

LIGUE INTERNATIONALE DU DROIT DE LA CONCURRENCE INTERNATIONAL
INTERNATIONAL LEAGUE OF COMPETITION LAW
INTERNATIONALE LIGA FÜR WETTBEWERBSRECHT

In the case of pharmaceuticals, in what way should the application of the competition rules be affected by the specific characteristics of those products and markets (including consumer protection rules, the need to promote innovation, the need to protect public budgets, and other public interest considerations)?

Recommendation 1

No specific legal differentiation of pharmaceutical products is recommended, as there is no widespread and shared practice suggesting that pharmaceutical products should be distinguished as a matter of basic competition law.

Recommendation 2

Market definition should operate with due regard to the specifics of the pharmaceutical market, in particular the role of insurance and the role of medical professionals in prescribing products and the role of patent protection. These factors should inform a context-sensitive market definition survey that does not apply categorisation without further calibration to market context.

Recommendation 3

Sector-specific joint purchasing guidelines could be considered as a means to address monopoly supply issues in some markets.

Recommendation 4

Context-sensitive weighing of intellectual property and competition law concerns should take place, with no starting presumption in favour of competition law or intellectual property law.

Recommendation 5:

Increased attention to harmful patent settlements with potentially anti-competitive effects (e.g. Pay for Delay) might potentially be beneficial to increase the scope to identify and address competition law issues arising from these agreements.

Recommendation 6

International comparisons reveal drug price regulation to be broader than necessary in some instances; regulation could be curtailed in competitive markets while preserving important protections where there is market power.

Recommendation 7

Reference pricing could be carefully reviewed for potential competition law issues from price interdependency where benchmarks interact.

Recommendation 8:

Retail and wholesale margins, if regulated, should be regulated with reference to costs and not as a percentage of total sales, as a large or fixed retail margin creates a potent disincentive to use generic drugs. Additionally, certain bans on loyalty discounts and other price cuts could be relaxed to enable more retail competition.

Recommendation 9:

Distributor obligations to supply entire retail markets may act as a barrier to entry in distribution markets and should not be adopted without careful balancing of competition issues and other relevant considerations.