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TRIBUNAL DE JUSTICIA DE LAS COMUNIDADES EUROPEAS  
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COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES  
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Press and Information

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Advocate General's Opinion in Joined Cases C-501/06 P and Others

*GlaxoSmithKline Services Unlimited v Commission and Others*

**IN THE VIEW OF ADVOCATE GENERAL VERICA TRSTENJAK, A  
PHARMACEUTICAL UNDERTAKING WHICH STIPULATES INCREASED EXPORT  
PRICES IN ORDER TO RESTRICT PARALLEL TRADE HAS AS ITS OBJECT THE  
RESTRICTION OF COMPETITION**

*The Advocate General proposes that the Court of Justice should uphold the contested judgment of the Court of First Instance in so far as that judgment ultimately requires a fresh examination by the Commission as to whether the sales conditions, which restrict competition, are to be exempted on the basis of a possible contribution to the promotion of technical progress*

The Court of Justice must decide whether the Court of First Instance was right to annul in part, on 27 September 2006<sup>1</sup>, the decision by which the Commission forbade the general business conditions ('General Sales Conditions') of the producer of medicines GlaxoSmithKline Services Unlimited ('GSK') because they infringed the prohibition of agreements restricting competition.

Under the General Sales Conditions, GSK agreed with intermediaries established in Spain prices for certain medicines that differed according to whether the Spanish intermediaries sold those medicines in Spain or other Member States. GSK's aim was to restrict the parallel trade in its medicines in which the Spanish intermediaries were engaging on account of the price differentials between Spain and other Member States.

On 8 May 2001 the Commission prohibited<sup>2</sup> GSK's General Sale Conditions. The Commission found that they infringed the prohibition of agreements that restrict competition and also that GSK had not proved that the conditions for exemption from the prohibition were met.

In the action brought by GSK, the Court of First Instance upheld the Commission's finding that the prohibition of agreements restricting competition was infringed. However, it annulled the decision in so far as the Commission had rejected GSK's request for exemption of the agreement in the absence of proof of a contribution to the promotion of technical progress.

<sup>1</sup> Judgment of the Court of First Instance of 27 September 2006 in *GlaxoSmithKline Services v Commission*, see Press Release No 79/06.

<sup>2</sup> Commission Decision 2001/791/EC of 8 May 2001.

Appeals, based on differing grounds, were brought against this judgment by, on the one hand, GSK and, on the other, the Commission and two trade associations of pharmaceutical wholesalers.

In the view of the Advocate General, GSK's appeal should be dismissed, since the relevant part of the contested Commission decision must be upheld, albeit with reasoning different from that chosen by the Court of First Instance. **The Court of First Instance gave a legally erroneous interpretation to the notion of restriction of competition by object. The existence of a restriction of competition by object cannot be made dependent on proof of a restriction of competition to the detriment of the final consumer.** The Commission correctly found that agreements which seek to restrict parallel trade have as their object a restriction of competition.

**The Advocate General proposes in addition that the Court of Justice should uphold the annulment by the Court of First Instance of the Commission's refusal to exempt the General Sales Conditions from the prohibition of agreements which restrict competition.**

In the view of the Advocate General, the Commission's finding that there was no appreciable objective advantage was not based on adequate reasoning. The Commission cannot disregard the submissions of an undertaking which relies on an economic argument, and cites economic and econometric data which are relevant to it, solely because no direct link between the agreement which restricts competition and the promotion of technical progress is thereby demonstrated.

The Commission can certainly refute in general terms submissions by an undertaking which are couched in general terms. However, where an undertaking backs up its arguments in a detailed and relevant manner, the Commission must also deal with those arguments in a detailed manner. A reference to the possibility that extra resources may also simply be added to the company's profits, since it is a matter of discretion for undertakings to decide how much they will invest in research and development, is not sufficient. Such a general reference fails to have regard to the fact that the market conduct of undertakings may be influenced to a considerable extent by competition with other undertakings and that an undertaking's discretion may be restricted by that. Account is to be taken in that regard of the importance of competition in terms of innovation in the medicines sector.

**IMPORTANT: The Advocate General's Opinion is not binding on the Court. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court of Justice are now beginning their deliberations in this case. Judgment will be given at a later date.**

*Unofficial document for media use, not binding on the Court of Justice.*

*Languages available: BG ES DE EN EL FR IT RO*

*The full text of the Opinion may be found on the Court's internet site*

*<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-501/06>*

*It can usually be consulted after midday (CET) on the day of delivery.*

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