



It is legitimate to limit the maximum authorized ex-factory price to the units of product dispensed in Spain and publicly funded

Resolution of the Spanish Competition Authority of 30 August 2018, Case S/DC/0608/17, EAEPC vs laboratorios farmacéuticos

Background

On 30 August, the Spanish Competition Authority (CNMC) closed, hopefully for good, a procedure started more than 10 years ago against several companies that put into practice systems to ensure that the maximum ex-factory price authorized by the Ministry of Health would apply only to the units of product dispensed in Spain and publicly funded. In this resolution, it is found that these systems, sometimes called double-price systems, are not contrary to competition law. This confirms the resolution of the CNMC of 19 of January of 2017 (S/DC/0546/15 Pfizer/Cofares) in which the CNMC declared that there was no evidence that these systems were intended to restrict parallel imports in the EU.

The procedure started by a complaint filed by the European Association of Euro-Pharmaceutical Companies (EAEPC), who alleged that these pharmaceutical companies had infringed competition law by coordinating a distribution system that sought to implement a double-price system depending on whether the medicinal products were dispensed in the Spanish market or were destined for parallel trade in the EU.

CNMC's position

In this procedure, the CNMC analysed 3 key aspects to determine whether or not there was an anticompetitive behaviour: the fact that the change in the price policy among the companies was produced around the same time (which could have been the result of an agreement between them), the aim pursued by the companies; and the de-

crease in the number of distributors with which the pharmaceutical companies worked.

Regarding the first aspect, the resolution states that price policies implemented by these companies imposed on the distributors the obligation to inform the companies about which medicinal products were actually dispensed in Spain and publicly funded because this was necessary in order to apply the maximum authorized ex-factory price to said units. The fact that the companies implemented this price policies around the same time was, according to the CNMC, due to the need imposed by the Spanish public funding system and not based on an agreement. As shown in previous cases, it has been proven that no pharmaceutical company would benefit from the fact that other companies applied the same system, so an agreement among these companies could not be presumed.

In connection with the aim pursued by the companies, the CNMC concluded that the prices at which pharmaceutical companies finally invoiced their products were not set depending on their territorial destination. Such prices were set -in all cases- based in their public funding by the Spanish national health system.

Finally, on the third aspect, the CNMC attributed the decrease in the number of distributors working with the pharmaceutical companies to the large number of concentrations that took place in the wholesale distribution sector since 2000.