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HUNGARIAN COMPETITION AUTHORITY FINED PHARMA WHOLESALERS AND CONSULTANT FIRMS € 7,8 MILLION FOR BID-RIGGING BY MAKING FULL USE OF EVIDENCE OBTAINED IN A CRIMINAL INVESTIGATION

On 15 September 2015 the Hungarian Competition Authority ('HCA') adopted a decision finding that three pharmaceutical wholesalers ('*Euromedic Pharma Zrt.*'; '*Hungaropharma Zrt.*' and '*TEVA Zrt.*'), along with two consultant companies ('*MEZADIN Kft.*' and '*PharmAudit Kft.*') influenced the outcome of a public procurement procedure for the supply of medicines and intravenous solutions. The unlawful bid-rigging cartel was sanctioned by a total fine of € 7 805 775, with fines on the three wholesalers amounting to ca. € 2,5 million each.

Background

In November 2011 the Budapest Healthcare Centre Plc. launched a tender procedure for the supply of medicines and intravenous solutions to twelve public hospitals in Budapest, with a yearly value of € 16 million. The contracting entity assigned PharmAudit Kft. as an independent expert to assist with the public procurement procedure. According to the HCA decision, the consultancy firm, along with another facilitator, MEZADIN Kft., organized the unlawful collusion among the wholesalers. Pursuant to the HCA decision, the companies manipulated the conditions of the tender notice to exclude other competitors from participating and then divided markets and fixed prices for each of the 919 active ingredients concerned by the public procurement procedure.

The alleged collusion came into the attention of the National Bureau of Investigation ('Nemzeti Nyomozóiroda'), the top Hungarian anti-corruption police agency already during the tendering procedure. Evidence obtained by the police using covert surveillance (recording of telephone calls and cell phone location tracking) was used to initiate criminal proceedings against certain individuals concerned (bid-rigging in public procurement tenders is a criminal conduct punishable up to 5 years imprisonment in Hungary).

Pending the criminal procedure, the HCA also started its own investigation in April 2013 by carrying out unannounced inspections (so-called 'dawn raids') at the premises of the companies concerned and the homes and vehicles of the executives of the consultancy firms. Although the HCA based its infringement decision also on evidence collected in the course of the dawn raids and on statements obtained from protected witnesses, a large part of the evidence relied on by the HCA has been obtained directly from the criminal authorities. The decision cites at length telephone conversations that were recorded by the police during the tendering procedure. The transcripts of telephone conversations obtained from the police serve as the primary evidence for the HCA to establish that the companies achieved the amendment of tender conditions with the aim to exclude other competitors from participating, and then met to divide markets for each active ingredient coordinating their bid prices.

Implications

The decision is of particular significance, as it relates to the first investigation by the HCA that substantially relied on evidence collected by the criminal authorities. As such, the decision may open a new era of antitrust enforcement in the field of public procurement cartels. Although the possibility for evidence to be passed on to the HCA by criminal authorities is disputed due to the dilution of procedural guarantees (especially in case of information that has been obtained through covert surveillance), if courts approve the transfer and use of such information, this will significantly boost the HCA's ability to uncover and penalize bid rigging cartels.

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This development comes in parallel with stricter sanctions under the new Hungarian Public Procurement Code that is expected to come into force on 1 November 2015. Contrary to the currently applicable rules, the new public procurement legislation provides for an *automatic* disqualification from public procurement tenders for three years if *any* competition authority imposed fines on a company for *any* type of restrictive agreement (i.e. not only bid-rigging) in a final and binding decision (or in case of court review, this has been confirmed by a final and binding judgment). The automatic exclusion is *five years* if an executive of the company has been convicted by a final and binding judgment of the Hungarian criminal courts for bid-rigging in public procurement or concession procedures.

In addition to severe sanctions on the companies and individuals concerned, an increasing focus on bid-rigging cartels may also result in damages actions being brought by contracting authorities and/or the National Health Fund, who can make use of the 10% damages presumption existing under Hungarian law for a number of years now.

Tightening sanctions and an increased focus on bid-rigging cartel infringements underline the importance of an effective internal compliance policy for every market player in the pharmaceutical sector, as a competition infringement may result in devastating consequences: beyond very serious administrative fines and potential damages claims, automatic exclusion from public procurement tenders is a sanction that can lead to disastrous business consequences.

ABOUT THE AUTHOR



Dr. Horányi Márton is specialized on Hungarian and EU competition law and leads the Antitrust & Competition practice of the firm. He is highly experienced in competition law and represents clients in cartel, abuse of dominance and merger cases before the Hungarian Competition Office, the European Commission and the Hungarian and EU Courts. Márton also regularly advises on distribution issues, state aid matters and assists clients in developing effective compliance programmes. Márton lectures at the post-graduate competition programme of the Pázmány Péter University, and regularly publishes at reputable competition law journals.

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