently, it is impossible to presume that parallel trade would always lead to prices reduction and therefore increase the welfare of final consumers. Hence, in order to find whether the agreement has negative effects it is always necessary to conduct the comprehensive analysis. The latter, according to the reasoning of the Court, means that the "dual pricing" system has not the object but effect of competition restriction.

Relying on the described argumentation and having assessed possible negative effects of the agreement, 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 criticism 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

[67] Ibid., para. 117;

[68] Case T-168/01, *GlaxoSmithKline Services Unlimited v Commission of the European Communities*, ECR II-02969 [2006], para. 121;

agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress"[69].

Those conclusions were sufficient for the court to annul the Decision of the Commission almost in all its points. Logically, all the parties were not satisfied with this result and appealed the CFI Decision to the ECJ. GSK asked the ECJ to confirm 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 sought "dual pricing" to be recognised as a measure restricting competition by object and therefore falling within the scope of Article 101(1) without the possibility of its justification under 101(3) TFEU.

The Opinion of AG Trstenjak

Before starting the analysis of the Decision by the ECJ it is necessary to take a brief look at the Opinion delivered by Advocate General Trstenjak in June 2009. The main point of the conducted analysis was that the CFI committed an error of law in one aspect. Thus, the Opinion states that the Court did not regard the object of parallel trade restriction as a sufficient basis to find a restriction of competition by object under 101(1) TFEU and wrongfully introduced the requirement of an analysis designed to determine whether the General Sales Conditions have as their object or effect the restriction of competition on the relevant market, to the detriment of the final consumers[70].

The most significant idea introduced and emphasised by Advocate General in the Opinion is the assumption that despite the agreement is restrictive by object, it is not however prohibited per se, as there always exits a possibility to present evidence that would justify the exemption by proving existence of benefits for final consumers from the agreement in question. It is therefore for the Commission to adequately review all the presented evidence and take the decision on the possibility of exemption.

4.2.2 Article 101(1) TFEU – Problems of Interpretation

As the Case arose before the ECJ, the Court basically had to consider two principal issues: whether the "dual pricing" clause violates Article 101(1) as restriction by object or

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[69] Ibid., para. 247;

[70] Case C-501/06P, *GlaxoSmithKline Services Unlimited v Commission of the European Communities,* ECR I-09291 [2009], Opinion of AG V.Trstenjak as of 30 June 2009, para. 84;

by effect and if it does, is there any possibility to justify such restriction under 101(3) TFEU.

Concerning the first issue the ECJ in line with the Opinion demonstrated an orthodox case-law based approach stating that such kind of agreements are doubtless subject to prohibition by Article 101(1) as restricting competition by object. The Court explicitly stated that the distinction between the "object" and "effect" restrictions should be always borne in mind. Thus, finding an agreement restrictive by object always requires scrutiny of the agreement itself and the circumstances in which it "works" (e.g. pharmaceutical market or motor vehicles market), while revealing "effect" restrictions presumes examination of the consequences of the agreement. Moreover, it was emphasised that anti-competitive object and effect are not cumulative but alternative conditions for assessing whether the agreement falls within article 101(1) TFEU.

In the next few paragraphs the Court developed the criticism of Advocate General concerning the introduction by the CFI of the requirement of proof that the agreement had negative effect on final consumers stating that first, according to the wording of Article 101(1) there is nothing to indicate that only those agreements which deprive consumers of certain advantages may have anti-competitive object. Second, and the most crucial aspect highlighted by the Court was that besides protection of the interests of final customers, article 101(1) also primarily aims to protect the single market structure and competition as such, which demonstrates the multi-goal approach to competition law. In that respect the Court referred to its recent Sot Lélos case, which established that parallel trade shall always be regarded as benefit for final customers, and therefore claimed that restrictions on parallel trade are anti-competitive by object even in very special sectors of economy, including the pharmaceutical market[71]. Thus, the ECJ expressly rejected the reasoning used by the CFI to explain why the agreement did not fit the category of restrictive by object.

Turning back to the decision of the CFI, it is obvious that its significance and revolutionary character were the results of the approach, where "competition was not meant as an end itself, but a process that ultimately must benefit consumers"[72]. Differences in the approaches demonstrated by the CFI and the ECJ originate from their

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[71] Case C-501/06P, *GlaxoSmithKline Services Unlimited v Commission of the European Communities,* ECR I-09291 [2009], para. 59-61;

[72] Carlo Petrucci, "Parallel trade of pharmaceutical products: the ECJ finally speaks comment of GlaxoSmithKline", *European Law Review*, 2010, 35(2), p. 279;

different positions concerning interpretation of Article 101(1) TFEU and the place of consumer welfare doctrine within the existing competition policy.

In this regard it is important to bear in mind that competition law of European Union developed in such economic and historical background, when the main goal was establishment and development of single market, while competition law was (and still remains) regarded as the main instrument, which would help to reach it. Therefore, it is logical that the officially declared paramount value was not the consumer welfare, but market integration, which also explains the nature of existing case law. This does not however mean that EU Competition law completely disregards the necessity of consumer welfare, but interprets it in line with multi-goal policy as the consequence of effective policy directed towards protection single market and competition as such. "Since Union competition law is not restricted to economic welfare there was nothing to justify departure from the orthodox position that "agreements … aimed at preventing or restricting parallel exports, … be agreements whose object is to restrict competition"[73].

However, in its decision, the CFI did appeal to the consumer welfare principle, which overturned the orthodox interpretation of Article 101(1) TFEU. The question is – why? The first reason is that in the Court's opinion consumer welfare principle shall be regarded along with the goal of establishment of the internal market as a legitimate aim laid down in the TFEU and their treatment as antithetical categories does not make any sense.

In that regard the reference shall be made to the very early case law, especially to the Judgement of the ECJ in Consten and Grundig, which was used by the CFI in order to demonstrate the role of consumer welfare principle on that landmark decision. As follows from the ECJ's argumentation, while assessing the anti-competitive nature of the agreement in question, the Court "did not hold that an agreement intended to limit parallel trade must be considered by its nature, that is to say, independently of any competitive analysis, to have as its object the restriction of competition"[74]. On the contrary, "the Court of Justice then carried out a competitive analysis, abridged but real, during the course of which it held, in particular, that the agreement in question sought to eliminate any possibility of competition at the wholesale level in order to charge prices which were

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[73] Okeoghene Odudu, The last vestiges of overambitious EU competition law", *Cambridge Law Journal*, 2010, 69(2), p. 249;

[74] Case T-168/01, *GlaxoSmithKline Services Unlimited v Commission of the European Communities*, ECR II-02969 [2006], para. 120;

sheltered from all effective competition, considerations which led it to reject a plea alleging that there was no restriction of competition"[75]. This line of argumentation is aimed to demonstrate that despite agreements tending to limit parallel trade have traditionally been treated as having the object of restricting competition, the reason for it was not the mere desire to foster the establishment of single market. Thus, the policy of absolute protection of parallel trade and market integration have never been an end in itself and served as a proxy for safeguarding consumer welfare[76]. In other words, there is nothing but the consumer, who is in very deed to benefit from development of intra-brand competition and elimination of artificial market barriers.

Along with parallel trade restriction, certain kinds of anti-competitive practices (such as price fixing) have also been regarded as anti-competitive by object not due to their negative economic consequences as such, but because they are most likely capable of harming consumer. As from the economic point of view it is almost axiomatic that those restrictions will lead to consumer harm, "they are considered to be anti-competitive by object, without it being necessary to show any anti-competitive effects"[77].

Those arguments are indirectly supported by the provisions of the TFEU itself, where Article 101(3) refers to the concept of consumer welfare in context of possible justifications for anti-competitive agreements. Furthermore, paragraph 13 of the Guidelines to Article 101(3) TFEU, which is intended to clarify its provisions, expressly and unambiguously declares that "the objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources"[78].

Relying on the discussion above, one shall reasonably conclude, that when the case concerns such an extraordinary situation, where it is impossible to presume that an infringement of Article 101(1) TFEU may cause harm to consumers, it is therefore necessary to assess the actual anti-competitive effects of the agreement in question. In that respect it seems appropriate to cite the CFI analysis of the agreement in question, which falls in line with the argumentation presented. The Court held that "an analysis of the terms of Clause 4 of the General Sales Conditions, carried out in that context, therefore

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[75] Ibid.;

[76] I. Lianos & I. Kokoris, Op.Cit., p. 398;

[77] Ibid., p. 401;

[78] Commission Notice "Guidelines on the application of Article 81(3) of the Treaty" (2004/C 101/08) as of 27 April 2004, OJ C101/97, para. 13;

does not permit the presumption that that provision, which seeks to limit parallel trade, thus tends to diminish the welfare of final consumers. In this largely unprecedented situation, it cannot be inferred merely from a reading of the terms of that agreement, in its context, that the agreement is restrictive of competition, and it is therefore necessary to consider the effects of the agreement"[79].

Another reason of the revolutionary ruling of the CFI can be presented as follows. As discussed in an article by Carlo Petrucci, the concept of an agreement "having the object of restricting competition" is actually misleading due to several reasons and has been introduced in the TFEU in order to simplify competition law enforcement and provide legal certainty for the parties by avoiding examination of anti-competitive agreements or behaviour consequences[80]. As described before, the CFI assessed pharmaceutical market and found it very special. Hence, the Court found the agreement not perfectly falling within the definition as anti-competitive by object and therefore, being bound by existing case law tried to find a logically reasoned approach and "mitigate the rigour of this concept by introducing the requirement of consumer welfare harm"[81].

Despite the ruling of the CFI seems to be very well reasoned and aimed to re-assess the approaches towards the notion of restrictions by object, the ECJ did not go so far. Both arguments used by the Court of Justice against this decision seem to be absolutely logical from the formal (or, "textual") point of view and standing in line with the case law. However, it's also obvious that the position taken by the Court is somewhere in between trying to follow the strict policy boundaries and understanding the imperfection of the existing system.

Those imperfections are the result of the presumption[82] that certain types of agreements are anti-competitive per se, which does not actually leave any flexibility as shown in the present case. The Court had to fit its argumentation to this concept in order not to ruin the existing framework of competition enforcement, which works perfectly for the majority of cases. Therefore, it had to find another way to compensate this inflexibility concerning infringements "by object" and create an approach which would let market

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[79] Case T-168/01, *GlaxoSmithKline Services Unlimited v Commission of the European Communities*, ECR II-02969 [2006], para. 147;

[80] Petrucci, Op. Cit., p. 279;

[81] Ibid., p. 280;

[82] Okoghene Odudu, Restrictions of competition by object – what's the beef", *Competition Law Journal*, 2009, 9(1), p.p. 11-17;

actors get out of trouble in case they find themselves in such unobvious situations like GSK had to face.

4.2.3 Article 101(3) TFEU – A New Hope?

This assumption becomes even more plausible when it comes to the discussion whether a restriction caused by the GSK's agreement can be justified and exempted from Article 101(1) TFEU. Despite the ECJ did not accept the revolutionary changes to the fundamental framework of competition policy enforcement, its decision however had crucial effects for application of Article 101(3) TFEU, which has traditionally been regarded as inapplicable to the cases of parallel trade restriction. Thus, during the proceeding at the CFI, GSK sought to challenge Commission's point that "dual pricing" systems impede parallel trade, are illegal per se and therefore cannot be exempted[83].

Article 101(3) TFEU provides the possibility for exemption to such concerted practices, which "contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit". On that basis GSK applied for an exemption stating that parallel trade would negatively affect development of the sector in question. As pharmaceutical market is very innovative and competitive, the company has to make huge investments into highly risky research and development business. However, parallel trade doubtlessly reduces the profits which pharmaceutical company can invest into research and development, while the distributors which gain the biggest benefits from exporting cheap medicines in their turn make no contribution to innovative activities. In case parallel trade remained unrestricted, GSK would not be able to generate sufficient funds to continue its R&D activities and therefore would seriously undermine consumer welfare. On the contrary, intensive research and development obviously contribute to development of pharmaceutical industry and therefore provide consumers with "a fair share of the resulting benefit" in line with the requirement of Article 101(3) TFEU.

However, such line of reasoning did not satisfy the Commission and it refused to apply Article 101(3) by merely stating that it is impossible to be sure that savings originating from limitation of parallel trade were destined to be R&D investments[84] without any further examination of the evidence presented by GSK.

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[83] Commission Decision 2001/791/EC *GSK Spain*, OJ L302/1 [2001], para.105;

[84] Ibid., para. 156;

The Court, along with the opinion of the CFI and the AG Trstenjak held that the Commission failed to conduct sufficient analysis in accordance with Article 101(3) TFEU and assessed only the possibility that parallel trade would give rise to a loss in competition efficiency, leaving behind the arguments regarding possible positive effects for consumers[85]. The most crucial and revolutionary aspect in that respect concerns the allocation of standard and burden of proof, as the ECJ claimed that *any* arguments presented by the party seeking an exemption must be assessed by the Commission in light of factual arguments and evidence provided, taking into account the specific nature of the sector concerned if these are decisive for the assessment. By stating that, the Court in fact revised and overturned its orthodox practice of treating the agreements aimed at limitation of parallel trade as non-justifiable per se, and recognised the necessity of assessment of the economic context of the case introduced and emphasised by the CFI.

In its decision the ECJ proposed the test for the purposes of assessing possible positive effects of the agreement under Article 101(3), according to which such effects shall be "sufficiently likely" in order to serve as a ground for exemption. Thus, the Commission must make sure relying on the presented evidence whether it seems more likely that the agreement in question will create advantages for final consumers or it will not[86]. This does not however mean that the burden of proof is somehow shifted onto the Commission from the applicant; the latter is still obliged to present all the existing evidence, while the Commission is to ensure that they are properly assessed and taken into consideration. As for the present moment, it is still hardly possible to presume which kinds of positive effects shall be regarded as sufficient grounds for exempting an anti-competitive agreement, and it is therefore for the further case law to develop the notion of positive effects and provide detailed guidelines on its practical implication.

Despite the Court offered a solution to assess positive effects as such, there may arise a difficulty proving causality between purported higher profits gained if no parallel trade was allowed and that these profits will cover high R&D costs, and hence produce positive effects. As there are no express tests suggested, the ECJ however commented on that aspect that the existence of an appreciable objective advantage does not necessarily suppose that all of the additional funds must be invested in R&D[87]. Therefore, the

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[85] Case C-501/06P, *GlaxoSmithKline Services Unlimited v Commission of the European Communities,* ECR I-09291 [2009], para. 131;

[86] Ibid., para. 93-94;

[87] Ibid., para. 120;

company seeking an exemption under Article 101(3) TFEU must present evidence showing the investments into innovative activities from the generated profits, though it remains unclear to which extent the R&D activities shall be financed from the funds at issue in order to justify the ban on parallel trade. That might have been left by the ECJ without any explanation on purpose in order the make special emphasis on the necessity of case-by-case analysis, which will ensure the flexibility of the introduced concept for very different situations.

The previous discussion leads to the legitimate conclusion that taking account of the nature and specific features of the relevant sector to decide on the applicability of Article 101(3) TFEU is obviously the most significant outcome of the GSK Spain judgement. This outstanding novelty is however not merely limited to the issue of parallel trade restrictions justification and has much broader implications for Article 101 TFEU as a whole, as it seems to be a necessary compromise, which the ECJ had to find in order to keep the existing policy on presuming some kind of agreements anti-competitive by object and providing flexibility in the cases where parallel trade restrictions are in fact not anti-competitive. One may not without a reason assume that the Court of Justice transferred the line of reasoning used by CFI in relation to Article 101(1) on 101(3), and therefore mitigated the rigidity of the existing policy. Therefore, the general idea implemented in the ECJ's judgement, rather simple, though revolutionary, can be formulated as follows: "although limitations of parallel trade restrict competition according to Article 101(1), they should be permitted under Article 101(3), as long as undertakings make a legal commitment whereby they undertake to devote the profits generated by such limitations to financing R&D"[88].

However, it is worth mentioning that there also may arise problems with this concept as it might get inconsistent with existing case law, especially the Sot Lélos case to be discussed further stating that parallel trade restrictions are not subject to justification by reference to specific features of some economy sectors as such[89].

4.3 The Glaxo Saga: GSK Greece

As follows from the Bayer/Adalat case, delivered by the ECJ in 2004, "for an

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[88] Petrucci, Op. Cit., p. 285;

[89] Case C-468/06, *Sot Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton,* ECR I-07139 [2008], para. 67;

agreement within the meaning of Article 81(1) of the Treaty to be capable of being regarded as having been concluded …, it is necessary that the manifestation of the wish of one of the contracting parties to achieve an anti-competitive goal constitute an invitation to the other party, whether express or implied, to fulfill that goal jointly…"[90]. By introducing this definition the Court proposed a test, which aimed first and foremost at drawing a clear distinction between practices caught by Article 101 TFEU and unilateral conduct. As long as the conditions of the test are not fulfilled, the practice in question cannot be regarded as a breach of Article 101 TFEU.

However, along with the restrictions of parallel trade by means of vertical agreements, companies occupying dominant positions on the market are capable of applying unilateral restrictive measures, which might be caught by Article 102 TFEU covering the cases on abuse of dominant position. In that regard GSK Greece cases are of special interest for the analysis of the treatment of parallel trade restrictions under Article 102 TFEU.

4.3.1 Syfait I Case

GlaxoSmithKline AEVE, the Greek subsidiary of GSK group and the national supplier of GSK's pharmaceutical, found itself in a situation almost similar to discussed in GSK Spain case, where due to price regulation and excessive development of parallel trade it had to impose a unilateral limitation on the volumes of products supplied to the Greek market with the purpose of parallel trade restriction. Distributors therefore complained to the Greek Competition Committee about the refusal by GSK AEVE to supply the ordered volumes. In order to deliver a decision on that application the Committee referred the case for a preliminary ruling to the ECJ, asking a rather broad question whether a dominant pharmaceutical company may unilaterally refuse to supply the distributors with the required volumes in order to limit parallel trade, and whether such conduct in itself is sufficient to be rendered abusive.

Despite this reference was rejected by the ECJ on the procedural grounds as made by the non-authorised body, the Court's Advocate General Jacobs managed to deliver his Opinion on the case, which shall be taken into account for the further analysis. Answering to the first part of the question AG admitted that in line with the case law an intention to

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[90] Case C-2/01 P, *Bundesverband der Arzneimittel-Importeure eV and Commission of the European Communities v Bayer AG,* ECR I-00023 [2004], para. 102;

limit parallel trade in principle is sufficient to regard the refusal to supply abusive[91]. Nevertheless, this presumption cannot be relevant for the case at issue, provided that the pharmaceutical industry is very different from any other, and therefore it is impossible to declare the mere intention of parallel trade restriction abusive per se[92]. Moreover, from the theoretical point of view, the concept of per se illegality is in principle not relevant for the abuse of dominant position. Thus, unlike Article 101 TFEU, which prohibits the mere existence of an agreement and mostly disregards the behaviour at issue, Article 102 TFEU focuses not on the fact of dominance as such, but prohibits its abuse. Provisions of Article 102 TFEU do not provide a possibility for an exemption as such: either the conduct is abusive, or not. And therefore, the analysis is always required in order to establish the fact of abuse, which precludes the possibility of per se violation.

Further detailed assessment with the emphasis on the regulatory and economic environment of the sector in question let the AG make a reasonable conclusion that the conduct aimed to exclude the possibilities of parallel trade was however justifiable. From the doctrinal point of view, "central to Advocate General Jacobs' Opinion is the fact that the restriction of parallel trade in pharmaceutical sector results in no harm to consumers"[93], while "a requirement to supply would not necessarily promote either free movement or competition, and might harm the incentive for pharmaceutical undertakings to innovate"[94].

This line of reasoning closely resembles the consumer welfare concept introduced by the CFI in GSK Spain case, and despite concerning different types of anti-competitive behaviour, both of them clearly demonstrate the shift of the accents in the approaches to enforcement of competition policy from formalistic to the consumer-oriented and economically justified. However, the ECJ did not have the chance to comment on the Opinion at issue.

Nevertheless, this case has not remained undecided on the procedural grounds. Inspired by the Opinion at issue, the Greek Competition Commission delivered its

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[91] Case C-53/03, *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v. Glaxosmithkline AEVE,* ECR I-4609 [2005], Opinion of AG Jacobs as of 28 October 2004, para. 70;

[92] Ibid., para. 105;

[93] I. Lianos & I. Kokoris, Op.Cit., p. 405;

[94] Case C-53/03, *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v. Glaxosmithkline AEVE,* ECR I-04609 [2005], para. 100;

decision in line with AG Jacobs' reasoning, which was appealed by the GSK's distributors before the Greek courts claiming that GSK's conduct be recognised anti-completive abuse of dominant position.

4.3.2 Sot Lélos kai Sia Case (Syfait II)

Once the case on the appeal of Competition Commission's decision appeared before the Greek court, it decided to stay the proceeding and refer to the ECJ for a preliminary ruling asking the same questions as the Committee did in Syfait case: whether the conduct of a dominant company aimed at restriction of parallel trade is abusive per se, and how the specifics of pharmaceutical sector can influence the decision on the first question.

Per Se Abuse

Therefore, it is first necessary to examine the Opinion delivered by AG R. Colomer[95], which to large extent differs from the one discussed above. While supporting the AG Jacobs' point that abusive behaviour aimed at parallel trade limitation cannot be illegal per se, AG Colomer provided further development of this argumentation. Therefore, despite such conduct runs contrary to the objectives of the Treaty, refusal to exercise respective analysis and presuming of the conduct at issue abusive as such would amount to depriving the undertaking of its right to defence[96]. As observed in a comment to the Opinion at issue, "it is important to add that a per se approach would also conflict with the rationale of Article 82 of EC Treaty, whose objective is to preserve the competitive process as a means to protect consumer welfare"[97]. In that regard when assessing the influence of a conduct in question on the welfare of consumers it is necessary to consider not only its negative aspects, but also the prospective benefits[98]. Existence of the well reasoned theoretical basis precluding a per se approach in relation of Article 102 TFEU clearly ensures the coherence between the two Opinions. The Court of Justice in its turn implicitly agreed with the reasoning provided above by declaring that in order to

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[95] Case C-468/06, *Sot Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton,* ECR I-07139 [2008], Opinion of AG Colomer as of 1 April 2008;

[96] Case C-468/06, *Sot Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton,* ECR I-07139 [2008], para. 69;

[97] Claudia Desogus, "Parallel trade and pharmaceutical R&D: the pitfalls of the rule of reason", *European Competition Law Review*, 2008, 29(11), p. 654;

[98] Ibid., p. 655;

determine whether the refusal to supply constitutes an abuse, "it must be examined whether there are objective considerations based on which such a practice cannot be regarded as an abuse of the dominant position occupied by that undertaking"[99].

Objective Justification

The discrepancies between Syfait I and Sot Lélos cases however originate from the approaches towards the possibility of justification of a conduct that prima facie seems to be anti-competitive. Due to the fact that both AG Colomer and the ECJ have taken similar position to this issue, it seems reasonable to concentrate on the judgement of the Court.

The well-established case law of the Commission and the ECJ has traditionally disregarded considerations of economic character as objective justification of abusive conduct[100]. The present case does not seem to be an exception. Both AG and the ECJ expressly rejected GSK's argumentation (almost identical to GSK Spain case) stating that the very special nature of parallel trade in pharmaceuticals precludes the benefits for final consumers, which traditionally result from development of intra-brand competition. The argument that price regulation shielding the market of pharmaceuticals form a normal way of functioning may preclude the application of respective provisions of the Treaty has also been dismissed. Despite the AG and the Court devoted significant attention to argumentation of their positions, which is definitely worth taking into consideration, there is however no point to conduct its comprehensive analysis within this research, provided that the reasoning in question is irrelevant for the further discussion.

Restrictions on parallel trade have generally been subject to prohibition under Article 101(1) TFEU. In that light, the GSK Greece case is one of the first cases before the ECJ to deal with the issue of parallel trade restrictions as a result of unilateral abusive conduct. Due to the lack of relevant case law, the ECJ referred to the respective practice under Article 101(1) TFEU, where any agreements aiming at limitation of parallel trade were regarded anti-competitive per se. This general attitude to parallel trade protection was transferred by the Court to the cases on the abuse of dominant position. Thus, in Sot Lélos ruling the ECJ emphasised that "there can be no escape from the prohibition laid down in Article 82 EC for the practices of an undertaking in a dominant position which are aimed at avoiding all parallel exports …, practices which, …, neutralise the benefits of

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[99] Case C-468/06, *Sot Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton,* ECR I-07139 [2008], para. 39;

[100] Desogus, Op. Cit., p. 655

effective competition in terms of the supply and the prices that those exports *would obtain for final consumers*…"[101]. In other words, by doing so the Court acknowledged that consumer protection shall be regarded as a fundamental goal of the TFEU and in principle provided a "quasi-exemption" within the Article 102 TFEU for those restrictions, which do not negatively affect the welfare of final consumers.

This being so, the Court took into consideration the argument raised by GSK, that even though special features of pharmaceutical sector as such are not sufficient for justification of an abusive conduct, they were the reason why GSK had to limit supplies of the pharmaceuticals in order to avoid the risk of reduction in the investments to the research and development of medicines. The ECJ explicitly stated that in the light of Treaty objectives to protect consumers, "even if the degree of regulation regarding the price of medicines cannot prevent any refusal by a pharmaceuticals company in a dominant position to meet orders sent to it by wholesalers involved in parallel exports from constituting an abuse, such a company must nevertheless be in a position to take steps that are reasonable and in proportion to the need to protect its own commercial interest"[102]. Provided that the findings of the Court open broad possibilities of abusive conduct justification for research-oriented businesses, the ECJ introduced the relevant test aimed at assessment of the proportionality of the restrictive measure in question. This test however concerns a very case specific aspect of refusal to supply, which limits its practical implication to such kinds of cases only. Moreover, it remains unclear whether it is only the pharmaceutical sector, which can benefit from the judgement at issue, or the policy of "objective considerations" may be applicable for any situations of similar character.

One way or another, it is for the future case law to answer the questions which will arise in context of the decisions taken in GSK Spain and GSK Greece cases, and therefore it is obvious that the Glaxo Saga is still very far from its end. However, the approach demonstrated by the Court in Sot Lélos is rather reasoned and consistent with the general trend to modernization of the parallel trade enforcement policy and re-assessment of consumer welfare doctrine, which began with the CFI ruling in GSK Spain case. "The jurisprudence seems to have abandoned the approach to the provision as a per se or quasi

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[101] Case C-468/06, *Sot Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton,* ECR I-07139 [2008], para. 66;

[102] Ibid., para. 69;

per se prohibition in favour of a *rule of reason"* and the concept of efficiency gains[103]. While staying from the formal point of view in line with the well-established case law on abuse of dominant position, the Sot Lélos case however serves as the much needed compromise reached by the ECJ in order to ensure sustainable development of the sector in question, which due to its very special features did not fit into the general model of competition enforcement.

[103] Desogus, Op. Cit., p. 665;

5 Parallel trade in CES of Russia, Belarus and Kazakhstan

The Common Economic Space between the Russian Federation, Republic of Belarus and Republic of Kazakhstan is the result of several decades of integration processes between the former republics of the Soviet Union. Thus, in the early 1990's the idea of establishment of a single market was introduced within the framework of the Commonwealth of Independent States, which was formed right after the break up of the USSR. However, due to lack of political influence and legal capacity (competence) the CIS was incapable of taking measures necessary to foster economic integration between its Members.

Therefore, in 2000 the Russian Federation initiated establishment of the Eurasian Economic Community, the new regional organization with the primary focus on effective promotion of "the process of formation of the Customs Union and the Single Economic Space"[104], which currently comprises 5 Member States[105]. In accordance with objectives of the Treaty, in 2010 the Customs Union was established between Russia, Belarus and Kazakhstan, which resulted in elimination of internal borders and introduction of the common customs tariff and legislation[106]. Further integration took place when Member States of the Customs Union announced the establishment of the Common Economic Space (CES), which has been functioning since January 2012. The new form of cooperation is to large extent based on the model of the European Union, where the 4 freedoms constitute the fundamental basis for development of the internal market and harmonization of national legislation. In February 2012, the Eurasian Economic Commission, which is intended to act as the supranational regulatory authority for the Customs Union, began functioning.

The Court of the EurAsEC began operating in January 2012. Given the similar position and competence of the Court in the hierarchy of CES institutions to those of the European Court of Justice, there is no doubt that its decisions will be to large extent

[104] Treaty on the Establishment of Eurasian Economic Community (Astana Treaty), as of 10 October 2000, SZ RF 18.02.2002 N7, Article 2;

[105] The Member States are: Republic of Belarus, Republic of Kazakhstan, the Kyrgyz Republic, the Russian Federation, Republic of Tajikistan;

[106] Treaty on the Creation of the Single Customs Territory and Establishment of the Customs Union (Dushanbe Treaty), as of 6 October 2007, SZ RF 21.03.2011 N12;

inspired by the existing case law of the ECJ[107]. This being so, it seems reasonable to briefly assess the possible implications of the European jurisprudence in regard of the approaches to regulation of parallel trade.

Harmonization of legislation within the free trade area has resulted in adoption of the common policy on intellectual property rights and competition regulation. The CES Agreement on intellectual property rights[108] has introduced the regional principle of IPR exhaustion, which made possible parallel trade between the Member States. Provided that national legislation of the Russian Federation and Belarus has traditionally rendered parallel trade illegal, this novelty is a big step forward towards establishment of the common market.

The instrument intended to enforce the development of free movement of goods and parallel trade is the Agreement on harmonised competition policy (hereinafter referred to as "AHCP"), which however in its present state fails to provide adequate protection to those freedoms. Thus, its content seems to be inconsistent with the purpose of working in context of supranational relations. The reason for it is rather simple: its fundamental provisions have been to significant extent transferred from the national anti-trust legislation of the Russian Federation, which of course does not have to deal with the problem of partitioning of internal market as a result of anti-competitive agreements and behaviour.

In that respect it is important to notice that unlike TFEU, the AHCP does not contain a very broadly formulated article equivalent to Article 101 TFEU, which prohibits all kinds of anti-competitive agreements regardless of their horizontal or vertical nature. On the contrary, the provisions of AHCP provide different treatment for horizontal and vertical agreements. Thus, while the AHCP renders illegal horizontal agreements, which may result in segmentation of product market on the territorial principle (relevant for national markets as well), it completely ignores the possibility of partitioning of the single market through vertical restrains. Vertical agreements are explicitly prohibited only in case they are aimed at resale price maintenance or imposing of obligations on the distributor not to deal with the products of competitive suppliers. However, in regard of

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[107] E. Dyuachenko, Competence of the EurAsEC Court in the Field of Competition and the Approaches of the Court of Justice of the European Union, *Court of EurAsEC* [web document] (2012) < http://sudevrazes.org/sm.aspx?guid=2983>, accessed 12 May 2013;

[108] Agreement on the common principles of IPR protection, as of 09 December 2010, SZ RF 30.01.2012 N5;

anti-competitive agreements the AHCP contains another "reserve" article, which leaves a possibility to prohibit such vertical and horizontal agreements, which are "capable of distortion of competition" within the internal market. Such a broad definition may in principle cover the above-mentioned imperfections, which of course will be the matter of further case law on its interpretation. One may assume that in line with the concept of restrictions by object in competition law of the EU, the AHCP aims at drawing a line between the practices which are restrictive per se (the explicitly mentioned types of vertical and horizontal restrains), and the practices where actual negative effect on competition shall take place for them to fall under within the scope of a "reserve" article.

The AHCP does not contain an explicit prohibition of territorial restrictions through abuse of dominant position as well, and the only possible solution in that case is the interpretation of general prohibition for dominant undertakings to take actions that cause or can cause distortion of competition in the common market. However, the account shall be taken of the fact that despite AHCP obviously lacks certainty regarding territorial restrictions, the advantage of it shall be taken by the EurAsEC Court, which is authorised to deliver interpretation of its provisions.

In any event, it is clear that the current version of AHCP does not expressly stipulate the policy of parallel trade protection, which would foster effective enforcement by the Court of EurAsEC of the internal market goals. This being so, one shall admit that re-assessment and interpretation of the AHCP provisions in the context of supranational integration is of primary importance for further development of CES. It is the EurAsEC Court who will have to formulate the fundamental policy and approaches towards the issue of parallel trade, and in that respect the jurisprudence of the ECJ and case law of the European Commission will be of superior value in order to ensure the proper functioning of internal market and hence integration within the CES.

6 Conclusion

As it has been determined in the beginning of this paper, its main goal is to review and analyse the development of the concept of parallel trade limitation as a hard-core restriction in the European Union law during the time through assessment of relevant legislation, case law and academic researches within the context of competition law. Provided that Article 34 TFEU still expressly motivates the per se approach under Articles 101 and 102 TFEU by declaring any restrictions to free movement incompatible with the EU law, the main focus in that regard has been made to the assessment of respective novels introduced through the recent judgments in GSK Spain and Greece cases.

Therefore, it seems necessary to summarise their main outcomes, which are of special importance for practical implication. The first thing to be stated is that in GSK Spain the ECJ expressly reaffirmed the principle that agreements impeding trade between Member States are regarded anti-competitive "by object". Despite different nature of prohibition laid down in Article 102 TFEU, almost equal treatment for abusive practices aimed at restriction of parallel trade has been introduced in GSK Greece, where only very special "objective considerations" may save the dominant company from being caught by the prohibition.

Secondly, the Court confirmed that prohibition of the agreements under Article 101(1) TFEU does not require any proof of adverse effect on final customers, regardless of specific nature of some markets. In other words, special features of certain markets as such cannot be regarded as the conditions, which may preclude application of Article 101(1) TFEU. This ruling stays in line with GSK Greece case, where the Court equally refused to treat considerations of purely economic nature as sufficient to exclude the abusive nature of dominant company's behaviour.

However, the third, and probably the most significant issue introduced in GSK Spain case is the assumption that hardcore infringements of Article 101(1) "by object" can nevertheless be objectively justified under 101(3) TFEU by reference to the concept of consumer welfare and the rule of reason. As discussed above, this development would be a very helpful instrument for the undertakings to avoid being caught by excessively strict policy on parallel trade protection. Similarly, the Court appealed to the concept of consumer welfare in context of "objective considerations" under Article 102 TFEU.

Fourthly, the Court introduced the requirement on the standard and burden of proof by stating that in order to rely on exemption under Article 101(3) an undertaking must

provide sufficient evidence for the Commission showing that infringement of Article 101(1) has positive effects for final consumers, while the Commission is obliged to properly examine all of them taking into account special features of certain business sectors and motivating its decisions in case it finds those evidence inadequate. Comparable, in regard of Article 102 TFEU the Court offered a test aimed at deciding whether the abusive measure is adequate for the purpose of protecting commercial interests and therefore contributing into development of the consumers' welfare. This last point seems to be very favourable for the undertakings seeking an exemption (or the quasi-exemption under Article 102 TFEU), as it would give them much more flexibility in reasoning their positions.

All those aspects together form a good example of derogation from the policies on parallel trade protection making the discussed cases doubtlessly a landmark in the long-standing development of parallel trade in the European Union. The GSK Greece and Spain cases demonstrate the much-needed shift towards the approaches, where the welfare of final consumers and the rule of reason are of the same value as the purpose of establishment of the internal market and protection of competition as such. This being so, it is the future case law of the ECJ and the Commission, which will make the most comprehensive and balanced assessment of the discussed novels and demonstrate their actual consequences for the enforcement of competition policy in the European Union.

7 Bibliography

Legislative material

EU Legislation

Consolidated Version of the Treaty on the Functioning of the European Union as of 9 May 2008, OJ C115/47;

Commission Notice "Guidelines on Vertical Restraints" (2010/C 130/01) as of 19 May 2010, OJ C130/1;

Commission Regulation (EU) No 330/2010 "On the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices" as of 20 April 2010, OJ L102/1;

Commission Notice "Guidelines on the application of Article 81(3) of the Treaty" (2004/C 101/08) as of 27 April 2004, OJ C101/97;

Commission Regulation No 67/67/EEC "On the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreements" as of 22 March 1967, OJ 57/849;

Directive 2001/83/EC of the European Parliament and of The Council "On the Community code relating to medicinal products for human use" as of 6 November 2001, OJ L 311/67;

CES Legislation

Treaty on the Creation of the Single Customs Territory and Establishment of the Customs Union (Dushanbe Treaty), as of 6 October 2007, SZ RF 21.03.2011 N12;

Treaty on the Establishment of Eurasian Economic Community (Astana Treaty), as of 10 October 2000, SZ RF 18.02.2002 N7;

CES Agreement on the common principles of IPR protection, as of 09 December 2010, SZ RF 30.01.2012 N5;

EU Publications

Commission Communication "On parallel imports of proprietary medicinal products for which marketing authorisations have already been granted", Brussels, COM(2003) 839 as of 30 December 2003;

Commission Communication "On the single market in pharmaceuticals", Brussels, COM(1998) 588 as of 25 November 1998;

Commission Communication "On parallel imports of proprietary medicinal products" as of 6 May 1982, OJ C115/5;

Literature

Monographs

BERNARD, CATHERINE, *The substantive law of the EU: the four freedoms, 3rd Edition* (Oxford ; New York : Oxford University Press, 2010)

CRAIG, PAUL and DE BÚRCA, GRÁNNIE, *EU Law: Texts, Cases and Materials, 5th Edition* (Oxford ; New York : Oxford University Press, 2011)

DESOGUS, CLAUDIA, *Competition and Innovation in the EU Regulation of Pharmaceuticals: The Case of Parallel Trade* (Intersentia Uitgevers N.V., 2010)

GOYDER, JOANNA, *EU Distribution Law, 5thEdition* (Oxford ; Portland, Ore. : Hart, 2011)

GOYDER, JOANNA and ALBORS-LLORENS, ALBERTINA, *Goyder's EC Competition Law, 5th Edition* (Oxford ; New York : Oxford University Press, 2009)

JONES, ALISON and SUFRIN, BRENDA, *EC Competition Law: Texts, Cases and Materials, 4th Edition* (Oxford ; New York : Oxford University Press, 2010)

KANAVOS, PANOS, et al., *The Economic Impact of Pharmaceutical Parallel Trade in European Union Member States: A Stakeholder Analysis* (London ; LSE Health and Social Care, London School of Economics and Political Science, 2004)

LIANOS, IOANNIS and KOKORIS, IOANNIS (eds.), *The Reform of EC Competition Law* (Alphen aan den Rijn : Kluwer Law International, 2010);

LIDGARD, HANS HENRIK, *Competition Classics Part I: Material & Cases on European Competition Law and Practice* (Lund : Magle International Publishing, 2011)

STOTHERS, CHRISTOPHER, *Parallel trade in Europe: Intellectual Property, Competition and Regulatory Law* (Oxford : Hart, 2008)

VAN BAEL and BELLIS (eds.), *Competition Law of the European Community, 5th Edition* (Alphen aan den Rijn : Kluwer Law International, 2010)

Articles

ABBOTT, FREDERICK M., "Parallel Importation: Economic and social welfare dimensions" [web document] (2007) <http://www.iisd.org/pdf/2007/parallel_importation.pdf>, accessed 16 May 2013

AILJE, SILVIA, "Parallel trade in pharmaceuticals: reconsidering the Underlying European Community Policies", *European Journal of Law Reform, 2005,* Vol. VII, no. 3/4, p.p. 463-504.

ANDRADE, RICHARD M., "The Parallel Importation of Unauthorized Genuine Goods: Analysis and Observations of the Gray Market", *U. Pa. J. Int'l Bus. L.,* 1993, Vol. 14:3 p.p. 409-436;

AOYAGI, YUKA, "Free Movement Rules and Competition Law: Regulating the Restriction on Parallel Importation of Trade Marked Goods", *IIP Bulletin* [Online Journal], 2007, < http://www.iip.or.jp/e/e_summary/pdf/detail2006/e18_23.pdf>, accessed 15 May 2013

DESOGUS, CLAUDIA, "Parallel trade and pharmaceutical R&D: the pitfalls of the rule of reason", *European Competition Law Review*, 2008, 29(11), p.p.654

DYUACHENKO, ELENA, Competence of the EurAsEC Court in the Field of Competition and the Approaches of the Court of Justice of the European Union, *Court of EurAsEC* [web document] (2012) < http://sudevrazes.org/sm.aspx?guid=2983>, accessed 12 May 2013;

ECCLES, RICHARD, "Parallel exports in the pharmaceuticals sector: taking nothing for

granted", *European Competition Law Review,* E.C.L.R. 2007, 28(2), p.p.134-142

FORRESTER, IAN S., DAWES, ANTHONY, "Parallel Trade in Prescription Medicines in the European Union: The Age of Reason", *Yearbook of Antitrust and Regulatory Studies*, 2008, Vol. No. 1, p.p. 9-31.

GINTER, GARRY, "Free Movement of Goods and Parallel Imports in the Internal Market of the EU", *European Journal of Law Reform,* 2006, Vol. VII. no. 3/4, p.p. 505-524.

HULL, DAVID W., "The Application of EU Competition Law in the Pharmaceutical Sector", *Journal of European Competition Law & Practice*, 2012, Vol. 3, No. 5, p.p. 473-480

HULL, DAVID W., "Parallel Trade in Pharmaceuticals and EC Competition Law", *PLC Cross-Border Life Sciences Handbook,* 2007/08, p.p. 125-129

KALBFLEISCH, PIETER, "Aiming for Alliance: Competition Law and Consumer Welfare", *Journal of European Competition Law & Practice*, 2011, Vol. 2, No. 2, p.p. 108-116

KILLICK, JAMES and SCHULZ, AXEL, "Parallel trade in Europe— the tide is turning", *White&Case* [web document] (2006), <http://www.whitecase.com/files/Publication/f6ff768c-0cca-4182-991f-10e1f369bd1f/Presentation/PublicationAttachment/80d9592b-a347-4979-bf5e-19d6319c523a/article_Parallel_trade_in_Europe.pdf>, accessed 15 May 2013

KORAH, VALENTINE, "'Consent' In Relation To Curbs of Parallel Trade In Europe", *Fordham International Law Journal*, 2001, Vol. 25, issue 4, p.p. 972-981

KYLE, MARGARET K., "Parallel Trade in Pharmaceuticals: Firm Responses and Competition Policy," *International Antitrust Law & Policy: Fordham Competition Law*, 2009, p.p. 339-358

LOOZEN, EDITH, "The workings of article 101 TFEU in case of an infringement that aims to limit parallel trade (GlaxoSmithKline Services (C-501/06 P, C-513/06 P, C-515/06 P, and C-519/06 P)", *European Competition Law Review*, 2010, 31(9), p.p. 349-353.

MASKUS, KEITH E., "Parallel Imports In Pharmaceuticals: Implications For Competition And Prices In Developing Countries" [web document] (2001), World Intellectual Property Organization <http://www.wipo.int/export/sites/www/about-ip/en/studies/pdf/ssa_maskus_pi.pdf>, accessed 15 May 2013

MOORE, SEBASTIAN, et al., "GlaxoSmithKline Services Unlimited v Commission of the European Communities (C-501/06 P): competition", *European Intellectual Property Review*, 2010, 32(3), p.p. 17-19;

ODUDU, OKOGHENE, "Restrictions of competition by object – what's the beef", *Competition Law Journal*, 2009, 9(1), p.p. 11-17;

ODUDU, OKOGHENE, "The last vestiges of overambitious EU competition law", *Cambridge Law Journal*, 2010, 69(2), p.p. 248-250;

PETRUCCI, CARLO, "Parallel trade of pharmaceutical products: the ECJ finally speaks comment of GlaxoSmithKline", *European Law Review*, 2010, 35(2), p.p. 257-286;

STOTHERS, CHRISTOPHER, "ECJ Rules on GSK's "Dual Pricing" of Pharmaceuticals in Spain", *Journal of European Competition Law & Practice*, 2010, Vol. 1, No. 2, p.p.123-124;

SZYMANSKI, STEFAN and VALLETTI, TOMMASO, "Parallel trade, price discrimination, investment and price caps", *Economic Policy*, 2005, Vol. 20, Issue 44, p.p. 705–749

TSOULOUFAS, GEORGIOS, "Limiting pharmaceutical parallel trade in the European Union: regulatory and economic justifications" – *European Law Review*, 2011, 36(3), p.p. 385-404;

TUMBRIDGE, JAMES, "Syfait II : Restrictions on parallel trade within the EU", *European Intellectual Property Review*, 2008 (31), p.p. 102-108

TUNER-KERR, PETER, "Finally a bit of clarity for pharmaceutical companies; but uncertainties remain: judgment of the ECJ in Sot Lelos kai Sia EE v GlaxoSmithKline AEVE", *European Competition Law Review*, 2009, 30(2), p.p. 57-60

ZEVGOLIS, NIKOLAOS and PANAGIOTIS, FOTIS, "Prohibition of parallel Imports as a hard core Restriction of Article 4 of Block Exception Regulation for vertical Agreements: European Law and Economics", *Journal of Advanced Research in Law and Economics*, 2012, Vol. II, No. 2(4), p.p. 162-174;

"Commission must re-examine GSK's Spanish sales conditions", *EU Focus*, 2009, 263, p.p. 7-8;

Table of Cases

Cases of the European Commission

Commission Decision 82/853/EEC *National Panasonic,* OJ L-354/28 [1982]

Commission Decision 93/554/EEC *Zera/Montedison,* OJ-L272/28 [1993]

Commission Decision 2001/791/EC *GSK Spain*, OJ L302/1 [2001]

Cases of the European Court of Justice

Joined cases 56 and 58-64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community,* ECR 1966/299 [1966];

Case 8-74, *Procureur du Roi v Benoît and Gustave Dassonville,* ECR 1974/837 [1974];

Case C-277/87*, Sandoz prodotti farmaceutici SpA v Commission of the European Communities,* ECR I-00045 [1990]

Case C-53/03, *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v. Glaxosmithkline AEVE,* ECR I-04609 [2005]

Case C-468/06, *Sot Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton,* ECR I-07139 [2008]

Case T-168/01, *GlaxoSmithKline Services Unlimited v Commission of the European Communities*, ECR II-02969 [2006]

Case C-501/06P, *GlaxoSmithKline Services Unlimited v Commission of the European Communities,* ECR I-09291 [2009]

Case 86/82, *Hasselblad (GB) Limited v Commission of the European Communities*, ECR-00883 [1984]

Case T-43/92, *Dunlop Slazenger International Ltd v Commission of the European Communities*, ECR II-00441 [1994]

Case T-66/92, *Herlitz AG v Commission of the European Communities,* ECR II-00531 [1994]

Case C-114/96, *Criminal proceedings against René Kieffer and Romain Thill,* ECR I-03629 [1997]

Case C-2/01 P, *Bundesverband der Arzneimittel-Importeure eV and Commission of the European Communities v Bayer AG,* ECR I-00023 [2004]

Opinions of Advocate Generals

Case C-501/06P, *GlaxoSmithKline Services Unlimited v Commission of the European Communities,* ECR I-09291 [2009], Opinion of AG V.Trstenjak as of 30 June 2009

Case C-53/03, *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v. Glaxosmithkline AEVE,* ECR I-04609 [2005], Opinion of AG Jacobs as of 28 October 2004

Case C-468/06, *Sot Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton,* ECR I-07139 [2008], Opinion of AG Colomer as of 1 April 2008;