



Romanian Competition Council Decision 15/12.03.2008 on market-sharing cartel and Public Health Ministry infringement on the insulin market

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Following an investigation initiated in July 2005 and which has lasted for almost 3 years, the Romanian Competition Council (RCC) has fined one pharmaceutical producer and three distributors for participation into a market-sharing cartel active between April 2003 and May 2005, imposing fines in a total amount of Euro 22.7 million (RON 83.6 million). At the same time, the RCC ascertained the breach of the law by the Ministry of Public Health.

At the auction within the Diabetic National Program in 2003, the products of Eli Lilly were offered through the three distributors, each authorized to participate with different products, so that they did not compete against each other in the auction. Following the auction minutes mentioning that the auction will be organized again, all three distributors transmitted to the Commission for the Evaluation of the Diabetic National Program the request that the auction is finalized by negotiation with only one source, and that no other auction is organized.

Although prior to the auction, all three distributors had distributed several product ranges from Eli Lilly, when required to provide explanations on the reasons for the decision to participate in the auction with only one product, they gave contradictory reasons: A&A initially mentioned that Eli Lilly allocated to it a part of the products, then it argued that it was its own decision; Relad stated that it was its own decision, while Mediplus declared that it did not have national experience in the distribution of insulin. The distributors also invoked technical and logistic capacity issues.

At various auctions for insulin (outside the National Program), at the auctions where insulin was requested (without indicating the producer), A&A bided prices lower with 20 – 33% as compared to the starting auction price (as there was the possibility of competition), while at the auctions where Eli Lilly insulin was requested, A&A participated with the maximum starting auction prices. At the same time, even if according to the non-exclusive contracts concluded, all three distributors could have participated in auctions for Eli Lilly insulin, and in some cases they even had the products in stock, the only offeror was one of the distributors, while the other two refrained from participating.

The RCC has identified during the investigation a document in which Eli Lilly analyzed the scenarios for the participation in the auction, and concluded that separating the products between the three distributors was the preferred scenario, while the scenario in which the distributors would have participated with the full range of products would have lead to competition between the three distributors and price erosion. The preferred scenario in the respective document was finally implemented.

Eli Lilly was also fined during the investigation because it has not provided to the RCC all the pages of the respective document from the beginning, but only after another request.

The RCC considered the anti-competitive conduct to be an understanding and / or concerted practice, without concluding on the exact form of infringement, in which the producer was the initiator.

One of the distributors argued it was a unilateral decision of the producer to authorize each of the distributors for a different type of product. However, the RCC decided that the distributors gave their tacit agreement by participating in the auctions exactly as described in the preferred scenario prepared by the producer. Due to the fact that the products could only have been offered in the auctions through the distributors, had they not agreed with the sharing of the products between themselves, there would have been the risk that the products were not offered at all in the auction. The decision could not be considered unilateral as long as it could not have been implemented without the distributors' agreement, since the producer could not have participated itself in the auction, as it did not fulfill the required eligibility conditions.

The parties invoked the *Adalat* case, but the RCC decided that there was a significant difference between the cases – in *Adalat*, the producer did not need the cooperation of the distributors for implementing its policy, and the distributors used several strategies to obtain more quantities of products for export purposes, while in this case, Eli Lilly could not unilaterally implement its preferred scenario, and the distributors did not oppose to it, but applied it in practice.

One of the distributors argued that the RCC should consider as mitigating circumstance that the Ministry of Public Health closed the market and eliminated competition, by failing to organize the auctions, as required. The RCC has not however expressly addressed in its decisions an answer to the possibility of considering the Ministry's infringement as mitigating circumstance. The RCC's decision does not put too much emphasis on the role of the Ministry within the whole context of the entire infringement – not even as concerns the duration of the cartel (should the Ministry have organized auctions in 2004-2006, there would have been a possibility for the cartel to have ended earlier).

The Ministry of Public Health (the Ministry) has breached article 9 of the Competition Law (a central or local public administration body performs an action which has as object or effect the restriction, hindering or distortion of competition), by failure to organize, during 2004-2006, national auctions and thus limiting the number of suppliers active on the Romanian insulin market and preventing the access on the market of the distributors that did not win or did not participate in the national auction in 2003, as well as of the newly authorized insulin.

Because of the Ministry's inaction, the contracts for the supply of medicines for the National Program concluded by the National Health Insurance House with the distributors declared winners following the national auction in 2003 were extended by additional acts until 2006 (including the agreements between Eli Lilly and its three distributors).

The RCC's decision remains relevant particularly in consideration of the following aspects:

- the RCC may ascertain the breach of the Competition Law by public authorities, but this is only of little practical effect;
- only rarely does the RCC view the intervention of an authority as mitigating circumstance;
- vertical cartels cannot be defended arguing unilateral conduct of the producers when it can be proven that the distributors tacitly agreed and the producer could not have implemented the conduct by itself, without cooperation from the distributors;
- dawn raids by competition authorities remain one of the most effective means of gathering evidence, and additional fines may be imposed for refusal to cooperate (e.g., provision of documents with missing pages which were eliminated on purpose).

