

EUROPEAN COMMISSION
Competition

CASE AT.36957 - Glaxo Wellcome

ANTITRUST PROCEDURE

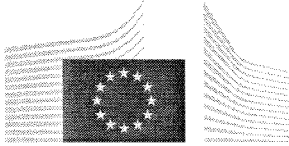
Council Regulation (EC) 1/2003 and Commission Regulation (EC) 773/2004

Article 7(2) Regulation (EC) 773/2004

Date: 27/05/2014

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EUROPEAN COMMISSION

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PUBLIC VERSION

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**Subject: Case COMP/AT.36957- Glaxo Wellcome
Commission Decision rejecting the complaint**
(Please quote this reference in all correspondence)

Dear Sirs,

- (1) I am writing to inform you that the European Commission (the "Commission") has decided, pursuant to Article 7(2) of the Commission Regulation (EC) No 773/2004,¹ to reject the complaint dated 19 January 1999 filed with the Commission by the European Association of Euro-Pharmaceutical Companies ("EAEPC") against Glaxo Wellcome SA, now GlaxoSmithKline SA, a subsidiary of the group GlaxoSmithKline plc (hereafter collectively referred to as "GSK"), alleging a violation of Article 101 of the Treaty on the Functioning of the European Union ("TFEU") by GSK in connection with the dual pricing scheme that GSK agreed in 1998 with a number of wholesalers active in Spain (the "Complaint").
- (2) By its letter dated 9 April 2013, EAEPC asked the Commission to act and adopt a decision regarding the Complaint pursuant to Article 265 TFEU. On 7 June 2013 the Commission sent EAEPC a letter pursuant to Article 7(1) of Commission Regulation (EC) No. 773/2004 (the "Article 7(1) Letter") which sets out the preliminary view that there was insufficient European Union ("EU") interest to further investigate the Complaint. EAEPC replied to the Article 7(1) Letter on 18 July 2013. The underlying motives of EAEPC's reply, as will be examined in depth hereafter, are not the assessment of this case's specific elements, but rather the opening of a general

¹ Commission Regulation 773/2004/EC of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123 of 27.04.2004).

investigation into parallel trade in the pharmaceutical sector in Spain which would go well beyond the scope of its Complaint.²

- (3) The Commission has examined EAEP's response of 18 July 2013 in detail. However, for the reasons set out in section 2 below, the Commission considers that there is insufficient EU interest for conducting any further investigation of the Complaint. The Commission therefore rejects the Complaint pursuant to Article 7(2) of Commission Regulation no. 773/2004.

1. THE COMPLAINT AND THE COMMISSION PROCEDURE

- (4) On 6 March 1998 GSK notified to the Commission its new General Sales Conditions (the "Sales Conditions") with a view to obtaining negative clearance or an individual exemption under the conditions set out in the now repealed Regulation (EEC) No. 17/62.³ The notification was followed by a number of complaints, including the Complaint by EAEP, which alleged an infringement of Article 81 EC Treaty (hereafter referred to as "Article 101 TFEU") because GSK had concluded an agreement for a dual pricing system with a number of Spanish wholesalers for the supply of 82 pharmaceutical products in Spain.
- (5) According to Clause 4 of the Sales Conditions notified to the Commission, GSK provided for two different prices. One price was the maximum ex-factory price established by the Spanish health authorities. This price would apply to pharmaceutical products (i) financed by Spanish public funds and (ii) subsequently marketed in Spain exclusively (i.e. through Spanish pharmacies or hospitals). In the absence of one of those two cumulative factors, GSK set another, second, price according to "real, objective and non-discriminatory economic criteria irrespective of the final destination of the product".⁴ If the products were finally exported, the wholesaler would have to pay the higher second price.
- (6) On 8 May 2001 the Commission adopted a decision finding that the agreement between GSK and a number of Spanish wholesalers operating a distinction between prices charged by GSK in the case of domestic resale of reimbursable medicines in Spain, and higher prices charged in the case of exports to other Member States had infringed Article 101 (1) TFEU as a restriction by object (the "Decision").⁵ The Decision also examined the effects on the market of the dual pricing clauses and concluded that it also had the effect of excluding or impeding parallel trade. Furthermore, the Decision held that GSK had not proven that the conditions set out in Article 81(3) EC Treaty (hereafter referred to as "Article 101(3) TFEU") were met.

² Both letters of 9 April 2013 and 18 July 2013 refer to the Commission antitrust case IV/37380/F3 *EAEP/Glaxo Spain*. This case, as well as the cases IV/36997/F3 *Aseprofar and Fedifar*, IV/37121/F3 *Spain Pharma* and IV/37138/F3 *BAI*, were merged into case AT.36957 *Glaxo Wellcome* (previously IV/36957/F3) for reasons of administrative efficiency.

³ Regulation No 17: First Regulation implementing Articles 85 and 86 of the EC Treaty (OJ 13 of 21.02.1962).

⁴ See quotation of Clause 4 section B of the agreement as cited in the Commission Decision 2001/791/EC of 8 May 2001, paragraph 19.

⁵ Commission Decision 2001/791/EC of 8 May 2001 (OJ L 302 of 17.11.2001).

- (7) In addition, the Decision pointed out that the Sales Conditions had entered into force on 9 March 1998 and their application had been suspended by interim measures ordered by the Spanish competition authority on 16 October 1998.⁶ The Decision also mentioned that GSK had refrained from implementing the Sales Conditions from the suspension ordered by the Spanish competition authority up to the date of the Decision.⁷
- (8) On 27 September 2006 the Court of First Instance (now the General Court) annulled the Commission's Decision (hereinafter the "GC" judgment).⁸ It held first that the Commission had been wrong to find that the agreement was a restriction by object but it confirmed the Commission's conclusion that the Sale Conditions had the effect of restricting competition. Second, it however found that the Commission had failed to carry out an adequate examination as to whether the conditions under Article 101(3) TFEU were met.
- (9) On appeal, the European Court of Justice in its judgment of 6 October 2009 (hereinafter the "ECJ" judgment)⁹ overturned the GC's reasoning, upholding the Commission's conclusion that the agreement was a restriction by object, thus falling within the scope of Article 101(1) TFEU. However, the ECJ confirmed the GC's finding that the Commission had failed to conduct a full examination of the arguments put forward by GSK in relation to the exemption under Article 101(3) TFEU, in particular the arguments on efficiency gains. On that ground the ECJ dismissed the appeal brought by the Commission. The effect of the judgment of the ECJ is that the Decision was considered null and void and the situation was to be regarded as if the Commission had never adopted the Decision.
- (10) Soon after the ECJ judgment, on 26 January 2010, GSK formally withdrew its application of 6 March 1998 for an individual exemption under Article 101(3) TFEU. GSK explained the withdrawal on the basis of the outcome of the GC and ECJ judgments and the lapse of time without having operated the dual pricing scheme. To date, GSK has not reinstated its dual pricing scheme in Spain.
- (11) Following the ECJ's judgment, the Commission held a series of meetings with EAEPCC and other stakeholders, carefully reviewed EAEPCC's submissions and opened a separate case file, as further detailed below:
- (a) On 12 November 2009 the Commission met with EAEPCC to discuss the ECJ judgment and agreed to give consideration to following up on the Complaint in light of the ECJ judgment.
 - (b) On 4 March 2010 EAEPCC submitted a memorandum providing suggestions for a review of GSK's dual pricing system under Article 101(3) TFEU.

⁶ Commission Decision 2001/791/EC of 8 May 2001, paragraphs 25 and 26. The Spanish competition authority had adopted interim measures ordering GSK to suspend the application of Clause 4 for a period of 6 months.

⁷ Commission Decision 2001/791/EC of 8 May 2001, paragraph 28.

⁸ Judgment of 27 September 2006, *GlaxoSmithKline Services v Commission*, T-168/01, ECR, EU:T:2006:265.

⁹ Judgment in *GlaxoSmithKline Services and Others v Commission and Others*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610.

- (c) On 22 September 2011 another meeting took place between EAEPC and the Commission to discuss the state of the case and recent developments.
- (d) On 7 October 2011 EAEPC submitted a second memorandum suggesting that the Commission should take decisive action on the Complaint.
- (e) On 26 October 2011 EAEPC submitted a number of studies concerning parallel trade.
- (f) In January 2012 the Commission [...] opened another case file (AT.39973 *Pricing schemes for distribution of medicines in Spain*) to investigate current parallel trade and dual pricing issues in Spain more generally, including pricing practices implemented by companies other than GSK. The Commission sent out from March to May 2012 requests for information to the largest Spanish pharmaceutical wholesalers accounting for more than 60% of the wholesale market. These requests for information asked for copies of supply contracts concluded with a number of pharmaceutical manufacturers and for the relative importance of the exports in their purchases. From the analysis of the replies to these requests for information, the Commission could verify that GSK's agreements with wholesalers currently do not appear to apply a differentiated pricing scheme in Spain.¹⁰ Case AT.39973 *Pricing schemes for distribution of medicines in Spain* is separate from the Complaint and is not subject to the present rejection.
- (g) In parallel, the Commission also held meetings and exchanges with other stakeholders, e.g. in June and September 2012 with [...] association representing pharmaceutical manufacturers, and in February 2013 with the European Confederation of Pharmaceutical Entrepreneurs ("EUCOPE") in order to gain clarity on regulatory, judicial and market issues relating to the current pricing schemes applied in Spain by certain pharmaceutical companies.¹¹ One of the main issues discussed were a number of cases which are pending before the Spanish Courts and concern the compatibility with EU and national competition rules of dual pricing practices applied in Spain by a number of pharmaceutical manufacturers other than GSK.¹²

¹⁰ Two documents originating from the requests for information addressed to Spanish wholesalers in the related Case AT.39973 (*Pricing schemes for distribution of medicines in Spain*) were transferred to the Case AT.36957 (*Glaxo Wellcome*) with the permission of the concerned Spanish wholesalers. Those documents were the replies submitted by [...distributor 1] on 29.05.2012 and by [...distributor 2] on 04.06.2012, stating that the supply agreements with GSK are verbal and do not apply a dual pricing scheme.

¹¹ EAEPC was given access to the accessible versions of the minutes of such meetings under Article 8(1) of Commission Regulation (EC) No. 773/2004, as referred to in paragraph (14) of the present decision. EAEPC did not express observations on the minutes.

¹² At present two cases have reached the Spanish Supreme Court. In the first case the original complaint was lodged by the wholesaler Spain Pharma against the pharmaceutical company Pfizer and the wholesaler Cofares. The decision by the Spanish competition authority was adopted on 21.05.2009 (Case 2623/05). In the second case the original complaint was submitted by EAEPC against the pharmaceutical manufacturers Pfizer, Novartis, Sanofi, Lilly, Janssen-Cilag and Merck Sharp & Dohme. The decision by the Spanish competition authority was issued on 14.09.2009 (Case S/0017/07).

- (h) At a meeting on 19 March 2013 with EAEPC, the status of the Complaint and the Commission's investigation in case AT.39973 were discussed. At that meeting EAEPC indicated its intention to formally call upon the Commission to adopt a new decision with respect to the Complaint.
- (12) By letter dated 9 April 2013, EAEPC formally requested the Commission, on the basis of Article 265 TFEU, to adopt a new decision in relation to the Complaint in light of the ECJ judgment.
- (13) On 7 June 2013, by way of the Article 7(1) Letter, the Commission expressed its intention to reject the Complaint without conducting any further investigation. That letter also defined the Commission's position within the meaning of Article 265 TFEU.
- (14) Following EAEPC's request of 19 June 2013, the Commission gave EAEPC access on 5 July 2013 to the documents that served as a basis for the provisional assessment set out in its Article 7(1) Letter, pursuant to Article 8(1) of Commission Regulation (EC) No. 773/2004.
- (15) By letter dated 18 July 2013, EAEPC has made known its observations in response to the Commission's Article 7(1) Letter, arguing that the Commission should continue to investigate the case.
- (16) On 11 September 2013 and 3 October 2013 the Commission met with EAEPC to discuss the Commission's position and the arguments presented in the Article 7(1) Letter.

2. ASSESSMENT OF THE COMPLAINT

- (17) As aforesaid, the Complaint from EAEPC is confined to asking the Commission to open an investigation into the dual pricing scheme that GSK agreed in 1998 with a number of wholesalers in Spain.
- (18) Bearing that in mind and following the initial assessment of the Complaint and subsequent submissions and in view of the factual and legal circumstances of the present case, the Commission does not intend to conduct a *new* in-depth investigation of the Complaint for the reasons set out below.

2.1. The need for the Commission to set priorities

- (19) The Commission is unable to pursue every alleged infringement of EU competition law which is brought to its attention. The Commission has limited resources and must set priorities, in accordance with the principles set out at points 41 to 45 of the Notice on the handling of complaints.¹³
- (20) In this respect, the Commission recalls, that in accordance with settled case law it is entrusted by Article 105(1) TFEU with the task of ensuring the application of Articles 101 TFEU and 102 TFEU and is responsible for defining and implementing EU

¹³ Notice on the handling of complaints of 27 April 2004 (OJ C 101, 27.04.2004)

competition policy.¹⁴ For that purpose, the Commission has discretion as to how it deals with complaints. In the exercise of that discretion, the Commission is entitled to decide not only on the order in which complaints are to be examined but also to reject a complaint on the ground that there is an insufficient EU interest in further investigating the case.¹⁵ The assessment of the EU interest raised by a complaint in competition matters depends on the factual and legal circumstances of that case, which may differ considerably from one case to another. The number of criteria on which the Commission may base the rejection of complaint for lack of EU interest is not limited, nor is the Commission obliged to rely exclusively on certain criteria to conclude on the lack of EU interest to reject a complaint. The Commission may rely on criteria which had not been envisaged before or may give priority to a single criterion to evaluate the EU interest of a complaint.¹⁶ Thus, the Commission is not obliged to always take into account the gravity of the alleged infringement in appraising the EU interest of a complaint.¹⁷

- (21) Moreover, the European Courts have consistently held that EU law, in particular Article 7 of Regulation No. 1/2003,¹⁸ does not give a person making a complaint the right to insist that the Commission takes a final decision as to the existence or non-existence of the alleged infringement,¹⁹ even if the Commission had become persuaded that the practices concerned constituted an infringement.²⁰
- (22) In addition, as explained in the Notice on the handling of complaints and in accordance with case law, the Commission is entitled to decide not to pursue a complaint concerning a practice that has ceased, provided that it ascertains that anticompetitive effects have also ceased (as this may be indicative of the lack of EU interest) and, as the case may be, that the seriousness of the alleged interference with competition or the

¹⁴ Judgment in *Ufex and Others v Commission*, C-119/97 P, EU:C:1999:116, paragraph 88; Judgment of 15 December 2010, *CEAHR v Commission*, T-427/08, ECR, EU:T:2010:517, paragraph 26. Also recent Judgment of 16 October 2013, *Vivendi v Commission*, T-432/10, ECR, EU:T:2013:538, paragraph 22.

¹⁵ Notice on the handling of complaints of 27 April 2004 paragraphs 41 and 45. Judgment of 15 December 2010, *CEAHR v Commission*, T-427/08, ECR, EU:T:2010:517, paragraph 27; Judgment of 14 February 2001, *Sodima v Commission*, T-62/99, ECR, EU:T:2001:53, paragraph 36; Judgment of 24 January 1995, *Tremblay and Others v Commission*, T-5/93, ECR, EU:T:1995:12, paragraph 60. Also recent Judgment of 16 October 2013, *Vivendi v Commission*, T-432/10, ECR, EU:T:2013:538, paragraph 23.

¹⁶ Notice on the handling of complaints of 27 April 2004, paragraphs 41-43. Judgment in *Ufex and Others v Commission*, C-119/97 P, EU:C:1999:116, paragraphs 79 and 80. Also Judgment of 16 October 2013, *Vivendi v Commission*, T-432/10, ECR, EU:T:2013:538, paragraph 25; and Judgment in *EFIM v Commission*, C-56/12 P, EU:C:2013:575, paragraph 85.

¹⁷ Judgment in *EFIM v Commission*, C-56/12 P, EU:C:2013:575, paragraph 89.

¹⁸ Council Regulation No 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1/1 of 04.01.2003).

¹⁹ Judgment of 16 January 2008, *Scippacercola and Terezakis v Commission*, T-306/05, ECR, EU:T:2008:9, paragraph 91; Judgment in *Ufex and Others v Commission*, C-119/97 P, EU:C:1999:116, paragraph 87; Judgment of 18 September 1992, *Automec v Commission*, T-24/90, ECR, EU:T:1992:97, paragraph 75; and Judgment in *GEMA v Commission*, 125/78, EU:C:1979:237, paragraph 18. Also Notice on the handling of complaints of 27 April 2004, paragraph 41.

²⁰ Judgment of 24 January 1995, *Tremblay and Others v Commission*, T-5/93, ECR, EU:T:1995:12, paragraph 61.

persistence of its effects were not such as to give the complaint a EU interest. After having taken account of the seriousness of the infringement, the Commission may dismiss the complaint even if the infringement is very serious, provided that it does not rely on facts that are substantively incorrect or commit a manifest error of assessment.²¹

- (23) The Commission relies on the following criteria to conclude on the lack of EU interest to reject the Complaint:
- (a) The conduct at issue took place many years ago, ceased in October 1998, has not been implemented again since and there is nothing in the file suggesting that GSK may be planning to implement it in the future;
 - (b) The conduct at issue is not producing persisting effects; and
 - (c) National courts and authorities appear to be well placed to handle the issues raised.

In order to avoid reiteration of the reasons set out in the Article 7(1) Letter, the Commission shall concentrate now on the arguments put forward in EAEPC's letter of 18 July 2013 and shall explain why such arguments do not warrant that the Commission's re-assesses the Complaint and undertakes an investigation into GSK's dual pricing scheme.

2.2. The conduct at issue has ceased

- (24) GSK implemented its new Sales Conditions with Spanish wholesalers between 9 March 1998 (not 6 April 2008 as stated in EAEPC's letter of 18 July 2013) and 16 October 1998.²² The Commission has ascertained (see Article 7(1) Letter, paragraph (30)) that the conduct at issue has not been implemented again since 1998 and there is nothing in the file to indicate that GSK is planning to implement it again in Spain. EAEPC does not contest that the infringement ceased on 16 October 1998, nor has it provided any evidence to explain how the anti-competitive effects of the infringement might have continued.
- (25) In this respect the Commission's assessment of the conduct at issue here is not solely based on the lapse of time and risk of repetition by GSK, as EAEPC implies in its letter of 18 July 2013. The Commission's assessment in this case is based on the information in the file and on all the facts and arguments made in EAEPC's

²¹ Notice on the handling of complaints of 27 April 2004, paragraph 44 fifth indent. Judgment of 11 July 2013, *BVGD v Commission*, T-104/07 and T-339/08, ECR, EU:T:2013:366, paragraph 201; and Judgment of 11 July 2013, *Diamanthandel A. Spira BVBA v Commission*, T-108/07 and T-354/08, ECR, EU:T:2013:367, paragraph 178; both cases quoting Judgment in *Ufex and Others v Commission*, C-119/97 P, EU:C:1999:116, paragraph 95. That case-law only applies where the Commission bases its decision on the fact that the alleged anti-competitive practice has ceased (Judgment of 12 September 2007, *Ufex and Others v Commission*, T-60/05, ECR, EU:T:2007:269, paragraph 74). See also paragraph 140 of Case T-60/05.

²² As mentioned above, the agreement entered into effect on 9 March 1998, as also indicated in the ECJ judgement paragraph 8 and the CFI judgment paragraph 15. Furthermore, according to paragraph 163 of the CFI judgment, "it follows from recitals 26 and 28 to the Decision that the application of the General Sales Conditions, which became applicable on 9 March 1998, was suspended on 16 October 1998 and remained suspended until the date of adoption of the Decision, as the parties recalled at the hearing."

submissions, including the letter of 18 July 2013. Furthermore, the Commission's rejection of the Complaint is not based solely on the three *Automec* criteria cited at the bottom of page 5 of EAEPC's letter of 18 July 2013, and, accordingly, this decision does not need to take a position on these criteria. As explained above, there is no exhaustive list of criteria that the Commission has to take into account.²³

2.3 No persisting effect of the alleged infringements

- (26) There is no evidence in the file nor in EAEPC's reply of 18 July 2013 that, as of today, Spanish wholesalers' ability to export the 82 medicines at issue would be restricted due to the 1998 dual pricing. The purchase prices and volumes that Spanish wholesalers currently face in order to export those 82 medicines are determined by today's market dynamics rather than by GSK's conduct in 1998. These market dynamics include, *inter alia*, GSK's current distribution strategy; the patent landscape for these 82 medicines, as some of the patents protecting those medicines may have expired; and the demand for parallel exports from Spain, as today's parallel trade flows may be different from the situation in 1998 (in particular, because exchange rates are different, because there are now low-price countries other than Spain as a result of the latest enlargements of the EU and because of the widespread use of international reference pricing). In fact, a number of Spanish wholesalers indicated to the Commission that GSK does not apply a dual pricing system with them (see footnote 10). Finally, the fact that the conduct lasted for seven months, more than fifteen years ago, which is not contested by EAEPC in its letter of 18 July 2013, also suggests that persisting effects are unlikely.
- (27) In relation to other pricing practices subsequently adopted by other manufacturers in Spain, the Commission does not share EAEPC's view that there is a causal link between the Commission's conduct in this case (in the words of EAEPC its alleged "lack of a coherent and sustained response to parallel trade in general and dual pricing in particular") and those subsequent pricing practices. EAEPC provides no evidence whatsoever of such a causal link and even EAEPC's letter admits that those other dual pricing systems have been investigated or assessed by competition authorities. This includes the Commission itself, whose investigation in the case AT.39973 is not affected by this decision, the national competition authority and the national courts.
- (28) [...]
- (29) In addition, EAEPC argues that, on the one hand, the Commission never took into account the limited duration of the infringement when deciding to initiate the administrative procedure and pursue the case until the ECJ handed down its judgement on 6 October 2009 and, on the other hand, that the Commission should not rely on its own inactivity since that date to close the case.
- (30) First, the limited duration of the infringement was not taken into account until the ECJ judgment given that the dual pricing clause had been suspended (see footnote 22). Second, the length of the first Commission investigation or the duration of the court cases are irrelevant to the assessment of the EU interest of the Complaint in the present circumstances of this case, bearing in mind that the Commission's Decision was annulled. Moreover, the long duration of an administrative procedure cannot preclude

²³ Notice on the handling of complaints of 27 April 2004, paragraph 43. See also Judgment in *Ufex and Others v Commission*, C-119/97 P, EU:C:1999:116, paragraph 79.

the Commission from concluding that, in view of other factors, there is no longer sufficient EU interest. Also, the Commission can conclude that there is insufficient EU interest even if it has actively investigated the case for a period of time.²⁴

- (31) Furthermore, it cannot be inferred from the Commission's course of action over the last 15 years that closing the case without a second investigation may be in contradiction with the Commission's own actions, as suggested by EAEPC.
- (32) The Commission in fact investigated the case from 1998 to 2001, when it adopted the Decision, and defended the Decision in court from 2001 to 2009. The Commission also took the abovementioned investigative steps between 2009 and 2013 concerning pharmaceutical parallel trade in Spain (see paragraph (11)).
- (33) Therefore, the Commission does not rely on "its own inactivity" to reject the Complaint given that the Commission has not been inactive since the ECJ judgment of October 2009. Reference is made to the chronology of events in paragraph (11) of this decision, and to EAEPC's own argument that the Commission pursued the case for "15 years", i.e. including the period since the ECJ judgment of October 2009. Moreover, as aforesaid in paragraph (11)(f), between March and May 2012 the Commission sent requests for information to the main pharmaceutical wholesalers representing more than 60% of the market in Spain, which requested copies of their supply agreements with manufacturers.
- (34) As regards the allegation that the Commission rejected various complaints concerning another manufacturer dual pricing scheme in Spain on the basis that the GSK case was pending before the EU courts, it must be recalled that two complaints were lodged in 2001²⁵ and three complaints in 2005.²⁶ They concerned Pfizer's dual pricing scheme in Spain, which was similar, albeit not identical, to GSK's scheme. The Commission decided at the time²⁷ that those complaints lacked sufficient EU interest to justify further investigation because the conduct at issue "raised the same competition issues and in the same country" as the one addressed in the GSK Decision, which "is the subject of an appeal before the Court of First Instance", and the national competition authority and courts were well placed to deal with the complaints. Therefore, the Commission suggested to the complainants to bring the cases before the Spanish competition authority.²⁸ EAEPC did not challenge these decisions at the time.
- (35) In this context EAEPC argues that the rejection decisions concerning the Pfizer complaints show that the Commission "based its policy regarding the analysis of restrictions to parallel trade under Article 101 TFEU" on the GSK case. EAEPC goes on to argue that the Pfizer decisions show that the Commission used the GSK case "as a valid precedent to fix its decision-making practice in this matter". This is incorrect.

²⁴ Notice on the handling of complaints, paragraph 45; and Judgment in *IECC v Commission*, C-449/98 P, EU:C:2001:275, paragraph 37.

²⁵ Cases COMP/38215/B2 *FEDIFAR/Pfizer* and COMP/38293/B2 *EAEPC/Pfizer*.

²⁶ Cases COMP/39184/B2 *Spain Pharma/Pfizer*, COMP/39243/B2 *EAEPC/Pfizer* and COMP/39257/B2 *Spain Pharma/Pfizer*.

²⁷ See mainly decision of 8 August 2006 in case COMP/39243/B2 *EAEPC/Pfizer* and decision of 15 October 2007 in case COMP/39184/B2 *Spain Pharma/Pfizer*.

²⁸ See footnote 12 above on the cases brought before the Spanish competition authority.

The Commission did not carry out an analysis of Pfizer's dual pricing system under Article 101 TFEU, as it considered that there was insufficient EU interest in pursuing a new investigation into what appeared to be a similar practice to that at issue in the GSK case, while this case was pending in court. In addition, the complainants of the Pfizer complaints had the opportunity to bring the complaint before national authorities, who were well placed to deal with them. Accordingly, the rejection of the complaints regarding the dual pricing scheme put in place by Pfizer for lack of EU interest does not support the EAEPC's argument that the Commission should open a new investigation into the GSK case. In addition, the fact that the Commission receives a number of complaints regarding similar, but not identical, conduct and in circumstances which are not identical does not prevent the Commission from rejecting those that appear to lack sufficient EU interest.

- (36) As regards the alleged need to provide legal guidance, this is not a mandatory factor to be taken into account when rejecting a complaint concerning past behaviour: it is sufficient for the Commission to meet the above-mentioned requirements of case-law referred to in paragraph (22). In any event, companies can find sufficient guidance from the EU Courts' jurisprudence on Article 101(1) TFEU and notably the ECJ judgment in this very case.²⁹
- (37) Finally, EAEPC's reliance on "the need to promote exemplary behaviour on the part of undertakings" and "the interest in discouraging any repeated infringement" mentioned in the *Sumitomo* judgment³⁰ is misplaced: that judgment concerned the circumstances in which the Commission may show that it has an interest in adopting a decision finding an infringement of the competition rules even though the possibility to impose fines for such infringement is prescribed.
- (38) To sum up, in deciding to reject the Complaint the Commission relies on a numbers of factors resulting from the file: i) the allegedly infringing practices have ceased, ii) the anti-competitive effects have ceased, and iii) as examined hereafter, the case can be brought before the national authorities. Other arguments put forward by the Complaint do no contradict the assessment carried out by the Commission.

2.4 The case can be brought before the national authorities

- (39) While the fact that complainant's rights cannot be adequately safeguarded by national competition authorities and the national courts is one of the criteria which the Commission may take into account when deciding on whether or not to take up a complaint, EAEPC has not provided any evidence to suggest that it would be impossible for the national judicial and administrative authorities to adopt a valid decision concerning Article 101(3) TFEU in the GSK case.
- (40) Even if it were true that the Commission has "all the relevant evidence" EAEPC does not explain why the national competition authority and the national courts will not be able to obtain that evidence, including by making use of the cooperation mechanisms

²⁹ Judgment in *GlaxoSmithKline Services and Others v Commission and Others*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610.

³⁰ Judgment of 6 October 2005, *Sumitomo Chemical v Commission*, T-22/02 and T-23/02, ECR, EU:T:2005:349, paragraph 137.

under Article 12 and 15 of Regulation no 1/2003 and in accordance with the case law.³¹

- (41) Moreover, EAEPC provided no evidence that the remedies available under the applicable national law would not be adequate to safeguard EAEPC's rights. Again, the difficulties EAEPC could encounter when commencing proceedings before competent national authorities derive from the fact that the infringement ceased producing anti-competitive effects a long time ago. In this respect, regardless of whether the Commission has greater experience on Article 101(3) cases and/or in applying competition law in the pharmaceutical sector, as EAEPC alleges, EAEPC does not explain why the national competition authority and the national courts in Spain would not be able to make the required assessments to deal with the case.

2.5 The Commission obligation under Article 266 TFEU

- (42) EAEPC argues that it must be inferred from Article 266 TFEU that the GC judgment, confirmed on appeal by the ECJ, required the Commission to re-examine the case and to adopt a new decision which assesses the alleged infringement under Article 101 TFEU, including the conditions of Article 101(3) TFEU. EAEPC also claims that a rejection of the Complaint would infringe the Commission's responsibilities in this regard.
- (43) The Commission does not share EAEPC's arguments in this respect.
- (44) As a preliminary point, it must first be borne in mind that, according to case-law, Articles 265 and 266 TFEU refer to failure to act in the sense of failure to take a decision or to define a position, and not the adoption of a measure different from that desired or considered necessary by the persons concerned.³²
- (45) Second, it is for the Commission to determine which measures, if any, are necessary to comply with a judgement of the GC or the ECJ. According to paragraph 320 of the GC judgement, it fell upon the "Commission, in the light of the partial annulment of the Decision and the retroactive effect thereof, to rule on the request for exemption presented by GSK by reference to the date of that request, in so far as that request remains before it" (emphasis added). However, GSK withdrew its request for individual exemption in January 2010. It follows that the Commission cannot in the present circumstances rule on the request for exemption made by GSK.
- (46) Third, while Article 266 TFEU imposes on the Commission the obligation to take the necessary measures to comply with the judgement of the EU courts, in this case given that the effect of the judgements of the ECJ is that the Decision was considered null and void and the situation was to be regarded as if the Commission had never adopted the Decision, the Commission is not obliged to take up the Complaint on account of the annulment of the Decision by the ECJ.
- (47) Finally, the Commission does not share EAEPC's view that a rejection of the Complaint would be contrary to the Commission's obligation under Article 266 TFEU.

³¹ Order in *Imm. J. J. Zwartveld and others*, C-2/88, EU:C:1990:440.

³² Judgment in *Irish Cement v Commission*, 166/86 and 220/86, EU:C:1988:549, paragraph 17.

As aforementioned, GSK withdrew its request for exemption. On the one hand, as mentioned in paragraph (21), a complainant under Article 7 of Regulation no 1/2003 does not have the right to oblige the Commission to adopt a decision finding the existence or non-existence of an infringement. On the other hand, this decision is the outcome of the assessment of the factual and legal aspects raised by the Complaint and further submissions which have been examined by the Commission in the light of the present circumstances of the case. In conclusion, the Commission considers that, by adopting the present decision, it defines clearly a position on how it is to give effect to the GC's judgment.

3. CONCLUSION

- (48) In view of the above considerations, the Commission, in its discretion to set priorities, has come to the conclusion that there are insufficient grounds for conducting a further investigation into the alleged infringement and consequently rejects the Complaint pursuant to Article 7(2) of Regulation No. 773/2004.

4. PROCEDURE

4.1 Possibility to challenge this Decision

- (49) An action may be brought against this decision before the General Court of the European Union, in accordance with Article 263 TFEU.

4.2 Confidentiality

- (50) [...]

For the Commission

Joaquín Almunia

Vice-President