



# Competition Law Update

November 2009

## Guidance for Trade Associations on compliance with competition law

### Overview

On 9 November 2009 the Competition Authority published a Guidance Notice on the activities of trade associations and competition law (the Notice). The Authority recognises in the Notice that trade associations can play a productive, pro-competitive role in the development of a sector and that many activities of trade associations may fall outside the ambit of competition law entirely.

However, the Authority warns that organisations of this nature remain vulnerable to stepping outside the boundaries placed by competition law, stating that *“any trade association engaging in anti-competitive coordination faces a strong possibility of being sued for very substantial damages by the victims of that illegal conduct, in addition to imprisonment and hefty criminal fines.”*

### To whom will the notice be relevant?

The term ‘trade association’ is defined very broadly in the Notice, encompassing *“individuals and firms with common interests in trade, which join together to further their commercial or professional goals.”* A professional body may also constitute a trade association for the purposes of the notice.

The Notice contains guidance for trade associations on the types of conduct which could lead to liability for a breach of competition law. Coordination on pricing is identified as a key enforcement priority for the Authority.

### Coordination on pricing

The Notice states that trade associations are prohibited from taking any decision which coordinates pricing policies among members. The Notice cautions that *“a simple discussion between competitors, at which commercially sensitive information is exchanged, such as pricing or sales figures”* may breach competition law. Where anti-competitive coordination is facilitated by the trade association, the organisation may be held responsible for its involvement in the breach of competition law.

The Authority recommends that a trade association which holds regular meetings at which discussions relating to commercially sensitive issues between competitors are likely to occur, should put in place a competition law compliance programme, to ensure that interactions between members remain within the parameters imposed by competition law.

### Information exchange

In competition law, the term ‘information exchange’ refers to the sharing of information. Competition law concerns may arise where commercially sensitive information is shared between competitors. The Notice contains welcome guidance on the Authority’s likely attitude to information exchanges. Previously, the only guidance in this regard was set out in European Commission guidelines for the maritime industry.

According to the Notice, competition law requires that competitors act independently of one another. The concern with the exchange of information is that it may result in market transparency to such a degree that firms can prejudge with sufficient accuracy the likely market actions of their competitors.

The Authority recommends that a trade association intending to gather and disseminate sensitive commercial information to its members seek legal advice as to the compatibility with competition law of its proposed scheme.



## Group purchasing

While group purchasing arrangements are often regarded as pro-competitive, the Notice identifies various undesirable effects which such arrangements may give rise to. The Notice focuses in particular on the possibility that significant purchasing power could raise other customer's costs.

## Confidentiality

As discussed below in relation to the proposed new code of conduct for grocery retailers, the issue of anonymity for complainants to the Authority is currently being debated. Interestingly, the Authority's Notice states that *"Information provided is always treated in the strictest confidence. It is Competition Authority policy not to...reveal the identity of a complainant during an investigation."*

However, the complaints section of the Authority's website states that *"it is important to note that the Authority may need to divulge information that it has obtained, including the identity of the source [of the complaint] to the firm under investigation."* This would seem to contradict the statement of policy in the Notice and it remains to be seen whether this represents a new approach to the anonymity of complainants by the Authority.

## Judgment in parallel trade case

### Case: GlaxoSmithKline v Commission

This case relates to a 'dual-pricing' policy formulated by GlaxoSmithKline (GSK) in 1998. The policy provided for a higher price to be paid to GSK by Spanish wholesalers for products to be resold outside of Spain and a lower price, set by the Spanish government, for products to be resold within Spain. GSK aimed to restrict parallel traders from capitalising on the price differentials between Spain and other EU member states.

The European Commission (the Commission), the body primarily responsible for enforcing EU competition law, considered that this policy was incompatible with competition law rules and a decade of litigation ensued, involving the Commission, GSK and associations representing pharmaceutical vendors. The European Court of Justice (ECJ) was asked to consider the compatibility of GSK's dual-pricing policy with Article 81(1) of the EC Treaty and delivered its judgment on 6 October 2009.

### Relevant competition law rules

Agreements which have as their 'object or effect' the restriction of competition are prohibited under Article 81(1) unless the criteria set out in Article 81(3) are satisfied. If these criteria are satisfied, the agreement is exempted from the prohibition. The Article 81(3) exemption is based on the premise that the Article 81(1) prohibition ought to be overridden where sufficient pro-competitive benefits flow from the agreement.

The terms 'object' and 'effect' in Article 81(1) are alternative grounds for finding that a breach of Article 81(1) has occurred. The significance of this distinction relates to the burden on the Commission of proving that an infringement of Article 81(1) has occurred.

Where an agreement has as its object the restriction of competition, it is not necessary to prove that the agreement would have an anti-competitive effect in order to establish a breach of Article 81(1). The converse is also true, in that where an agreement does not have as its object the restriction of competition, it is necessary for the European Commission to undertake the more difficult task of proving that it would have a restrictive effect.

### Decision

On 6 October 2009 the ECJ held that agreements aimed at limiting parallel trade in the pharmaceutical sector can be characterised as having the object of restricting competition. Therefore, it is not necessary to establish that such agreements have a restrictive effect on competition. Interestingly, the court rejected the proposition that only those agreements which deprive consumers of certain advantages may have an anti-competitive object.



As regards Article 81(3), the court held that anyone who relies on this provision must demonstrate “*by means of convincing arguments and evidence*” that the criteria for exemption have been satisfied. However, the ECJ held that the Commission had not conducted an adequate assessment of GSK’s arguments regarding the application of the Article 81(3) criteria for exemption. The court held also that the Commission must undertake the Article 81(3) analysis in light of the factual arguments and evidence provided by the allegedly infringing business. This analysis may require the nature and specific features of the sector concerned to be taken into account.

### **Implications of the decision**

Pharmaceutical manufacturers, and all businesses engaged in policies aimed at restricting parallel trade will need to revisit these policies in light of this decision. Clearly, it is in these businesses’ interests to pre-empt any investigation by the Commission or national competition enforcement bodies, by gathering convincing evidence that these agreements benefit from the Article 81(3) exemption.

## **International trends: alleged anti-competitive conduct affecting the introduction of generic medicines**

### **Europe**

In July 2009, the European Commission released the final report of its pharmaceutical sector inquiry. The report was prompted by concerns regarding the alleged conduct of certain brand name pharmaceutical manufacturers aimed at hindering the entry of generic versions of their product after patent expiry.

The report identified various practices which may raise competition law issues, including:

- Marketing strategies aimed at undermining and creating a negative perception of generics;
- Intervention by brand name manufacturers in regulatory approval processes for generics; and
- Patenting strategies, for example, brand name manufacturers settling patent disputes on terms that provide a financial benefit to a generic manufacturer in return for delaying the introduction of generics.

The Commission warned in its report that it will be stepping up its enforcement activities against pharmaceutical companies engaged in such anti-competitive practices.

### **US**

On 15 October 2009, the Senate Judiciary Committee passed a Bill intended to address the issue of ‘pay-for-delay’ deals in the US, whereby generic manufacturers are financially incentivised by brand name manufacturers to defer the launch of generic medicines. The Bill prohibits these deals unless ‘clear and convincing evidence’ is advanced demonstrating that there are no anti-competitive consequences.

The Federal Trade Commission (FTC), the agency charged with eliminating anti-competitive conduct in the US, has initiated proceedings against drug companies in respect of several alleged violations of competition law. Certain of these alleged violations involve agreements between brand name companies and generic companies to share profits for so long as the launch of generic products is delayed. The FTC estimates that a prohibition of these deals would save consumers \$35 billion and the government \$12 billion over the next decade.

### **Ireland**

Ireland is among the minority of EU member states which do not permit ‘generic substitution,’ whereby pharmacists switch branded drugs on prescriptions for cheaper generic versions, when appropriate and in circumstances where patient safety would not be compromised. The Commission has noted that Ireland has one of the lowest penetration rates for generics in the EU. The Irish Pharmacy Union, which has long argued for the introduction of generic substitution, earlier this year pointed to potential savings of €30 million to the State if restrictions on generic substitution were removed.



## Competition Authority criticises proposals for a code of practice for grocery goods undertakings

In our previous competition law alert (see publications section of Beauchamps website) we discussed the draft code which was published by the Department of Enterprise Trade and Employment in August 2009. The draft code was mooted as a solution to perceived deficiencies in competition law rules and their application to supermarket buyers with significant market muscle. The draft code made provision for the hearing of anonymous complaints by a new 'Grocery Ombudsman' and also contained other measures to address the supposed disparity in bargaining power between retailers and suppliers.

On 5 October 2009, the Competition Authority published its response to the Tánaiste and Minister for Enterprise Trade and Employment's call for submissions on the draft code. The Minister's proposals received a lukewarm response from the Authority, which suggested that the strengthening of existing competition legislation could more effectively combat harmful practices within the sector.

The Authority observed that much of the conduct at issue in the draft code is already prohibited by legislation. It also noted that suppliers are reluctant to bring complaints under the existing legislation for fear of being delisted by retailers. However, the Authority believes that it is not clear whether the attitude of suppliers would change if a code of practice is introduced, given that *"the strongest duty of the proposed ombudsman appears to be to merely act as an arbitrator in relation to disputes arising under the code."* The Authority also criticised the additional costs to the Exchequer associated with the creation of an ombudsman.

The Authority proposes a number of alternative methods of tackling anti-competitive behaviour in the sector. It suggests that retaliatory behaviour, where a retailer removes a supplier's products from its shelves for not paying slotting allowances or hello money, should be expressly prohibited by law. The Authority considers that the costs exposure of a plaintiff in private actions under the Competition Act should be limited. Also, the availability of 'double damages' might incentivise suppliers to bring private actions under existing legislation and act as a deterrent to offenders.

## Lisbon Treaty

It has been reported that following the decision of the President of the Czech Republic to ratify the EU's Lisbon Treaty, its provisions could come into force as early as December. Due to the changes which this will bring about elsewhere in the EC Treaty, the numbering of the Articles which deal with competition law will change. Articles 81 and 82 will be numbered Articles 101 and 102 respectively. The State Aid rules will be numbered Articles 107-109.

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