

by Valentina Rucker and Dan Kane

Forewarned is Forearmed

~ Part II ~

Pharmaceutical Companies Considering Distribution Networks in Russia Should
Take Heed of the Novo Nordisk Experience



Forewarned is Forearmed

Part II

The appeal of potential global consumers for any multinational corporation can be tempting, but with varying regulations on business practices, one needs to exercise caution. As discussed in Part I of this article, Russia's OOO "Novo Nordisk" (Novo Nordisk), a subsidiary of a Danish pharmaceutical company, recently faced charges from Russia's Federal Antimonopoly Service ("FAS") for anticompetitive practices. This decision came after the FAS allegedly found violations in Novo Nordisk's limited distribution network. This case makes apparent that such previously well-established antitrust principles in the United States may not be as clear in other jurisdictions.

Comparison to the United States Standard

FAS's decision in Novo Nordisk stands in stark contrast to established law in the United States. Generally, in the United States, a pharmaceutical manufacturer has considerable discretion to select the members of its distribution channel. In a matter like this, it is unlikely that the Department of Justice or the Federal Trade Commission (together, the "United States agencies") would have deemed Novo Nordisk's business conduct sufficiently anticompetitive to investigate, much less litigate.

Market Definition Under the U.S. Law

In the United States, the determination of monopoly power is made by reviewing the market's inter-brand competition. Here, the United States agencies would have assessed Novo Nordisk's market position relative to its competitors – firms like Eli Lilly, Sanofi-Aventis, and Pendiq – and determined whether Novo Nordisk possessed sufficient market power to raise prices and deter innovation without losing market share to competitors.

Refusals to Deal Under the U.S. Law

Even if the United States agencies had determined that Novo Nordisk possessed monopoly power, it is unlikely that the firm would be required to work with any distributor meeting basic standards. A bedrock principle of American antitrust policy is that businesses are free to contract with the firms of their choosing. Although very narrow exceptions to this rule exist, none would have applied here.

If the United States agencies had brought suit, long standing legal precedents would have supported Novo Nordisk's right to treat its distribution network selectively. This, in turn, would have likely prevented the government from requiring Novo



FAS's decision in Novo Nordisk stands in stark contrast to established law in the United States.

Nordisk to accept as a partner any potential applicant that met government-mandated requirements.

A Limited Distribution Network May Be Pro-Competitive

In analyzing this case, the United States agencies would have considered the pro-competitive benefits of Novo Nordisk's behavior. United States law recognizes that limiting the size of a distribution network often lowers the administrative and transaction costs associated with using resellers to market a product. Furthermore, a limited distribution network incentivizes potential sales partners to compete for the opportunity to sell the product, which results in greater sales commitments. This, in turn, results in a greater investment from the sales partner to appropriately market and promote the product. Finally, a limited distribution network eases the burden on a manufacturer to review and audit its partners, which is particularly necessary in industries where certain storage and delivery practices must be met.

Conclusion

The Novo Nordisk case demonstrates that companies that are considering global expansion should ensure that their legal teams do a full survey of each new jurisdiction before investing time and money in the project.

Forewarned is forearmed, indeed. **NPT**

Valentina Rucker and Dan Kane are associates in the Washington, D.C. office of Wilson Sonsini Goodrich and Rosati. Special thanks to Seth Silber, a partner in the Washington, D.C. office of Wilson Sonsini Goodrich and Rosati, for his insightful comments.