

JUDGMENT OF THE COURT (Grand Chamber)

31 May 2005 *

In Case C-53/03,

REFERENCE under Article 234 EC for a preliminary ruling, by the Epiteproi Antagonismou (Greece), by decision of 22 January 2003, received at the Court on 5 February 2003, in the proceedings

Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others,

Panellinios syllogos farmakapothikarion,

Interfarm — A. Agelakos & Sia OE and Others,

K.P. Marinopoulos Anonymos Etairia emporias kai dianomis farmakeftikon proionton and Others,

v

GlaxoSmithKline plc,

GlaxoSmithKline AEVE, formerly Glaxowellcome AEVE,

* Language of the case: Greek.

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and R. Silva de Lapuerta, Presidents of Chambers, C. Gulmann (Rapporteur), R. Schintgen, N. Colneric and S. von Bahr, Judges,

Advocate General: F.G. Jacobs,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 18 May 2004,

after considering the observations submitted on behalf of:

- Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others, by P. Kaponis and S. Orfanoudakis, dikigoroi,

- Panellinos syllogos farmakopothikarion and K.P. Marinopoulos Anonymos Etairia emporias kai dianomis farmakeftikon proïonton and Others, by L. Roumanias and G. Papaioannou, dikigoroi, and W. Rehmman, Rechtsanwalt,

- Farmakeftikos Syndesmos Anonymi Emporiki Etairia, by D. Chatzinikolis, dikigoros,

- Interfarm A. Agelakos & Sia OE and Others, by G. Mastorakos, dikigoros,

- GlaxoSmithKline plc and GlaxoSmithKline AEEV, by D. Kyriakis, dikigoros, I. Forrester QC and A. Schulz, Rechtsanwalt,

- the Swedish Government, by A. Kruse, acting as Agent,

- the Commission of the European Communities, by T. Christoforou and F. Castillo de la Torre, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 October 2004,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 82 EC.

- 2 The request was made in proceedings before the Epiteproi Antagonismou (the Greek Competition Commission), between the complainants, Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others ('Syfait and Others'), Panellinios syllogos

farmakapothikarion ('PSF'), Interfarm — A. Agelakos & Sia OE and Others ('Interfarm and Others') and K.P. Marinopoulos Anonymos Etairia emporias kai dianomis farmakeftikon proïonton and Others ('Marinopoulos and Others'), and GlaxoSmithKline plc ('GSK plc'), a United Kingdom company, and its subsidiary incorporated under Greek law, GlaxoSmithKline A EVE, formerly Glaxowellcome A EVE ('GSK A EVE'), concerning the latter two companies' refusal to meet orders for certain pharmaceutical products on the Greek market.

Law

Community law

3 Article 82 EC provides:

'Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

- (b) limiting production, markets or technical development to the prejudice of consumers;

- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.'

National law

- 4 Article 2 of Law No 703/1977 on the control of monopolies and oligopolies and the protection of free competition (FEK (Official Gazette) A' 278), as amended by Law No 2941/2001 (FEK A' 201, hereafter 'Law No 703/1977'), essentially corresponds to Article 82 EC.

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 5 Syfait and Others are associations of pharmacists established in Greece whose main activity is the operation of a joint wholesale repository for pharmaceutical products, which they purchase from various pharmaceutical companies in order to ensure the supply of their members.

SYFAIT AND OTHERS

- 6 PSF is an association of wholesalers of pharmaceutical products established in Greece, which defends the interests of its members.

- 7 Interfarm and Others are wholesalers of pharmaceutical products established in Greece. Marinopoulos and Others are distributors of pharmaceutical products operating in Greece.

- 8 GSK A EVE is established in Greece and is wholly owned by GSK plc, a manufacturer of pharmaceutical products established in the United Kingdom resulting from the merger in 2000 of Glaxowellcome plc and SmithKline Beecham.

- 9 GSK A EVE imports and distributes numerous proprietary medicinal products including Imigran, Lamictal and Serevent. Those are newly created medicines resulting from research and technology and are classified as prescription medicines.

- 10 The members of Syfait and Others, and of PSF, and Interfarm and Others and Marinopoulos and Others buy those medicines, amongst others, in all forms from GSK A EVE and then distribute them on the national market and abroad.

- 11 Until November 2000, GSK A EVE met all orders which it received. A large proportion of the supplies corresponding to those orders was re-exported to other Member States, especially to the United Kingdom because of the much lower price of Imigran, Lamictal and Serevent in Greece.

- 12 From early November 2000, invoking significant shortages on the Greek market, which it attributed to re-exports by third parties, GSK AEVE changed its system of distribution in Greece and stopped meeting the orders of the complainants in the main proceedings and of third parties, stating that it would supply hospitals and pharmacies directly.
- 13 In February 2001, considering that the supply of medicinal products had to some extent been normalised, and that the stocks of hospitals and pharmacies had been rebuilt, GSK AEVE replaced the previous sales system with another system of distribution.
- 14 The complainants in the main proceedings brought before the Epitropi Antagonismou the question of GSK AEVE's marketing of Imigran, Lamictal and Serevent on the Greek market under successive systems of distribution since November 2000. They alleged that that company had not met in full the orders it had received and that such conduct is an abuse of a dominant position within the meaning of Article 2 of Law No 703/1977 and Article 82 EC.
- 15 By Decision No 193/111 of 3 August 2001 ordering interim measures, the Epitropi Antagonismou temporarily required GSK AEVE, pending adoption of the decision in the main proceedings, to meet the orders for the three medicinal products in question. GSK AEVE applied to the Diikritiko Efetio Athinon (Administrative Appeal Court, Athens) for an order suspending that decision, but it was confirmed on 10 January 2002 and was still in force at the date of the referring decision.
- 16 The Epitropi Antagonismou states that GSK AEVE complied with the interim measures prescribed by Decision No 193/111 at least to the extent that that

company was supplied by GSK plc. That supply exceeded the consumption needs of the domestic market. The evidence provided to the Epitepropi Antagonismou by GSK A EVE shows, however, that orders were considerably higher than that level, in particular in September 2001, so that not all orders could be met.

- 17 In the referring decision, the Epitepropi Antagonismou states that GSK A EVE and GSK plc comply with the circular adopted on 27 November 2001 by the Ethnikos Organismos Farmakon (National Organisation for Medicines), which provides that all participants in the distribution of prescribed medicines 'must supply to the domestic market quantities at least equal to current prescription levels ... plus an amount (25%) to cover any emergencies and changes of circumstance'.

- 18 Furthermore, on 5 December 2001, GSK A EVE applied to the Epitepropi Antagonismou for negative clearance under Article 11 of Law No 703/1977 in respect of its refusal to cover more than 125% of Greek demand.

- 19 Faced simultaneously with that application by GSK A EVE for negative clearance and the complaints from Syfait and Others, PSF, Interfarm and Others and Marinopoulos and Others against GSK A EVE and GSK plc, the Epitepropi Antagonismou asks to what extent the refusal by the latter two companies to meet in full the orders placed by the complainants constitutes an abuse of a dominant position within the meaning of Article 82 EC. If it is not an abuse, the Epitepropi Antagonismou states that it will be in a position to consider whether the conditions for the grant of the negative clearance sought by GSK A EVE are satisfied.

20 In those circumstances, the Epitropi Antagonismou decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

1. Where the refusal of an undertaking holding a dominant position to meet fully the orders sent to it by pharmaceutical wholesalers is due to its intention to limit their export activity and, thereby, the harm caused to it by parallel trade, does the refusal constitute per se an abuse within the meaning of Article 82 EC? Is the answer to that question affected by the fact that the parallel trade is particularly profitable for the wholesalers because of the different prices, resulting from State intervention, in the Member States of the European Union, that is to say by the fact that pure conditions of competition do not prevail in the pharmaceuticals market, but a regime which is governed to a large extent by State intervention? Is it ultimately the duty of a national competition authority to apply Community competition rules in the same way to markets which function competitively and those in which competition is distorted by State intervention?

2. If the Court holds that limitation of parallel trade, for the reasons set out above, does not constitute an abusive practice in every case where it is engaged in by an undertaking holding a dominant position, how is possible abuse to be assessed?

In particular:

- (a) Do the percentage by which normal domestic consumption is exceeded and/or the loss suffered by an undertaking holding a dominant position compared with its total turnover and total profits constitute appropriate

criteria? If so, how are the level of that percentage and the level of that loss determined (the latter as a percentage of turnover and total profits), above which the conduct in question may be abusive?

- (b) Is an approach entailing the balancing of interests appropriate, and, if so, what are the interests to be compared?

In particular:

- (i) is the answer affected by the fact that the ultimate consumer/patient derives limited financial advantage from the parallel trade? and
- (ii) is account to be taken, and to what extent, of the interests of social insurance bodies in cheaper medicinal products?
- (c) What other criteria and approaches are considered appropriate in the present case?’

The jurisdiction of the Court

- ²¹ As a preliminary point, it is necessary to ascertain whether the Epitropi Antagonismou is a court or tribunal within the meaning of Article 234 EC and whether the Court therefore has jurisdiction to make a ruling on the questions referred to it.

The national law governing the Epitropi Antagonismou

22 Article 8(1) of Law No 703/1977 provides:

‘An Epitropi Antagonismou shall be established which shall operate as an independent authority. Its members shall enjoy personal and operational independence and shall be bound in the exercise of their duties only by the law and their conscience. The Epitropi Antagonismou shall be administratively and economically autonomous subject to the supervision of the Ministry for ... [Development].’

23 The Epitropi Antagonismou has nine members appointed pursuant to Article 8(3) of Law No 703/1977. Four members and their deputies are chosen by the minister from lists of three persons which are submitted by each of four professional bodies. The other members include a member of the government legal service or a judge of the highest rank, two academics, one a lawyer and the other an economist, and two persons of acknowledged repute with experience of economic law and competition policy. According to Article 8(5) of Law No 703/1977, the members of the Epitropi Antagonismou and their deputies are appointed by the Minister for Development for a term of three years.

24 Article 8(6) of the same law provides:

‘The president of the Epitropi Antagonismou and his deputy shall be appointed by the Minister [for Development] from amongst the members of the [Epitropi Antagonismou]... The president of the Epitropi Antagonismou shall be a member of the national civil service and shall exclusively perform that task for the duration of his term of office ...’

25 Article 8(7) of Law No 703/1977 provides:

'During their term of office, the President and the members shall not carry on, whether for remuneration or otherwise, any other public function or professional activity, whether or not in-house, which is incompatible with the role and duties of a member of the Epitropi Antagonismou.'

26 As regards relations between the Epitropi Antagonismou and its secretariat, Article 8C(1)(b) of the same law provides:

'The President shall coordinate and direct the secretariat of the [Epitropi Antagonismou].'

27 Article 8C(1)(d) of the same law provides:

'The President is the immediate superior of the personnel of the secretariat of the Epitropi Antagonismou and shall exercise disciplinary power over them.'

28 According to Article 8C(3), the President of the Epitropi Antagonismou may authorise the Director General or the directors of the secretariat of the Epitropi Antagonismou to exercise some of his powers. The Director General is to be appointed for three years, and the appointment is renewable by decision of the Minister for Development subject to the assent of the Epitropi Antagonismou, as laid down by the second sentence of Article 8D(1) of Law No 703/1977.

Findings of the Court

- 29 According to settled case-law, in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent (see, in particular, Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23, Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, paragraph 33, Case C-195/98 *Österreichischer Gewerkschaftsbund* [2000] ECR I-10497, paragraph 24, and Case C-516/99 *Schmid* [2002] ECR I-4573, paragraph 34). Moreover, a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see, in particular, Case C-134/97 *Victoria Film* [1998] ECR I-7023, paragraph 14, and *Österreichischer Gewerkschaftsbund*, paragraph 25).
- 30 It should be noted, first of all, in this regard that the Epitropi Antagonismou is subject to the supervision of the Minister for Development. Such supervision implies that that minister is empowered, within certain limits, to review the lawfulness of the decisions adopted by the Epitropi Antagonismou.
- 31 Next, whilst it is true that the members of the Epitropi Antagonismou enjoy personal and operational independence and are bound in the exercise of their duties only by the law and their conscience within the meaning of Law No 703/1977, it nevertheless remains that there are no particular safeguards in respect of their dismissal or the termination of their appointment. That system does not appear to constitute an effective safeguard against undue intervention or pressure from the executive on the members of the Epitropi Antagonismou (see, to that effect, Case C-103/97 *Köllensperger and Atzwanger* [1999] ECR I-551, paragraph 21).

- 32 It should also be noted that under Article 8C(1)(b) and (d) of Law No 703/1977, the President of the Epitepropi Antagonismou is responsible for the coordination and general policy of the secretariat, is the immediate superior of the personnel of that secretariat and exercises disciplinary power over them.
- 33 It should be noted in this regard that the Tribunales Económico-Administrativos (Economic and Administrative Courts) (Spain) were found by the Court, in paragraphs 39 and 40 of the *Gabalfrisa* judgment, to be third parties in relation to the departments of the tax authority responsible for the management, clearance and recovery of VAT, particularly given the separation of functions between them. However, in so far as there is an operational link between the Epitepropi Antagonismou, a decision-making body, and its secretariat, a fact-finding body on the basis of whose proposal it adopts decisions, the Epitepropi Antagonismou is not a clearly distinct third party in relation to the State body which, by virtue of its role, may be akin to a party in the course of competition proceedings.
- 34 Lastly, it should be noted that a competition authority such as the Epitepropi Antagonismou is required to work in close cooperation with the Commission of the European Communities and may, pursuant to Article 11(6) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1), be relieved of its competence by a decision of the Commission. It should moreover be noted in this context that Article 11(6) of Regulation No 1/2003 essentially maintains the rule in Article 9(3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (O), English Special Edition, 1959-1962 p. 87), that the competition authorities of the Member States are automatically relieved of their competence where the Commission initiates its own proceedings (see in that connection the 17th recital in the preamble to Regulation No 1/2003).
- 35 A body may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see *Victoria Film*, paragraph 14, and *Österreichischer Gewerkschaftsbund*, paragraph 25).

- 36 Whenever the Commission relieves a national competition authority such as the Epiteproi Antagonismou of its competence, the proceedings initiated before that authority will not lead to a decision of a judicial nature.
- 37 It follows from the factors examined, considered as a whole, that the Epiteproi Antagonismou is not a court or tribunal within the meaning of Article 234 EC.
- 38 Accordingly, the Court has no jurisdiction to answer the questions referred by the Epiteproi Antagonismou.

Costs

- 39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the Epiteproi Antagonismou, the decision on costs is a matter for that body. The costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

The Court of Justice of the European Communities has no jurisdiction to answer the questions referred by the Epiteproi Antagonismou by decision of 22 January 2003.

[Signatures]