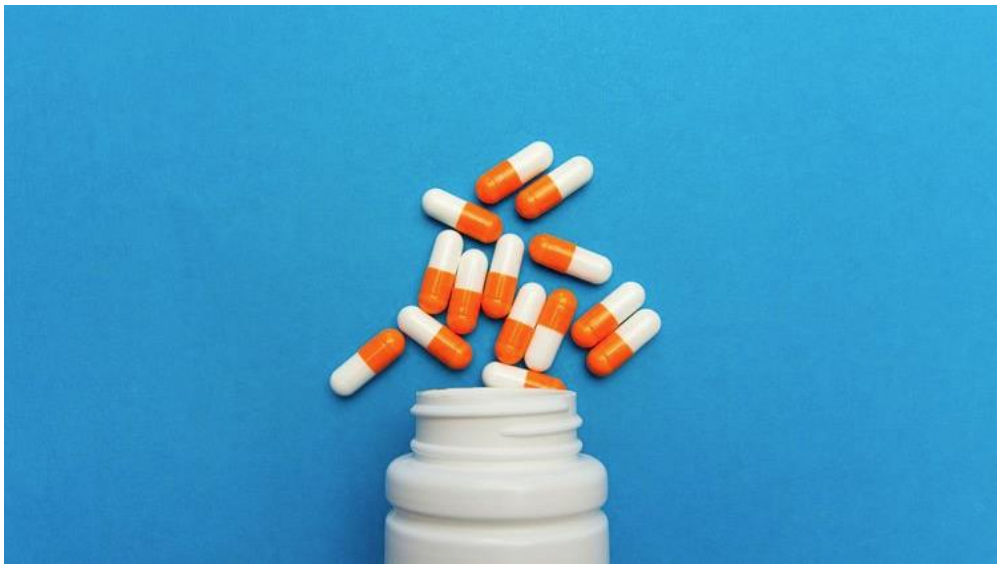
Na Mídia

05/06/2019 | GCR

CADE clarifies predatory pricing criteria

Charley Connor



Brazil's competition authority has recommended that its tribunal find that Genzyme did not foreclose rivals from the market to supply dialysis medication.

The Administrative Council for Economic Defence said yesterday that it found no evidence to show the drugmaker used predatory pricing or sham litigation to push rivals EMS and Germed Pharmaceutical out of the market for drugs made with sevelamer hydrochloride.

The enforcer therefore closed its decade-long investigation into Genzyme. It also recommended that its judicial arm, which is responsible for issuing final decisions in competition cases, find no infringement.

Genzyme manufactures Renagel, which uses the active ingredient sevelamer hydrochloride to regulate phosphorus levels in the blood of patients undergoing dialysis. It enjoyed a monopoly from 2002 until 2009, when EMS and Germed Pharmaceutical attempted to enter the market with medications they had also developed using sevelamer hydrochloride.

EMS and Germed complained to CADE in 2009 that Genzyme used various anticompetitive tactics to prevent them from accessing the market to supply phosphorus-regulating medications.

In particular, they said Genzyme launched a series of sham legal proceedings against them shortly after they registered their rival medications with the government. This sham litigation was accompanied by defamatory public comments that questioned the safety and efficacy of the rival drugs, they alleged.

Additionally, EMS and Germed said that Genzyme engaged in predatory pricing when it submitted bids to supply the Ministry of Health with drugs based on sevelamer hydrochloride. The price Genzyme offered was well below market prices and its own historical price, the complainants said.

As the Ministry of Health is the main purchaser of sevelamer hydrochloride-based drugs, EMS and Germed claimed that Genzyme's conduct was an attempt to cause their registrations with the government to lapse due to the non-commercialisation of their products.

However, CADE said today that it found no evidence of sham litigation, defamation or predatory pricing.

Predatory pricing

The enforcer said it is important to analyse all allegations of predatory pricing carefully, as the purpose of antitrust law is to establish a competitive and balanced market that supplies products to consumers at the lowest price. It will therefore find predatory pricing infringements only if there is no procompetitive logic to a company's conduct, it said.

CADE noted that EMS and Germed had presented no evidence to show that Genzyme priced its drug below its own average variable cost, nor that Genzyme had a rationale to engage in predatory pricing.

Predatory pricing behaviour is logical only if the predator company can exclude competitors from the market and then earn monopoly profits in a stable and durable way, so as to recover at least the costs incurred by deliberately pricing its product below production cost, it said.

In this case, EMS and Germed continue to operate in the market, actively participate in bidding competitions and structure their research and development so they can remain in the market in the future, CADE said.

Furthermore, EMS and Germed themselves offered prices lower than Genzyme's allegedly predatory bid in response to subsequent tenders issued by the Ministry of Health, the authority noted. For example, another 2009 tender featured intense competition between Genzyme and Germed; Germed won with a bid that was lower that the Ministry of Health's reserve price.

As there was no rationale for Genzyme to engage in predatory pricing and competition remained, CADE dismissed the predatory pricing allegations.

Sham litigation and defamation

The enforcer also found no evidence to suggest that Genzyme engaged in sham litigation to prevent EMS and Germed accessing the market.

The first set of legal proceedings between the drugmakers stemmed from Genzyme's appeal against the government's decision to approve both EMS and Germed's drugs for the Brazilian market in 2009. A second set of claims alleged that EMS and Germed had violated Genzyme's intellectual property rights when they used data obtained from testing Genzyme's Renagel drug without its express permission.

Although Genzyme's various claims against its rivals were all dismissed, CADE said the pharmaceutical sector is so technical and complex that it was unclear whether the cases completely lacked merit. The competition

authority therefore could not conclude that Genzyme filed the claims solely to prevent EMS and Germed accessing the market.

CADE also found the defamation allegations meritless, as various consumer organisations and trade associations had issued the public documents that EMS and Germed allegedly attacked the safety and efficacy of their medications. No evidence directly links Genzyme to the writing and sending of these letters, nor indicates that Genzyme influenced a coordinated movement to send such correspondence, CADE said.

Bruno de Luca Drago, a partner at Demarest Advogados in São Paulo, said CADE's jurisprudence regarding predatory practices is "quite poor" and usually takes on a case-by-case approach.

The enforcer has never convicted any company for predatory prices, Drago noted, partly because of the "high standards" required to find this practice. The Brazilian authority tends to follow the US approach and consider the element of recoupment as part of the standard, he said.

In Genzyme's case, however, CADE basically seems to have compared the prices of drugs offered by different companies during the relevant tender process, rather than engage in a cost analysis as required by law, Drago said.