

BRIEFING

PHARMA COMPANIES RECEIVE RECORD
FINES FOR ABUSING THEIR DOMINANT
POSITION

DECEMBER 2016

- THE UK'S COMPETITION AND MARKETS AUTHORITY ("CMA") HAS IMPOSED FINES OF £84.2M AND £5.2M ON PFIZER AND FLYNN PHARMA FOR EXCESSIVE PRICING
- TO DATE THIS IS THE HIGHEST FINE IMPOSED BY THE CMA
- RARE EXAMPLE OF THE CMA FINDING AN EXCESSIVE PRICING ABUSE
- CONTINUED CMA FOCUS ON THE PHARMA SECTOR



The CMA announced on 7 December 2016 that it has imposed a record fine of £84.2m on Pfizer, and a fine of £5.2m on Flynn Pharma for abusing their dominant positions by charging excessive and unfair prices in the UK for phenytoin sodium capsules – an anti-epilepsy medicine used by around 48,000 patients in the UK.

The CMA has also ordered the two companies to lower their prices.

WHAT HAS HAPPENED?

Before September 2012, Pfizer manufactured and sold – at a regulated price – phenytoin sodium capsules to wholesalers in the UK and pharmacies under the brand name “Epanutin”. In September 2012, Pfizer sold the UK distribution rights for this drug to Flynn Pharma, which de-branded the drug. This essentially meant that Epanutin was genericised and was no longer subject to price regulation in the UK.

The CMA's investigation has found that since the sale of the UK distribution rights to Flynn Pharma, Pfizer continued to manufacture and sell phenytoin sodium capsules to Flynn Pharma, albeit elevating the price by 780% to 1,600%. Furthermore, the CMA found that Flynn Pharma sold these drugs to wholesalers and pharmacies in the UK at a price 2,300% to 2,600% higher than these wholesalers and pharmacies previously paid.

The CMA found that both Pfizer and Flynn Pharma held a dominant position in their respective markets for manufacture and supply of phenytoin sodium capsules in the UK, and both companies abused their dominant positions by charging excessive and unfair prices. The CMA particularly noted that patients cannot be switched over to any other medicine without a risk of serious side-effects to their health. Therefore, the UK National Health Service (“NHS”) had no choice but to keep purchasing these capsules at the inflated prices. According to the CMA, the NHS’ expenditure on the medicine increased from £2m a year in 2012 to approximately £50m a year in 2013 – an increase of 2,400%.

The CMA also found that these prices were significantly higher than those Pfizer charged in other European countries for phenytoin sodium capsules.

COMMENT

Every business fundamentally aims to maximise its profits, and generally, non-dominant companies may price their goods or services as they wish to achieve maximum profits.

Dominant companies, however, have to be wary of charging prices for their goods or services, which bear little or no relation to the underlying costs of providing those goods or services. If a dominant company’s price is excessive in relation to the economic value of the product or service supplied, this could be abusive.¹

In practice, excessive pricing abuses are very difficult to prove because it is not always possible to undertake a meaningful assessment of the costs of the products or services in question. The CMA uses a number of indicators in its analysis, for instance: pricing of identical or similar products in other markets; comparison of prices with the dominant company’s cost estimates; level of profits earned by a dominant company from excessive pricing; and absence of effective pressure on a dominant company to reduce its prices etc.

In the present case, owing to the significant level of price increase (780% to 1,600% by Pfizer, and 2,300% to 2,600% by Flynn Pharma) and the inability of patients to switch to other medicines (i.e. absence of competitive pressure), the CMA found excessive pricing. The fact that the prices charged by Pfizer were significantly higher than those it charged in other European jurisdictions also supported the CMA’s conclusion.

Unusually, the fine levied on Flynn Pharma represents 10% of its worldwide turnover (i.e. the statutory maximum permissible), which shows the seriousness of its infringement in the CMA’s view.

Furthermore, it is open to the NHS to rely on the CMA’s infringement decision in making a claim in the courts for damages against Pfizer and/or Flynn Pharma.

¹ For example, see Case 27/76 *United Brands v Commission* [1978] ECR 207.

This case follows another big fine imposed by the CMA on pharmaceutical companies in February 2016 – the CMA imposed a fine of £45m on GlaxoSmithKline plc and certain suppliers of generic medicines for entering into the so-called pay-for-delay agreements for the supply of anti-depressant drugs (for further information see our e-briefing [here](#)). The CMA also currently has four ongoing separate investigations into alleged anti-competitive conduct by pharmaceutical companies, which indicates the continued focus of the CMA on the pharmaceutical sector.

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this Briefing, please speak with a member of our team below or your regular contact at Watson Farley & Williams.



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