Decision no. 19/2013

On 24 September 2010, SC Relad International SRL submitted a complaint to the Competition Council, according to the Regulation for the application of provisions of Articles 5 and 6 of the Competition Law no.21/1996 regarding anticompetitive practices in case of complaints. The complaint had as object the infringement by SC Roche Romania SRL of provisions of Article 6 let. a), b), c) and f) of the Competition Law no. 21/1996, as amended and Article 102 of the Treaty on the functioning of the European Union (TFEU).

The complaint envisaged the abuse of dominant position of La Roche, visible through constant refusal to sell pharmaceutical products to Relad as well as a discriminatory policy of supply, which significantly restrain competition on the market for distribution of pharmaceutical products. Taking these actions into account, Relad considered Roche had infringed Article 6 of Competition Law. Moreover, by refusal to meet the requests of distributors, Relad considered that Roche pursued to limit the intra community trade, thus infringing Art. 102 TFEU.

On 21 February 2011, following the complaint, an investigation was opened regarding alleged infringement of Article 6 par. 1 of Competition Law no. 21/1996, as amended and Article 102 TFEU by SC Roche Romania SRL, by President Order no. 397/21.02.2011.

Roche Romania performs activities in the field of wholesale of pharmaceuticals. The company’s portfolio comprises over 35 products, all originators, most of the products being of high technology, addressed with therapeutically scope to meet special medical demands, respectively oncology, HIV - AIDS, chronic viral hepatitis. Roche Romania is active in the import and wholesale distribution of pharmaceuticals which are sold based on medical prescription (medicines for human use).

To apply Article 6 par. 1 of the Competition Law and Article 102 TFEU, the following two conditions shall be cumulatively met:
(i) the undertaking holds a dominant position on a particular relevant market
(ii) the undertaking shall abuse of its dominant position.

With regard to the first condition, it was found in the assessment of the case that Roche Romania holds a dominant position on five relevant markets defined at ATC3 level, respectively L3B, B3C, J5B, L1X and L1B, with the products: Pegasys, Roferon, Mircera, Neorecormon, Copegus, Cymevid, Tamiflu, Valicyte, Avastin, Herceptin, Mabthera, Tarceva, Vesano and Xeloda.

With regard to the second condition, the arguments of Relad laid down in the complaint were evaluated in the investigation. Thus, according to these assertions, Roche abused of its dominant position held on the Romanian market through several actions, such as:
- limitation and control of distribution in the disadvantage of consumers, as well as restriction of exports in the European Union;
- discriminatory conditions applied to Relad in comparison with other distributors, which benefitted from increased amounts of products in comparison with their requests and possibilities of distribution;
- unfair contractual clauses imposed and refusal to deal;
- annulment of distribution contract for the sole reason that the partner refuses to accept unjustified commercial conditions.

Taking account of ECJ ruling, Competition Council assessed if Roche’ refusal to entirely meet the orders of Relad could be considered an abuse of dominant position. Thus, for each pharmaceutical product of Roche, included in the relevant markets, the following data were assessed for the period 2008 – 2010:

- Data regarding Relad’ orders;
- Data regarding orders of other distributors;
- Data regarding deliveries of Roche to Relad;
- Data regarding deliveries of Roche to other distributors;
- Data regarding all orders and deliveries.

Taking account of:

- ECJ case law on abuse of dominance regarding refusal to deliver;
- Specific modality of assessment in case of alleged abuse of dominance in pharmaceutical sector;
- Conclusions of the assessment made on relevant markets on which Roche holds a dominant position;
- Conclusions of the analyses of contractual clauses;

the Competition Council concluded on the basis of the information in its possession that the conditions for prohibition under Art. 102 TFEU and Art. 6 of the Competition Law no. 21/1996, as amended are not met, therefore, there are no grounds for intervention.