

BOSNA I HERCEGOVINA
Konkurencijsko vijeće



БОСНА И ХЕРЦЕГОВИНА
Конкуренијски савјет

DECISION
**Upon the Request of 15 Private pharmacies against Health Insurance Institute of
Sarajevo Canton and Assembly of Sarajevo Canton**

Sarajevo
20 July 2007



Number: 01-01-26-001-69-II/07
Sarajevo, 20 July 2007

Pursuant to Article 42, item g) of the Act on Competition («Official Gazette of BH», No. 48/05), and in connection with Article 4, paragraph (1), item c) and d) of the Act on Competition and Article 193, paragraph (2) of the Administrative procedure Law («Official Gazette of BH», No. 29/02 and 12/04) in the procedure started on the basis of the Request of 15 Private pharmacies from Sarajevo Canton area: «Višnjik», «Eurofarm-Centar», «Revita», «Medikaliz», «*Shopping*», «Lupriv apoteke – branch no. 10», «Dijasan», «Leko-International», «Medisan», «Čobanija», «*My medico*», «*Pharmamed*», «*Pharmamed Vitez* – branch Sarajevo», «Park» and «Čelebić», registered under the number: 01-01-26-001-II/07, on 04 January 2007, represented by a lawyer Mustafa Karović, Sime Milutinovića Sarajlije 15, 71000 Sarajevo, against Health Insurance Institute of Sarajevo Canton, Ložionička 2, 71000 Sarajevo and Assembly of Sarajevo Canton, Reisa Džemaludina Čauševića 1, 71000 Sarajevo, the Council of Competition in its 48th (forty-eighth) session held on 20 July 2007, has adopted

DECISION

- I. It is established that Assembly of Sarajevo Canton by means of its Decision on adoption of Network of pharmaceutical practices-pharmacies in Sarajevo Canton, adopted on 04 October 2001 («Official Gazette of Sarajevo Canton», No. 24/01) prevents, restricts and distorts the market competition in the relevant market, pursuant to Article 4, paragraph (1), item c) and d) of the Act on Competition.
- II. The Assembly of Sarajevo Canton is ordered to adopt within the period of 6 (six) months a new Decision on adoption of Network of pharmaceutical activities-pharmacies in Sarajevo Canton, which will enable all registered pharmacies to dispense the prescribed medicines to insured persons falling within the burden on funds of the Health Insurance Institute of Sarajevo Canton .
- III. The Assembly of Sarajevo Canton is ordered to submit to the Council of Competition within the determined time period evidences on fulfillment of the obligations set forth in item II of this Decision.
- IV. The Request of 15 private pharmacies from Sarajevo Canton area against the Health Insurance Institute of Sarajevo Canton which relates to the Article 4, paragraph (1), item c) and d) of the Act on Competition is dismissed as groundless.
- V. The Request of 15 private pharmacies from Sarajevo Canton asking for adoption of a Decision on temporary measure in order to prevent the limitation of free market competition, discrimination and financial loss to the Applicant is dismissed as groundless.
- VI. The Request of 15 private pharmacies from Sarajevo Canton asking for adoption of an obligatory act which would order the Health Insurance Institute of Sarajevo Canton to make an agreement with the Applicant is dismissed as groundless.
- VII. This Decision is final and it shall be published in the «Official Gazette of BiH» and in official gazettes of Entities and Brčko District of Bosnia and Herzegovina.

E x p o s i t i o n

The Council of Competition received on 04 January 2007 a Request for initiation of proceedings (hereinafter: the Request) in a sense of Article 28 of the Act on Competition, number: 01-01-26-001-II/07, against Health Insurance Institute of Sarajevo Canton, Ložionička 2, 71000 Sarajevo (hereinafter: the Institute) in order to establish presence of prevention, restriction and distortion of the market competition, that is to establish a presence of prohibited competition activities in sense of Article 4, paragraph (1), item c) and d) of the Act, in the procedure of conclusion of an agreement on providing a pharmaceutical services to the insured persons falling within the burden on funds of the Institute, submitted by 15 (fifteen) private pharmacies from Sarajevo Canton area: «Višnjik» (owned by Koštić Jasminka), «Eurofarm-Centar» (Private health institutes), «Revita» (owned by Rustempašić Belma), «Medikaliz» (owned by Izmirlija Mufid), «*Shopping*» (owned by Galijašević Amra), «Lupriv Apoteke-branch no. 10» (owned by Lukenda Ivan), «Dijasan» (owned by Hromadžić Blanka), «Leko-International» (owned by Nada Pilipović), «Medisan» (owned by Hodžić Amela), «Čobanija» (owned by Krkbešović Aida), «*My medico*» (owned by Knežević-Ćeranić Maja), «*Pharmamed*» (owned by Medanhodžić Saira), «*Pharmamed Vitez-branch Sarajevo*» (owned by Bucek-Pobrić Vlasta), «Park» (owned by Turalić Aida) and «Čelebić» (owned by Čelebić Fatima), represented by a lawyer Mustafa Karović, Sime Milutinovića Sarajlije 15, 71000 Sarajevo (hereinafter: the Applicant or 15 private pharmacies).

The Council of Competition found out that Notification was not complete pursuant to Article 28 of the Act and therefore requested (on 05 January 2007, number: 01-01-26-001-1-II/07) the supplements in order to establish presence of presumptions mentioned in the Request.

The Applicant completed the Request with documents containing factual situation, practice and conditions and other written proofs confirming the statements and providing a reason for the Request, and submitted all to the Council of Competition on 19 January 2007, number: 01-01-26-001-2-II/07.

Analysis of Request for initiation of the proceedings

The Applicant stated that establishment of Network of pharmaceutical practices-pharmacies in Sarajevo Canton (hereinafter: the Network) is violation of regulations of the Act, pursuant to Article 4, paragraph (1), item c) and d) and therefore 15 pharmacies, which are not included in the Network in question, are not equal in realization of incomes in the market of pharmaceutical services comparing to the contract pharmacies belonging to the Network.

The Applicant stated also that the Ministry of Health of Sarajevo Canton authorized all 15 private pharmacies by means of a decision to perform pharmaceutical practices and to act in accordance with general and specific regulations in Sarajevo Canton area. Further, it stated that most of 15 private pharmacies were not able to apply to the mentioned Public announcement for joining to the mentioned Network advertised by the Institute in Dnevni avaz on 02 March 2002 because they were registered after the given date.

The Applicant stated that the aim of the above mentioned Public announcement is location-linked formation of the pharmacies in Sarajevo Canton area, that is, the division of the market or supply sources which is prohibited by Article 4, paragraph (1), item c) of the Act; the pharmacies within the Network are ensured the advantageous incomes comparing to the pharmacies that are not within the Network in question.

Due to that reason 15 private pharmacies requested individually or in group a possibility to make an agreement with the Institute in order to be permitted to provide dispensing services of prescribed medicines to insured persons falling within the burden on funds of Institute of

Sarajevo Canton. But, these requests were rejected with explanation that the said pharmacies did not fulfill the conditions stipulated by the Decision on Network.

Subsequently, 15 private pharmacies asked the Council of Competition to adopt a decision on temporary measures, pursuant to Article 40 of the Act because the mentioned Network placed the other pharmacies to the unequal position by restricting the number of pharmacies which affected the results of their financial business activities.

At same time, the Applicant requested the Council of Competition to issue a binding act by means of which the Institute will be ordered to make agreement with 15 private pharmacies which will ensure dispensing of prescribed medicines to insured persons falling within the burden on funds of the Institute.

The Applicant stated that regulations and practice in majority of cantons of Federation of Bosnia and Herzegovina, excluding Sarajevo Canton, Srednje-Bosanski Canton, Unsko-Sanski Canton, enable the registered private pharmacies to dispense prescribed medicines falling within the burden on funds of the relevant health institute.

The Council of Competition ascertained that it was not possible to establish a presence of the prohibited competition practices without conducting the procedure, pursuant to Article 4, paragraph (1), item c) and d) of the Act and therefore, pursuant to Article 32, paragraph (2) of the Act, it adopted a Resolution on initiation of the proceedings number: 01-01-26-001-3-II/07, at the 40th (fortieth) session held on 05 February 2007

The Council of Competition submitted to the Institute a Request on initiation of the proceedings, pursuant to Article 33 of the Act (on 05 February 2007, number: 01-01-26-001-7-II/07) expecting its commitment.

The Institute submitted its commitment within the determined time period (on 23 February 2007, number: 01-01-26-001-9-II/07) where it denied all allegations of the Applicant relating to the joining the Network in question and limitation of the market competition, pursuant to Article 4, paragraph (1), items c) and d) of the Act.

The Institute stated that the joining the Network in question was done legally, publicly and transparently, referring to the Law on Health Protection («Official Gazette of Federation of BiH, No.29/97) and particularly to Article 41 of the mentioned Law («The Institute is authorized to advertise a public announcement for joining a network of health practices.») and to Article 42 of the same Act («The Institute decides on the best chosen supplier with whom concludes an agreement on providing the health protection»), to the Decision on adoption of Network of pharmaceutical practice-pharmacies in Sarajevo Canton issued by the Assembly of Sarajevo Canton («Official Gazette of Sarajevo Canton», No. 24/01) (hereinafter: the Decision) and to Decision on joining the Network issued by the Board of directors of the Institute (Decision number : UO/04-1070/02-VI, on 24 April 2002).

Further, the Institute stated that Decision in question determined a schedule and locations of pharmacies in order to provide the civilians with benefits of equal pharmaceutical services in Sarajevo Canton area, that is, that 10.000 of population is entrusted to one pharmaceutical team, which means that 42 locations (pharmacies) were determined in municipalities of Sarajevo Canton (comparing to the number of population in 2000.)

The Council of Competition submitted a Request to the Applicant who made a response (number: 01-01-26-001-41-II/07, on 16 April 2007) stating that number of the pharmacies, which made agreement with the Institute to dispense prescribed medicines, does not correspond to the number of locations in Sarajevo Canton.

During the Decision making procedure, the Applicant, pursuant to Article 121 of the Law on Administration procedure («Official Gazette of BiH», number 29/02) amended the mentioned Request by adding the Assembly of Sarajevo Canton (number: 01-01-26-001-44-II/07, on 15 May 2007) and its Decision on adoption of the Network in question which was taken as one of the legal basis for the Institute's activity.

The Council of Competition accepted the mentioned amends to the Request as it is a matter of rights and obligations of the parties based on the same or similar factual condition and the same legal basis, and submitted it (supplied to documentation –Request, a Resolution for initiation of the proceedings) to the Assembly of Sarajevo Canton, that is to the cantonal Public Attorney for commitment, pursuant to Article 33 of the Act, number: 01-01-26-001-45-II/07, on 18 May 2007.

The Ministry of Health of Sarajevo Canton submitted within the determined time period, on behalf of the Assembly of Sarajevo Canton a commitment (number: 01-01-26-001-46-II/07, on 07 June 2007) where it was stated that the Decision in question was adopted according to the existing positive regulations of the Law on Health Protection, referred to Article 37, paragraph (3) of the mentioned Law which authorized the cantonal legislative body to determine a network of health practice within the context of primary health care on the proposal of the cantonal minister for health. It was also stated that a Minister for Health of Sarajevo Canton recommended adoption of Decision on Network in question which was realized by the Government of Sarajevo Canton and Assembly of Sarajevo Canton, pursuant to standards and criterions determined in Article 38 of the Law in question.

Considering the statements, the Ministry of Health of Sarajevo Canton deemed groundless the Applicants allegations on infringements of its interests regarding the possibility of making agreement on providing pharmaceutical services with the Institute because the Applicant failed to apply to the Public announcement, pursuant to Article 41 of the Law on Health protection. Also, the statement regarding the prevention and restriction of the free market competition and discrimination is deemed groundless because the pharmacies pursuant to Article 37, paragraph (4) and Article 66 of the Law on Health Protection may act outside the Network of health practice(outside the Network of pharmacies).

As the matter was a case between parties representing opposite interests, the Council of Competition called the hearings, pursuant to Article 39 of the Act. The hearing called on 04 July 2007 was not held.

The Council of Competition held the hearing on 10 July 2007 in the premises of the Council of Competition in the presence of all parties, that is their authorized representatives. During the hearing, the parties remained committed themselves to their statements and proves.

Relevant market

Relevant market pursuant to Article 3 of the Act and Articles 4, 5 and 6 of the Regulation on the definition of a relevant market («Official Gazette of BiH, No. 18/06) is a market of particular products/services which are the subject of business activities in the particular geographic market. The relevant products market comprises all products which are deemed by the consumers and/or users mutually interchangeable under the acceptable conditions, considering particularly their characteristics, quality, usage and sales conditions and prices.

The relevant geographic market is an entire or significant part of territory of Bosnia and Herzegovina where the undertakings perform the sale and /or purchase of particular products under the equal and sufficiently equal conditions which differs that market from competing conditions of other neighboring geographic markets.

The Council of Competition established that the relevant market in this case is a services market for dispensing of prescribed medicines to insured persons which are burden on funds of the Institute of Sarajevo Canton.

The Council of Competition used the submitted documentation of the Ministry of Health of Sarajevo Canton and data submitted by the Applicant in the economic analysis of the relevant market (number: 01-01-26-001-20-II/07, on 13 February 2007):

Table 1.

No.	Year	Number of issued receipts	Income achieved by realized receipts
1.	2002	1.940.665	25.103.685,00 KM
2.	2003	2.160.633	29.435.368,00 KM
3.	2004	2.418.577	34.779.337,00 KM
4.	2005	2.561.138	38.106.064,00 KM
5.	2006	2.774.325	45.826.543,00 KM

According to the data given by the Ministry of Health of the Sarajevo Canton, responsible body for issuance of decisions, over 95 pharmacies (and branches) are registered for pharmaceutical practice in Sarajevo Canton area; 40 are in the Network (made an agreement with the Institute) but other 55 pharmacies are outside of the Network in question, that is, only 42,0% of the registered pharmacies in Sarajevo Canton belong to the Network in question.

Considering the data of the Institute and the Ministry of Health of Sarajevo Canton (number: 01-01-26-001-18-II/07, submitted on 12 March 2007), the Institute finished a procedure and made agreements until 31 December 2006 with 40 pharmacies – 30 belonging to JU «Pharmacies Sarajevo» and 10 private pharmacies.

According to the data (Table 1.), in 2006, in Sarajevo Canton area, 2.774.325 receipts and medicines were realised, valued at 45.826.543,00 KM, where 89,7% (of all receipts and total value of medicines) was realised in pharmacies belonging to JU «Pharmacies Sarajevo» which are in the Network in question (contracted pharmacies of the Institute).

The Applicant states that the total income realized in the sale of medicines in Sarajevo Canton market in 2005 was 70.000.000,00 KM, but 45,0% of that amount is realized through the sale of prescribed medicines falling under burden on funds of the Institute.

Relevant facts important for decision making process

The Council of Competition considered the requests in question and upon assessment of each separate proof or all proofs together and their mutual connections, on the basis of the results of the whole procedure in the case concerned, adopted a decision resulting from the following :

I - III

The Council of Competition considered, in the proceedings concerning the Assembly of Sarajevo Canton, a part referred to the regulations of Decision on adoption of the Network in question issued by Assembly of Sarajevo Canton, that is, the determination of prohibited competition activities, pursuant to Article 4, paragraph (1), item c) and d) of the Act.

The Council of Competition did not assess the legal basis for adoption of the mentioned Decision of the Assembly of Sarajevo Canton but the harmonization of its contents with the Act and Article 37 and 38 of the Law on Health Protection which is in its preamble referred to the Decision concerned.

The Act stipulates in Article 2, paragraph (1), item b) that its regulations are applied to the state administration and local self-government bodies which directly or indirectly have influence on the market or acts to prevent, restrict or distort the market competition in the relevant market. Article 4, paragraph (1) of the Act, stipulates that the following activities are prohibited: contracts, agreements and individual regulations of the contract or agreement, common activities, explicit and tacit arrangements of undertakings, as well as decisions of undertakings (including the decisions adopted by the state administration and self-government bodies - Article 2, paragraph (1) of the Act).

The Assembly of Sarajevo Canton, pursuant to Article 2 of the Act, as a state administration body (local self-government) by means of its activity, that is, by its Decision, adopted on 01 October 2001, indirectly affected the market imposing a location-linked formation and other restrictions which prevents free access to relevant market for other undertaking (pharmacies) and places them in the unequal position in realization of incomes (and the Applicant, too).

The Decision in question, regarding the regulations on protection of the competition market, is by means of legal and administrative barriers restricted a free entry of competing undertakings to the relevant market and limited unnecessarily a number of pharmacies where the buyers, users of services may realise their rights to get prescribed medicines falling under burden on funds of the institute.

The Council of Competition thinks that the Network should ensure a minimal number of pharmacies in each of local areas but not to determine maximal number of pharmacies (because the more number of pharmacies provide better and easier access to users of dispensing services of prescribed medicines) in the relevant market.

The Council of Competition during the assessment procedure considered regulations of the Law on Health Protection mentioned in the preamble of the Decision concerned and particularly the following:

- Article 37, paragraph (3) - the Network of health practices, stipulated in paragraph (2) of this Article («health institutes for primary health care are established in accordance with the Network of Health practices, which implies a type and capacity of health institutes needed for providing the health protection of civilians in Sarajevo Canton area») is determined by the cantonal legislative body on the proposals of the Minister.
- Article 38 determines criteria for establishment of the Health protection Network from Article 37, which are determined by the plan of the canton, considering: a number, the age and gender structure of the population, equal conditions for users of health protection services, an organizational level, etc.

The mentioned Articles of the Law on Health Protection and Article 37, paragraph (4) of the mentioned Law do not state a different treatment for health institutes/pharmacies belonging to the Network and for those outside of the Network, within the meaning of a fact that the first may dispense prescribed medicines to insured persons falling under the burden on funds of the responsible institute of health protection but the second that are outside of the Network may not do that.

Also, the Law on Health Protection does not determine that the network of health care practice (primary network of pharmacies) should imply a maximum number of pharmacies, as it is stated in point III of the Decision in question (totally 42 pharmacies).

Also, the Decision on determination of temporary health protection standards and norms of the obligatory insurance («Official Gazette of Federation of BiH», No.21/00) is in that context and it is passed by the Federal Minister for Health on the basis of Article 35, paragraph (3) of the Law on Health Insurance («Official Gazette of Federation of BiH», No.39/97 and 07/02) and it was effective in the time when the Decision in question was passed; it regulates that the

pharmaceutical practice is ensured through provision to the insured persons the listed prescribed medicines falling under the burden on funds of the cantonal institute for health protection but it does not state a maximal number of pharmacies for dispensing prescribed medicines.

Further, the economic analysis of the relevant market (Table 1.) shows that pharmacies belonging to the Network in question (contracted pharmacies with the Institute) are privileged because they have additional source of incomes, have possibility to sell prescribed medicines to insured person falling under the burden on funds of the health insurance institute, while other pharmacies, outside of the Network, have only a possibility of direct sales of medicines as a source of incomes, which makes their position disadvantageous compared to the competitors.

The Council of Competition has assessed that the Decision concerned provides neither improvement of production and distribution of goods and/or services nor better services for customers and users, and therefore it can not be deemed as exception, pursuant to Article 4, paragraph (3) of the Act, because it restricts a distribution of goods and services in the relevant market of Sarajevo Canton.

The Council of Competition collected the data from all health insurance institutes and responsible cantonal ministries of health in Federation of Bosnia and Herzegovina about the way of regulating and applying the Law on Health protection, particularly about the way of making agreement with pharmacies which may dispense to insured persons the prescribed medicines falling under the burden on funds of the health insurance institute.

On the basis of the data analysis, the Council of Competition established that majority of cantons apply the regulations of the Law on Health Protection on the way which is not opposite to the Act, because the practice shows that all pharmacies, regardless of the ownership structure, have possibility to dispense prescribed medicines to the insured person falling under the burden on funds of the health insurance institute.

The Council of Competition thinks that the equal conditions must be allowed to all pharmacies registered at the Ministry of Health of Sarajevo Canton for carrying out the pharmaceutical practices, regardless of the fact whether a pharmacy belongs to the Network or not, to provide the services of dispensing prescribed medicines to insured persons falling under the burden on funds of the Institute.

The Council of Competition established that the Decision concerned prevents, restricts and distorts market competition in the relevant market and deemed its implementation to be prohibited competition activity, pursuant to Article 4, paragraph (1), item c) of the Act, because it divides the market or sources of supply and applies different conditions for the same activities (sales of medicines) assigned to undertakings (pharmacies) in the market, placing the mentioned undertakings (pharmacies) in the disadvantageous position compared to the competitors, pursuant to Article 4, paragraph (1), item d) of the Act.

Considering all mentioned above, the Council of Competition decided as it is in enacted terms of this Decision, in points I-III.

IV - VI

The Council of Competition established in the proceedings that the Institute, pursuant to Article 41, paragraph (2) of the Law on Health Protection, advertised a Public announcement, the subject of which is the selection of the best offer for joining the Network concerned - for 42 locations, on 02 March 2002.

After that, the Directors Board of the Institute adopted a Decision on joining the Network of

pharmaceutical practice-pharmacies in Sarajevo Canton (Decision No.: UO/04-1070/02-VI, on 24 April 2002 and Decision No.: UO/04-4837/02-III, on 23 December 2002) by means of which the Decision of the Assembly of Sarajevo Canton is to be implemented.

When the Public announcement procedure was finished, the Institute made agreement with 40 pharmacies (30-belonging to JU «Pharmacies Sarajevo» and 10-private pharmacies) on dispensing prescribed medicines to insured persons falling under the burden on funds of the Institute.

On the basis of the above mentioned, the Institute carried out the determined procedure and acted in accordance with the stipulations of the Law on Health Protection and Decision concerned, that is, implemented regulations/ decisions of higher ranked legislation institutions /bodies.

Considering all mentioned above, the Council of Competition established no prohibited competition activities carried by the Institute, pursuant to Article 4, (paragraph (1), item c) and d) of the Act.

The Council of Competition decides as it is stated in enacted terms of this Decision, in point IV.

The Council of Competition rejected as groundless a request of the 15 private pharmacies from Sarajevo Canton area for adopting a decision on temporary measures, by means of which the limitation of the free market competition, discrimination and financial loss of the Applicant would be prevented. The Council thinks that the direct threat is not find out which would provide harmful effect to the undertakings in question (pharmacies), that is, to some branches of economy or customers interests, pursuant to Article 40 of the Act.

The Council of Competition decides as it is stated in enacted terms of this Decision, in point V.

The Council of Competition rejected a request of 15 private pharmacies from Sarajevo Canton area for adopting an obligatory act by means of which the Health Insurance Institute of Sarajevo Canton would be obliged to make an agreement with the Applicant as same as it made with (pharmacies) provider of services participating in costs of dispensing prescribed medicines to insured person falling under the burden on funds of the Institute, because the Council of Competition is not responsible to carry out this activity, pursuant to regulations of the Act. The Council of Competition stressed that Article 41 and 42 of the Law on Health Protection stipulates a way of making agreement.

The Council of Competition decides as it is stated in enacted terms of this Decision, in point VI.

LEGAL REMEDY

No appeal is allowed against this Decision. Unsatisfied party shall be entitled to bring an administrative dispute before the Court of Bosnia and Herzegovina within thirty days (30 days) from the date of acceptance of this Decision, i.e. from the date of its publication in the Official Gazette of BiH.

President

Sanja Božić