

COMPETITION & REGULATORY NEWSLETTER

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CMA reimposes Pfizer and Flynn fines for excessive pricing

On 21 July 2022 the Competition and Markets Authority (CMA) issued a second [infringement decision](#) against Pfizer Limited and Pfizer Inc and Flynn Pharma Limited and Flynn Pharma (Holdings) Limited following an in-depth remittal investigation. The CMA fined Pfizer and Flynn a combined £70 million, deciding - as it had done in 2016 - that the companies had each abused their respective dominant positions by charging unfairly high prices for an anti-epilepsy drug over a four year period.

BACKGROUND

On 7 December 2016 the CMA issued its original [infringement decision](#) finding that Pfizer and Flynn had each abused their respective dominant positions by charging excessive and unfair prices for phenytoin sodium capsules in the UK. The CMA imposed a financial penalty of £84.2 million on Pfizer and £5.2 million on Flynn and directed both companies to reduce their prices. Both Pfizer and Flynn appealed to the Competition Appeal Tribunal (CAT).

In June 2018 the CAT found that the CMA had incorrectly applied the legal test for unfair pricing and remitted the case back to the CMA (as reported in a previous [briefing](#)). Consequently, the CMA appealed the CAT's judgment to the Court of Appeal, which ultimately agreed with the CAT, quashing the fines and remitting the case back to the CMA (as reported in a previous [briefing](#)). The Court of Appeal's judgment provided guidance on the appropriate methodology for assessing unfair and excessive pricing in the pharmaceutical industry, which the CMA had to apply in its remittal investigation of the case.

The CMA commenced its remittal investigation on 8 June 2020, and on 5 August 2021 [announced](#) that it had again provisionally found that Pfizer and Flynn had charged unfairly high prices for phenytoin sodium capsules (as reported in a [previous edition](#) of this newsletter).

CMA'S REMITTAL INVESTIGATION (RE-)FINDINGS

After additional evidence gathering and analysis, the CMA's remittal investigation has reached the same conclusion as its original investigation in 2016, namely that Pfizer and Flynn abused their dominant positions in their respective markets by charging unfairly high prices for phenytoin capsules over a four year period. This time it has imposed total fines of £70 million - £63.3 million for Pfizer (compared to £84.2 million previously) and £6.7 million for Flynn (compared to £5.2 million previously).

The CMA's decision is not yet publically available - many will be waiting to see how the CMA has interpreted and applied the guidance from the Court of Appeal.

In relation to the CMA's decision, Andrea Coscelli, Chief Executive of the CMA, emphasised the importance of the drug to those suffering from epilepsy, stating that: "*Phenytoin is an essential drug relied on daily by thousands of people throughout the UK to prevent life-*

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threatening epileptic seizures. These firms illegally exploited their dominant positions to charge the NHS excessive prices and make more money for themselves - meaning patients and taxpayers lost out”.

CONCLUSION

The fines demonstrate the CMA’s determination to continue to apply regulatory pressure to Big Pharma in order to prevent drugmakers excessively inflating the prices of their products.

While the CMA’s latest findings against Pfizer and Flynn are the result of years of disputes and investigations, the saga surrounding the excessive pricing of drugs is far from over. Indeed, the companies may well appeal the CMA’s infringement finding once again - both have been granted extensions of time to appeal by the CAT. Appeals are also pending before the CAT in respect of fines imposed by the CMA over the pricing of hydrocortisone and liothyronine tablets (as reported in a [previous edition](#) of this newsletter).

OTHER DEVELOPMENTS

GENERAL COMPETITION

CMA PUBLISHES UPDATE PAPER FINDING MUSIC-STREAMING SECTOR WORKING WELL

On 26 July 2022 the CMA published an update paper on its market study into music and music streaming. It initially concluded that the music sector is delivering good results for consumers and, in light of its initial findings, is consulting on a proposal not to make a market investigation reference.

On 27 January 2021 the CMA announced that it had [launched](#) a market study into music and music streaming, at the request of the House of Commons Digital, Culture, Media and Sport Committee. In the market study, the CMA has been considering whether competition in the music streaming value chain is operating in the interest of consumers, and whether competition is working well. The market study is focussed on three key areas: (i) competition between music companies (of which there are three main players: Warner Music Group, Universal, and Sony); (ii) competition between music streaming services such as Spotify; and (iii) competition issues that may arise from agreements and interrelationships between music companies and streaming platforms.

On 26 July 2022 the CMA published an [update paper](#) on its market study. The CMA has initially concluded that the music sector is delivering good results for consumers. It found that music streaming has transformed the industry, with 80 per cent of recorded music now listened to via streaming services. Listeners now have access to a vast choice of old and new music for a fixed monthly subscription fee, and these fees have fallen in real terms in recent years as they have not kept pace with inflation. For artists, while digitisation makes it easier to record and share music with a wide audience, the market remains challenging, with only a select few enjoying huge financial success. Although three major record labels play a key role in the recorded music sector, the CMA found that this is not causing consumer harm or driving concerns raised by artists.

As a result, the CMA [proposes](#) not to make a market investigation reference. It is consulting on this proposal and welcomes responses by 19 August 2022.

CMA PUBLISHES ITS 2021/22 ANNUAL REPORT

On 21 July 2022 the CMA [published](#) its Annual Report 2021/22 for the year ended 31 March 2022.

In the period under review the CMA resolved seven Competition Act investigations, including into pharmaceuticals, online advertising and the lighting sector. The Annual Report highlights, in particular, the CMA’s continued competition enforcement work in the pharmaceutical sector, with the CMA concluding three cases in the last year and imposing over £400 million in fines on pharmaceutical companies for breaches of competition law in the supply of medicine to the NHS. Consequently, last year saw the highest level of fines imposed since the Competition Act came into force in 2000.

In terms of merger control, the CMA scrutinised a record number of merger transactions, reviewing 827 transactions this year - an increase from 600 in the previous year. It opened 60 phase 1 merger cases, granting approval to 34 mergers, referring 10 to phase 2, and accepting six undertakings in lieu. It also completed eight

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phase 2 mergers - of which two were cleared unconditionally, two were resolved with remedies, three were blocked, and one was abandoned. The CMA also considered three public interest intervention cases.

Also, the CMA launched two market studies: one market study was issued into [mobile ecosystems](#) and another relates to [music streaming](#) (see also the article above), and the authority concluded market studies into [electric vehicle charging](#) and [children's social care](#). It also launched a [market investigation](#) into the supply of land mobile radio network services.

Finally, the CMA progressed consumer protection investigations in a variety of areas, including the leasehold housing market, anti-virus software and fake online reviews.

Overall, the CMA estimates that the average consumer saving following CMA action was £2 billion a year over the last three years.

DIGITAL MARKET UNITS ESTABLISHED IN SOUTH KOREA AND SINGAPORE

On 27 July 2022 South Korea's Ministry of Science and ICT [announced](#) it has established a taskforce to design the legal framework for South Korea's planned self-regulatory body, which will aim to address issues related to digital platforms. The taskforce consists of major online platforms, including global players such as Google and Meta Platforms, and local platforms such as Naver, Kakao and Coupang, as well as legal and administrative experts and research institutions. The taskforce plans to draft the legislative proposal to establish the framework by the end of 2022.

The following day, the chief executive of the Competition and Consumer Commission of Singapore (CCCS), Aik Kor Sia, stated in her keynote speech at the [Mergermarket M&A Forum Southeast Asia](#) that the CCCS had created a new digital market coordination unit. The unit will monitor global regulations and other developments regarding regulation of the digital economy and co-ordinate with other agencies, with a view to identifying trends and making recommendations to the CCCS.

The moves by South Korea and Singapore come amid similar efforts to regulate the digital economy in many other jurisdictions and may demonstrate alternatives to the more formal proposals for regulation proposed in jurisdictions such as the European Union.

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