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PARALLEL TRADE AND DISTRIBUTION STRATEGIES

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PARALLEL TRADE IN THE PHARMACEUTICAL MARKET

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Parallel trade in the pharmaceutical market

- Parallel trade consists in buying pharmaceutical products in one Member State and selling them in another at a higher price, thus making a profit from the price difference between the export country and the import country
- Differences in pricing between member states for pharmaceutical products (caused by national price controls and regulations) give parallel traders the opportunity to buy pharmaceutical products in low-price member states and re-sell them in high-price areas

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Parallel trade in the pharmaceutical market (2)

- Parallel trade in pharmaceuticals is widespread in the European Union and plays a more and more increasing role on the overall market. Based on information received by the European Commission during its 2008/2009 sector inquiry on the pharmaceutical market, the turnover of parallel traders in Europe reached at that point approx. EUR 3.5-5 billion, representing 2-3% of the overall market
- The approach angle of parallel traders and pharmaceuticals companies inevitably clash. On one hand, parallel trade is a multi-billion euro business opportunity for those wholesalers who engage in it. On the other hand, it is considered a threat, especially to the returns and the R&D spending ability of pharmaceutical companies

LEGAL FRAMEWORK

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Legal framework

- Core competition law provisions under the Treaty on the Functioning of the European Union (TFEU):
  - Article 101 covering anticompetitive agreements or concerted practices
  - Article 102 on abuse of dominant position
- In applying these provisions to cases regarding restrictions on parallel trade, the Commission and the EU Courts have been guided by the 'Single Market imperative' which requires the unhindered free movement of goods and services throughout the EU
- Although there were attempts to qualify the pharmaceutical market as characterized by specific attributes that might justify a milder application of competition rules, the fact remains that such rules equally apply irrespective of the sector concerned

MOST COMMON STRATEGIES

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Most common strategies

- Common strategies used by pharmaceutical companies for limiting parallel trade activities include:
  - Dual pricing schemes: where companies seek to apply differential prices depending on the destination of their supplies within the EU
  - Supply quotas: where companies objectively limit the volumes to ensure appropriate and continuous supplies within each national market in the interest of patients and public health
- Other strategies: (i) resale prohibitions; (ii) measures aimed at making imports/exports more difficult; (iii) direct-to-pharmacy sales; (iv) market authorization withdrawal

  → Not all potential strategies comply with competition rules!!!

DUAL PRICING

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Dual pricing

- An agreement between a pharmaceutical manufacturer and its wholesalers whereby different prices are applied depending on the ultimate selling destination
- Restriction of parallel trade is qualified as object restriction in breach of Article 101(1) TFEU (Judgment of the CJEU in Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P – GSK Spain)
- However, the restriction may be exempted under Article 101(3) TFEU in case the positive efficiencies outweigh the anticompetitive effects. The sector specific features represent one of the key elements for the assessment
- In the form of price discrimination, may be caught under Article 102 unless justified by objective dissimilarities between the Member States (e.g. differences in costs, non-homogeneous geographic conditions)

QUOTA SCHEMES

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Quota schemes

- A supplier either ceases to meet orders from wholesalers or reduces the supply quota so as to provide the wholesalers with only enough products to cover domestic demand (there is no excess product allowing wholesalers to engage in parallel trade)
- Risk to breach Article 101(1) in case there is a concurrence of wills aimed at preventing parallel trade (*Joined Cases C-2/01 P and C-3/01 P Adalat case, but regard must be taken to the concept of tacit acquiescence under the EC Guidelines on Vertical Restraints)*
- May breach Article 102 if applied by a dominant undertaking (refusal to supply, restriction of parallel trade). However, a dominant undertaking on the medicinal products market may refuse out of the ordinary orders (Joined Cases C-468/06 to C-478/06 GSK Greece, recently upheld by the Romanian Competition Council in Roche Case)

Thank you!

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