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The portuguese competition authority sanctions abusive behaviour by dominant company before national health service hospitals (Roche Farmacêutica Química)

Portugal, Unilateral practices, Abuse of dominance, Relevant market, Bundling, Distribution/Retail

Portuguese Competition Authority, Roche Farmacêutica Química, PRC 2009/12, 12 April 2012

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I. Background

The Portuguese Competition Authority (PCA) decision of 12 April 2012, in case PRC 2008/10, was triggered by an antitrust complaint lodged on June 2008 against *Roche Farmacêutica Química, Lda* (*Roche*) by a competitor also active in supply of medicinal products to Portuguese National Health Service (*NHS*) hospitals. The complaint was grounded on the discriminatory rebate system applied by ROCHE before NHS hospitals in specific relevant medicines markets.

II. The PCA legal analysis

In what regards the definition of the relevant medicines markets, the PCA in its decision of followed the European Commission decisional *acquis* and approach, thereby relying on the ATC – Anatomical Therapeutic Classification Code which groups pharmaceutical products in 16 categories, each with 4 levels, using as a reference their composition and their therapeutic properties. Per PCA reasoning, the products included in the third ATC level, taking into account their properties and their use, can be accepted for the definition of the relevant product market, since the third ATC level usually includes medicinal products that serve the same therapeutic purposes and are not permutable with products from other categories.

The four relevant product medicines markets were deemed by the PCA as having a national geographic scope, reasoned *inter alia* in previous national decisions in merger cases (Ccent 10/2005 Angelini/Aventis/Laboratórios Roussel and Ccent 7/2005 Frenesius/Kabi/Labesfal) and also weighting the following factors: (i) existence of different national structures for wholesale distribution, (ii) country to country price variations due to different national public health policies, (iii) variations in the price composition structure and (iv) absence of significant evidence of

acquisitions from other EU Member States .

For the establishment of ROCHE'S dominant position in four relevant medicines markets, the PCA took into account the company's market shares and the competitive structure of the relevant markets, considering also the existence of significant entry barriers, notably due to the demand of strong investment in R&D, the mandatory public authorities' authorizations for a medicine to enter the market and the existence of stringent quality and pharmacovigilance controls systems.

III. The abusive discount policy adopted before portugese NHS hospitals

The PCA, anchored in the European Court of Justice case-law (including in *Michelin II* and *Portugal v Commission*; see Cases T-203/01 and C-163/99, respectively), stated that the application of multiproduct rebates by a company holding a dominant position constitutes an abusive conduct, when it cannot be objectively justified through efficiency gains. Hence, rebates systems that feature discounts conditioned by commitments of exclusivity or mandatory subordinated acquisitions of other products, imposed by a dominant undertaking to its clients are deemed illegal due to their negative effects, as these limit clients' choices and impede the entry of efficient suppliers in the market (horizontal effects).

The Roche abusive conducts were reflected during 2006 in multiproduct discounts, applied retroactively to NHS hospitals regarding the acquisitions made by the latter during a one year period. According to the PCA, such multiproduct discounts are susceptible of having an effect of inducing customer loyalty, thereby limiting the possibility of clients to contract with alternative suppliers for smaller orders because these become less attractive as they can lead to a loss of the rebates applied by the dominant firm. Hence, if hospitals diversified their sources of supply and did not reach the specific threshold to be eligible for the rebate applied by ROCHE, they would not only lose the discount on additional units (exceeding the threshold), but also the discount that was calculated retroactively for all the products that they already had acquired during the relavnt time period. In addition, in the decision the PCA also underlines the fact that the rebates applied by ROCHE varied significantly from hospital to hospital, triggering a discriminatory pricing policy by the dominant company (vertical effects). The company was therefore fined with a 900.000,00 EUR fine by the PCA in its 12 April 2012 decision for abusing its dominant position before NHS hospitals. The PCA decision was not subject to judicial review.

IV. Comment

This case highlights that a commercial policy adopted by a dominant company aimed at guaranteeing customer loyalty, through multiproduct discounts, bundling dominant and non-dominant products in articulation with retroactive rebates and the application of a discriminatory discount policy configures an abusive conduct.

This PCA decision in this case is straightforward example of the PCA's application at the national level of EU courts' reasoning in dominance cases. Under such settled jurisprudence, the application by a dominant company of divergent trade conditions to economic agents without any objective reasoned justification can constitute a breach of antitrust rules.

The fine imposed on the dominant company by the PCA serves as a strong reminder to pharmaceutical companies that, in relation to dominant and innovative medicines, they must apply a

sound objective and non-discriminatory policy when interacting with clients, including when dealing with public hospitals, or face the risk of non-negligible fines.

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