SLAUGHTER AND MAY/

NEWSLETTER

10 - 23 FEBRUARY 2021

ISSUE 4

COMPETITION AND REGULATORY NEWSLETTER

QUICK LINKS

Commission accepts commitments by Aspen to address its excessive pricing

On 10 February 2021 the European Commission announced that it had accepted legally binding commitments (Commitments) offered by the pharmaceutical company Aspen Pharma, following the Commission's investigation into alleged excessive pricing by Aspen for critical off-patent cancer medicines.

BACKGROUND

In 2009 Aspen acquired several off-patent cancer drugs. On 15 May 2017 the Commission opened a formal investigation into concerns that Aspen had engaged in excessive pricing of six of these life-saving cancer medicines from 2012 and thereby abused a dominant market position in breach of EU antitrust rules. The Commission's investigation focused on information indicating that Aspen had carried out "price gouging" by imposing significant and unjustified price increases of up to several hundred per cent, including reports that Aspen had threatened to withdraw, and in some cases had withdrawn, relevant medicines in some Member States so as to impose such price increases. The Commission's investigation covered all countries in the European Economic Area except Italy, where the Italian competition authority had already adopted an infringement decision against Aspen on 29 September 2016, finding that Aspen had engaged in excessive and unfair pricing in relation to four cancer drugs and fining Aspen €5 million.

THE DECISION

Following its initial investigation, on 14 July 2020 the Commission raised serious concerns that Aspen had abused its dominance in numerous national markets. It found that Aspen increased the prices of the cancer medicines in Estonia, Germany, Latvia, Lithuania, Poland, Sweden and the UK in 2012 and then implemented the same strategy in all other European countries where Aspen sold the medicines. The Commission's analysis of Aspen's accounting data showed that following the price increases, Aspen had consistently earned higher profits from the sale of these drugs in Europe, both in absolute terms and compared to the profit levels of similar pharmaceutical companies. On average, Aspen's prices exceeded its relevant costs by almost 300 per cent, although differences did exist between products and countries. The Commission did not find any legitimate reasons for Aspen's high profit levels and found that Aspen was able to charge high prices because medical practitioners had no alternatives to these particular drugs.

The Commission accepted a revised package of commitments offered by Aspen following market participant feedback on the initial commitments package proposed by Aspen. The revised package will apply retrospectively from 1 October 2019, last for ten years and will be monitored by an appointed trustee, under supervision of the Commission:

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- **Price reduction**. Aspen will reduce its prices across Europe for the six cancer medicines by an average of 73 per cent, which is on average below the prices of 2012, before Aspen's price increases started;

- **Ten-year maximum price**. The reduced prices will be the maximum that Aspen can charge for ten-years. The prices are not fixed and Aspen is able to charge and negotiate lower prices with Member States. The price ceiling may be reviewed by the Commission if Aspen's costs linked to the medicines increase by at least 20 per cent; and

- **Continued medicine supply**. Aspen guarantees the supply of the medicines for the next five years (2020 to 2024), and, for an additional five-year period (2025 to 2029), will either continue to supply or make its marketing authorisation available to other suppliers.

Notably, the Commitments do not involve an admission of guilt therefore follow-on action is not a risk for Aspen. Nevertheless, the retrospective reimbursement of overcharges from 2019 is still significant. Aspen's share price increased modestly following the Commission's announcement, indicating that the Commitments were in line with market expectations.

The Commission's investigation into concerns over Aspen's price gouging was its first investigation into excessive pricing practices in the pharmaceutical industry. The Commission's acceptance of the Commitments marks a significant achievement for the Commission in fulfilling certain initiatives of the Commission's Pharmaceutical Strategy for Europe, adopted on 25 November 2020, specifically the greater affordability of medicines and security of supply.

Excessive pricing is a controversial aspect of competition law due to the difficulty in establishing an agreed-upon economic definition of "excessive" and therefore in proving that a price is "excessive". Consequently, excessive pricing competition cases have historically been rare. However, in recent years regulators have taken greater interest in alleged excessive behaviour, including the UK's Competition and Markets Authority (CMA) in its investigation into Pfizer and Flynn's excessive pricing of an anti-epilepsy drug to the NHS, which culminated in a £90 million fine in 2016 (although following appeals to the Competition Appeal Tribunal and the Court of Appeal, this case has been remitted to the CMA for reconsideration).

OTHER DEVELOPMENTS

ANTITRUST

CMA REVIEW OF RETAINED VERTICAL BLOCK EXEMPTION REGULATION

On 10 February 2021 the UK Competition and Markets Authority (CMA) announced it is reviewing the retained EU Vertical Agreements Block Exemption Regulation (retained VBER). This review will inform the CMA's recommendation to government on varying or revoking the retained block exemption, or to replace it with UK legislation when it expires in May 2022.

The retained VBER provides a general exemption from the prohibition of agreements which restrict competition as set out in Chapter I of the Competition Act 1988. It automatically exempts most vertical agreements entered into by businesses with market shares of 30 per cent or less, and which fall within its terms, from the Chapter I prohibition. These terms include that an agreement does not contain any "hardcore restrictions" such as for instance resale price maintenance. The VBER was retained in UK law when the transition period came to an end on 31 December 2020, and the CMA is now required to provide the UK Secretary of State for Business, Energy and Industrial Strategy with a recommendation as to whether to renew the terms of the retained exemption, or whether any amendments would have to be made, upon its expiry on 31 May 2022.

The CMA has stated that its current view is that retained VBER "*largely delivers what it was intended to deliver, but it should be examined rigorously to ensure that it takes account of any specific features of the UK economy so that it serves the interests of UK businesses and consumers*". The CMA has also confirmed that it will draw on the European Commission's recent evaluation of the EU block exemption regulation.

The CMA plans to hold roundtable discussions in spring 2021 and to subsequently consult on its proposed recommendation in summer 2021 to enable interested parties to share their views. It is currently inviting stakeholders to participate in a roundtable and is welcoming expression of interest in particular from businesses with operations in the UK that rely on the retained VBER, and other stakeholders with an interest in the UK market.

HONG KONG REGULATOR ISSUES INFRINGEMENT NOTICES FOR TOURIST ATTRACTION TICKET CARTEL

On 17 February 2021 the Hong Kong Competition Commission (HKCC) announced that it had issued Infringement Notices to six hotel groups and a tour counter operator (together Recipients) for facilitating a price-fixing cartel.

The case concerns an alleged cartel between two competing travel services providers, Gray Line and Tink Labs, both of which sold tourist attractions and transportation tickets at the premises of the relevant hotels. The Recipients have admitted to facilitating the implementation of this cartel by passing requests and information between Gray Line and Tink Labs, ultimately resulting in the alignment of ticket prices sold by the two providers. The HKCC considered the facilitation of the cartel to be in contravention of the First Conduct Rule in Hong Kong.

The Commission was willing in this case to issue Infringement Notices against the Recipients, which allowed them to make commitments in lieu of the Commission bringing enforcement proceedings before the Tribunal against them. The Recipients' early and active cooperation with HKCC and their role as facilitators of the cartel (i.e. not as direct members of the cartel) were important factors that weighed in favour of issuing Infringement Notices in these circumstances.

Despite the Infringement Notices and commitments made by the Recipients, the HKCC indicated in its press release that its investigation against other parties in the case are ongoing.

GENERAL COMPETITION

"*POWER TO THE PEOPLE*" - PENROSE REPORT PROPOSES REFORMS TO UK COMPETITION REGIME

On 16 February 2021 the UK Government published the independent report of John Penrose MP into the UK competition regime.

The report, entitled "*Power to the People*", sets out proposals to reform the UK competition and consumer law regimes, in particular in response to the COVID-19 pandemic, the challenges presented by Brexit, as well as the increasing importance of digital technologies. The report also makes recommendations in relation to the UK sector regulators, including the proposal for each sector regulator to be subject to a "*Brexit Dividend*" better regulation target.

For further details, see our Brexit blog post "*The Penrose Report: A roadmap for the UK's post-Brexit competition and consumer law regime?*".

CHINA ISSUES ANTI-MONOPOLY GUIDELINE FOR THE PLATFORM ECONOMY INDUSTRY

On 7 February 2021 the State Council published the final "Anti-Monopoly Guideline for the Platform Economy Industry" (the Guideline). A number of changes were made to the consultation draft released in November 2020 (the Draft Guideline), which was considered in our previous newsletter. The key changes made in the Guideline include:

- **Further elaboration on factors relevant to mergers in the platform economy**. The Guideline notes that "*development of the national economy*" will be a relevant consideration when SAMR reviews mergers in the platform economy. It also notes that "*opening up access to data*" could be a remedy for mergers in the sector that raise competition concerns.

- **Confirmation that market definition "*usually*" is required in antitrust enforcement**. This reverses the contrary suggestion in the Draft Guideline that market definition is not always required.

- **SAMR sets out its approach to concerted actions, defences to alleged abuses, MFNs**. The Guideline provides welcome clarification on certain factors relevant to a finding of a concerted practice, defences for restrictive dealing and selling below cost, and the types of conduct that may constitute an abusive refusal to deal. The Guideline also further clarifies SAMR's position on the global debate regarding most-favoured nation (MFN) clauses – these may be considered as abuses of dominance as well as anti-competitive agreements.

- **Contemplation that an online platform could constitute an "*essential facility*"**. The Guideline no longer suggests that data itself could constitute an essential facility, but retains the position that platforms themselves could.

The Guideline represents a clear move by the Chinese government to join the global shift to closer competition law regulation of the burgeoning platform economy in China. Companies within the platform economy sector will need to be mindful of the heightened scrutiny they face both in a merger control context and in day-to-day conduct in China.

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