Parallel Imports in EU Law

Manufacturers sometimes try to prevent imports of their goods to third countries in the EU. However, this interest may be contrary to the principle of a single internal market. This article deals with the question to what extent may manufacturers prevent parallel imports of their goods between different EU countries.

Introduction: The concept of parallel imports

Parallel imports refer to cross-border sales of goods by independent traders outside the manufacturer’s distribution system without the manufacturer’s consent. Parallel importers generate profit by buying goods in one EU Member State at a relatively low price and subsequently reselling them in another Member State where the price is higher.

Parallel imports may increase consumer welfare, as imports of goods from a country with lower prices force sellers in the country of destination to reduce prices. Consequently, EU law protects and supports parallel imports as a tool for achieving and maintaining a single market.

The issue of parallel imports affects various business sectors and areas of law. This article aims to point out the most typical areas where entrepreneurs may come across parallel imports.

Intellectual property rights – Exhaustion doctrine

To a large extent the issue of parallel imports involves cross-border trade with goods protected by intellectual property rights (such as patents or trade marks). In this area the interest of the manufacturer (or the proprietor) to decide on the destiny of its own goods may sometimes clash with the interest on maintaining the EU’s internal market. This conflict is resolved by the doctrine of exhaustion of rights.1

Under this doctrine distributors may freely import goods which have been put on the internal market by the proprietor of intellectual property rights, or with their consent, from one EU Member State to another. In this situation the rights are exhausted and the proprietor cannot prevent parallel imports.

Over the years the conditions for the exhaustion of rights were defined more precisely through the interpretation of the EU courts. For instance, “putting goods on the market” of a Member State2 means the sale of the goods.3 When a trade mark proprietor provides products to distributors free of charge the products are not “put” on the market. Consequently, the proprietor’s rights are not exhausted and they can successfully prevent further distribution of these products.

The condition that the proprietor must consent to putting the goods on the market may also lead to ambiguities in interpretation. For instance, under EU case law,4 if a licensee who puts goods protected by a trade mark on the market breaches the terms of the licence (e.g. relating to duration and territorial applicability of the licence, the form of the trade mark or the scope and quality of the goods), then the marketing is not to be said to be with the consent of the proprietor. The rights are not exhausted and the trade mark owner can prevent parallel imports.

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1 Exhaustion of intellectual property rights involves all types of intellectual property. Regarding trade marks this doctrine is regulated under Czech law in Section 11 of Act no. 441/2003 Sb., on trade marks.
2 International treaties extended the regional applicability to EU Member States by including other states from the European Economic Area.
3 CJEU judgment no. C-324/09 - L’Oréal SA v eBay International AG of 12 July 2011.
Even if the conditions for exhaustion of rights are fulfilled, in exceptional cases, intellectual property rights owners can prevent the resale of goods. This typically occurs where trademark protected goods are altered, de-packaged, repackaged or the trade mark is altered or advertised.

**Distribution relationships – ban on on-line sales**

In an attempt to limit parallel imports of products to third countries manufacturers sometimes prohibit distributors from selling the goods through e-shops. However, the EU courts have a very negative attitude to the restriction of online sales. They regard such prohibitions as a restriction by object, which is unlawful in principle. The prohibition can be justified only on objective grounds based on the product’s characteristics (a prohibition of the sale of hazardous substances to certain groups of customers can be justified as a prohibition protecting the health and life of these customers) or a prohibition resulting in economic benefits (if the manufacturer proves that the adverse impact of the restriction is outweighed by economic benefits from which end-consumers at least partially benefit).\(^5\)

In some cases not even public interest reasons such as the protection of human health are sufficient for restricting on-line sales. This is documented by the judgment of the Court of Justice of the European Union (“CJEU”) in *Ker-Optika bt*\(^6\) in which the court considered compliance of Hungarian legislation which prohibited the sale of contact lenses via the Internet. The CJEU dismissed the argument that the prohibition of on-line sales was necessary for the protection of customers’ health, as it was possible to use also a less restrictive alternative based on recent tests of the lenses undergone by the customers.

However, it seems that in some cases the restriction of on-line sales may be justifiable. In this connection we can mention a decision by the French competition authority (*Conseil de la concurrence*) from 2006 in which the authority concluded that restrictions on on-line sales of perfumes and hi-fis were justified, as the characteristics of these products cannot be performed at a distance. However, the same authority rejected a similar argument regarding the sale of watches.\(^7\)

The issue of restricting on-line sales is a relatively new phenomenon and will certainly be subject to further developments. Nevertheless, a general trend can be observed among competition authorities and courts that are highly sceptical in this respect or are not willing to accept the reasons given in support of the restrictions.

**Pharmaceutical sector – restricting parallel imports of pharmaceuticals**

Probably the most controversial area of parallel imports relates to pharmaceutical law. In many cases pharmaceutical companies try to restrict parallel trade of their pharmaceuticals as it reduces their profits. Although they argue that the pharmaceutical sector must be treated with respect to its specific features, EU courts do not share their opinion and their attitude to the restriction of parallel imports of pharmaceuticals is to a large extent strict. The practices of pharmaceutical companies aiming to restrict the parallel trade in pharmaceuticals in the EU can be highly risky and violate Article 101 of the Treaty on the Functioning of the European Union (“TFEU”), which imposes a general ban on cartels, or Article 102 TFEU, prohibiting the abuse of a dominant position.

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Under EU case law, charging two different prices to distributors depending on the intended destination of pharmaceuticals may be considered as an anti-competition practice. If a pharmaceutical company charges higher price for pharmaceuticals intended for export than for pharmaceuticals for the domestic market, it breaches the ban on cartels and the competition authorities are not obliged to analyse the actual impact market. A pharmaceutical company can avoid sanctions only if it proves that the benefits for financing further research and development (which result from the restriction of the parallel imports) outweigh the negative effects resulting from the loss of the option to choose from different supply alternatives.

A risk is also involved in certain unilateral measures taken by pharmaceutical companies with a dominant position on the market, especially those which involve refusal to supply. Although it is accepted that pharmaceutical companies should have the option of taking reasonable measures to protect their commercial interests, they may refuse only orders from distributors that are apparently disproportionate with respect to the previous business relationships with these distributors or with respect to the market needs. Therefore, a dominant manufacturer of pharmaceuticals refusing to satisfy orders of a customary nature in an attempt to prevent parallel exports may abuse its dominant position in violation of Article 102 of the TFEU.

Robert Neruda
Roman Barinka
Marián Minárik

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8 CJEU judgment in joined cases nos. C-501/06P, C-515/06P and C-519/06P - GlaxoSmithKline Services Unlimited, formerly Glaxo Wellcome plc, vs Commission of 6 October 2009.
9 CJEU judgment no. in joined cases nos. C-468/06 to C-478/06 - Sot. Lélos kai Sia EE and other vs GlaxoSmithKline AEVE Farmakeftikon Proionton of 16 October 2008 (Syfait II).