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Competition - Portugal

Roche abuses dominant position with NHS hospitals

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Findings

Comment

The Competition Authority recently issued a decision (Antitrust File 10/2008) finding pharmaceutical company Roche Farmacêutica guilty of abusing its dominant position in the context of proposals submitted in public tenders opened by National Health Service (NHS) hospitals.⁽¹⁾

Findings

The inquiry was grounded on a complaint lodged before the authority by a US biopharmaceutical company that was in direct competition with Roche Farmacêutica in some of the public tenders, which involved the supply of several medicines.

Due to its market share in several relevant medicine markets, the defendant was considered to have a dominant position in relation to part of the medicines included in the proposals submitted to the hospitals. On the basis of the submitted documentary evidence (eg, tender announcements, tender bids and award decisions), the authority concluded that in 2006 the defendant abused its dominant position in relation to several relevant medicine markets by, among other things, offering mixed-bundle and loyalty rebates in its medicine tender proposals, thereby infringing Article 6 of the Competition Act (Law 18/2003).

Although it took into account the mitigating circumstances of the defendant's cooperation throughout the inquiry, the authority nonetheless ruled against Roche, imposing a €900,000 misdemeanour fine.

Comment

This condemnatory decision, which is now final, is another classic example⁽²⁾ of the Portuguese Competition Authority's application of EU courts' legal reasoning in dominance cases.⁽³⁾ Under such settled jurisprudence, a dominant company's application of dissimilar commercial conditions to economic agents without objective grounded justification can, almost *per se*, constitute a breach of antitrust rules.

The fine imposed on Roche serves as a strong warning to pharmaceutical companies that, in relation to dominant medicines, they must apply a soundly objective, autonomous and non-discriminatory commercial policy when interacting with clients, including NHS hospitals, or risk antitrust penalties.

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Endnotes

⁽¹⁾ See the 2012 Portuguese Competition Authority Annual Report, available at www.concorrencia.pt, for additional information on this case.

⁽²⁾ For another example please see "Sale terms of pay television sport channel lead to fine".

⁽³⁾ Notably in *Michelin II* and *Portugal v Commission*; see Cases T-203/01 and C-163/99, respectively.

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