Danish Competition Council finds CD Pharma’s 2000% price increase unfair

The Competition Council has established that CD Pharma abused its dominant position when it increased the price of its oxytocic infusion Syntocinon in 2014 by approx. 2000% from DKK 45 to DKK 945. The decision is in line with an international trend with competition authorities keeping an eye on the medical sector and cracking down on “excessive” price increases.

The Danish Competition Council’s decision of 31 January 2018

By attorney Line Berg Madsen

In 2014, parallel importer Orifam informed the wholesaler Amgros that it was unable to deliver the pharmaceuticals ordered under the parties’ framework agreement. Instead, Amgros started purchasing Syntocinon from the only other supplier in the market, CD Pharma. Initially, CD Pharma charged Amgros DKK 45 for the product, but shortly after increased the price to DKK 945. According to the Competition Council, CD Pharma was able to increase the price so much in 2014 because CD Pharma enjoyed a very favourable competitive position at that time.

Based on its investigations, the Competition and Consumer Authority concluded that CD Pharma’s conduct amounted to abuse of dominance through excessive pricing. The Authority held that the increase of the price to DKK 945 did not serve a legitimate purpose, and that the price did not reasonably reflect the financial value of the drug. Council chairman Christian Schultz noted that the case was of general public importance in relation to the Danish regions’ purchase of pharmaceuticals.

The Council’s decision to pursue the matter is hardly surprising considering the recent years’ trend among national competition authorities to crack down on price increases on that scale. The Flynn Pharma/Pfizer case from 2016 also involved the use of detailed financial analyses, and in the Aspen “Cosmos drugs” case from 2016 (which is now being investigated by the European Commission) the court noted that price increases of up to 1500% were not financially justified.

The United Brands test is alive and kicking

In assessing the case, the Competition and Consumer Authority relied on the criteria from the United Brands case from 1978 which have been used in several decisions and case law since then. The criteria include five tests:

- 1st criterion: Is the difference between the costs actually incurred and the price actually charged excessive?
  
  Test A: Based on seven financial analyses, including also the UK Pharmaceutical Price Regulation Scheme, the Authority held that a profit margin of around 80% and a mark-up of at least 500% supported a finding that the price was unfair.

- 2nd criterion, 1st limb: Is the price unfair in itself?
Test E: In comparing CD Pharma’s price and the financial value of Syntocinon, the Authority did not find any non-cost related factors such as “sunk costs” or any intangible value that could justify the price charged.

- 2nd criterion, 2nd limb: Is the price unfair when compared to competing products?

Test B: In a price comparison over six months, the Competition Council found that the price of DKK 945 had been approx. 2000% higher than the historic prices charged for the drug in Denmark.

Test C: A comparison of the prices charged by CD Pharma’s competitors also showed that CD Pharma's price was approx. 2000% higher than the prices charged by the two other Amgros suppliers Novartis and Sobi.

Test D: Based on a cross-country comparison, the Council found that the price charged by CD Pharma for Syntocinon abroad differed significantly from the price charged in Denmark.

By way of summary, the Council held that the price charged by CD Pharma for Syntocinon after the price increase was unfair. The Council has announced that the case will now be submitted to the State Prosecutor for Serious Economic and International Crime for prosecution.

Read the decision (in Danish).

Read also: Vestager: The competition authorities still have focus on high medicine prices
( in Danish).