SLAUGHTER AND MAY

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CMA pharma investigation leads to fines and NHS payment, as well as director disqualification

On 4 March 2020 the Competition and Markets Authority (CMA) announced its decisions to **fine** four pharmaceutical companies for breaking competition law. The CMA's investigation into the suppliers of the antidepressant drug nortriptyline has resulted in fines of over £3.4 million, as well as a payment of £1 million to the National Health Service (NHS) and the disqualification of a director.

Background

Thousands of patients across the UK rely on nortriptyline to relieve symptoms of depression. NHS spending on the drug peaked at £38 million in 2015.

The CMA launched its investigation into the suppliers of nortriptyline in October 2017. In June 2019 it **provisionally found** that King Pharmaceuticals Ltd and Auden Mckenzie (Pharma Division) Ltd had agreed to share the supply of 10mg and 25mg nortriptyline tablets to a large pharmaceutical wholesaler, as well as colluding to fix quantities and prices, and that King, Lexon (UK) Ltd and Alissa Healthcare Research Ltd had exchanged commercially sensitive information in an attempt to keep the price of nortriptyline high.

CMA decisions

Consistent with its provisional findings, the CMA has in its final decisions identified two separate breaches of competition law – one concerning market sharing and one concerning information exchange.

Market sharing

The CMA has found that between September 2014 and May 2015 King and Auden Mckenzie shared the supply of 25mg and 10mg tablets to a pharmaceutical wholesaler and also colluded to fix quantities and prices, thus distorting competition. Both companies have since admitted to these illegal practices, and Accord-UK Ltd has been held liable for Auden Mckenzie's conduct (having

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subsequently acquired its nortriptyline business). The companies were handed reduced fines for admitting their breaches. King has been fined £75,573 and Accord-UK has been fined £1,882,238.

Accord-UK and Auden Mckenzie have also agreed to pay £1 million directly to the NHS in relation to the case. The payment does not preclude the NHS from seeking further damages if it considers doing so would be appropriate, although the £1 million payment would be set off against any further damages. This is the second time the CMA has secured a direct payment to the NHS following anti-competitive practices. In August 2019 the drug company Aspen **agreed** to pay £8 million to the NHS following anti-competitive arrangements regarding the supply of fludrocortisone, a drug used to treat Addison's Disease.

Information exchange

The CMA has also found that between 2015 and 2017, when the cost of nortriptyline was falling, King, Lexon and Alissa exchanged commercially sensitive information on prices, volumes and Alissa's plans to enter the market, in an attempt to keep prices of nortriptyline high. King and Alissa were handed reduced fines of £75,573 and £174,912 respectively, having **admitted** in September 2019 to an illegal information exchange. Lexon denied liability and was therefore fined £1,220,383.

Director disqualification

In addition to sizeable fines, the CMA also secured the disqualification of Dr Philip Hallwood, a director of King and the sole director of Praze Consultants Ltd (which conducted King's corporate and commercial services and took part in the infringement alongside King). In December 2019 Dr Hallwood gave a legally-binding disqualification undertaking not to be involved in the management of any UK company for 7 years. The CMA is also considering the potential disqualification of other directors.

Conclusion

These latest decisions are part of an ongoing crackdown by the CMA on illegal cartels, with over **£43 million in fines being issued by the CMA in 2019 alone**. They follow the CMA's launch in February of its **"Cheating or Competing?"** campaign, which reminds businesses that they should be aware of which practices are illegal and ensure that proper systems are in place to prevent anti-competitive behaviour. The campaign also warns of the serious consequences for "business cheats", including the issuance of large fines, investigations, disqualifications and prison sentences. Howard Cartlidge, the CMA's Senior Director of Cartels, has said: *"The CMA is cracking down on businesses that collude to rip off customers by fixing prices, sharing out markets amongst themselves or rigging bids… Pleading ignorance is no defence"*.

Other developments

Merger control

Speech by CMA's Andrea Coscelli on CMA interventionism in merger control

On 2 March 2020 the CMA published a **speech** by Chief Executive Andrea Coscelli, given at the GCR Live: Telecoms, Media and Technology Event 2020, in which he discussed whether the CMA's evolution in approach to merger control requires substantive or jurisdictional updates to legislation.

When answering whether he felt the CMA was becoming increasingly interventionist, Coscelli considered four factors in turn:

- **Horizontal mergers in concentrated markets**: Coscelli stated that mergers are more likely to raise competition concerns where merger parties' pricing power is already sizeable to begin with. He felt that the CMA ought to be "vigilant" when assessing mergers in concentrated markets.
- **Richer evidence sources:** Coscelli argued that the increasingly dynamic nature of the markets which are subject to CMA review ensured that a wider range of evidence is being used as part of the CMA's analysis. Internal documents are increasingly reviewed in the context of their intended audience, timeframe and purpose. Moreover, the CMA may consider making use of third party evidence such as internal documents, forecasts and analysts' reports, in particular when conducting a forward-looking assessment. Referring in particular to *Paypal/iZettle* and *Ilumina/PacBio,* Coscelli further considered the use of deal valuation materials and assessment of synergies as these can provide a useful insight into the acquirer's expectations for the future success of the target and the rationale behind the deal. He also noted that the traditionally "static" evidence used, such as market shares and win/loss data, may be less conclusive in a continuously evolving market.
- **Dynamic markets and uncertain future market outcomes:** Coscelli recognised that the CMA is making decisions under greater levels of uncertainty than before but refuted the suggestion that the correct response would be to avoid intervention, affirming that the balance of probabilities test remains applicable regardless of the uncertainty of the future. Coscelli noted previous mergers such as *Google/Doubleclick*, *Facebook/Instagram* and *Facebook/Whatsapp* as examples of decisions from which the CMA can learn. Coscelli recognised that, in markets prone to tipping, competition is often for the market rather than in the market. Citing Valletti and Zenger's articles, he stated that it is important that competition authorities mirror the mind-set of dominant incumbents by taking potential competitors with no earnings seriously. [1]
- **Remedies in dynamic markets:** Coscelli acknowledged that the CMA has learned to be more sceptical of behavioural remedies as a comprehensive solution and will make increasing use of structural remedies.

[1] Tommaso Valletti and Hans Zenger (2018), "Should Profit Margins Play a More Decisive Role in Merger Control? – A Rejoinder to Jorge Padilla", Journal of European Competition Law & Practice, Vol.9, No. 5 and Tommaso Valletti and Hans Zenger (2019), "Increasing Market Power and Merger Control", Competition Law & Policy Debate, Vol. 5, No. 1.

Coscelli viewed the CMA's regime as "largely fit-for-purpose" but recognised that the increasingly multi-jurisdictional nature of merger control in light of Brexit could mean that a mandatory suspensory regime for certain mergers may be introduced to complement the voluntary regime. Furthermore, Coscelli referenced the potential introduction of a parallel regime for acquisitions by companies designated as having "strategic market status", building upon the regulatory framework envisaged by the **Furman Report**. Finally, Coscelli noted that the CMA Merger Assessment Guidelines are likely to be updated in the second half of this year in order to reflect some learnings from the past ten years, specifically in relation to digital markets and use of the internet.

China's SAMR conditionally approves Danaher's proposed acquisition of General Electric's biopharma business

On 28 February 2020 the State Administration for Market Regulation (SAMR) conditionally approved Danaher's proposed USD21.4 billion acquisition of General Electric's biopharma business (GE Biopharma). Danaher and General Electric are listed on the New York Stock Exchange, and are active in providing products and services in bioprocessing and other areas of the life sciences.

The SAMR found that the parties overlapped horizontally in 25 global markets, including micro-carriers, hollow-fiber tangential-flow filters, non-protein A affinity media, ion exchange media, mixed-mode media, label-free detection and a number of chromatography products. The transaction has been cleared subject to the following legally binding conditions:

- Danaher will divest (a) its micro-carriers and particle validation standards business, (b) its chromatography hardware and resins units, and (c) certain businesses involving label-free detection operating under the FortéBio brand. The divestments must include all related tangible and non-tangible assets, agreements, leases, commitments, customer orders and relevant employees.
- A transitional agreement must be reached with the purchaser of the divested businesses to give access to all tangible assets and non-exclusive licences regarding proprietary technology and trade secrets related to an early-stage project (the Emily Project).
- The parties will also continue research and development on the Emily Project for two years after the transaction completes.

An annual written report must be submitted to SAMR and the supervising trustee confirming compliance with these commitments.

The GE Biopharma acquisition has been conditionally cleared in Korea and the EU, subject to broadly similar divestments. The transaction has reportedly also been unconditionally cleared in Japan and Brazil, but is still pending clearance from the U.S. Department of Justice.

Antitrust

European Commission fines hotel group Meliá for restrictive clauses in contracts with tour operators

On 21 February 2020 the European Commission **announced** its decision to impose a fine of €6,678,000 million on Spanish hotel group Meliá for its inclusion of anti-competitive clauses in agreements with tour operators. The clauses discriminated against certain consumers within the EEA based on their country of residence.

Following consumer complaints, in February 2017 the Commission launched an **investigation** into hotel accommodation agreements concluded by Meliá and four tour operators (Kuoni, REWE, Thomas Cook and TUI). The investigation found that Meliá had entered into contracts with tour operators that restricted active and passive sales for hotel accommodation. The hotel group had included a clause in its standard terms and conditions for contracts with tour operators stating that the contracts were valid only for customers who resided in specific countries. Competition Commissioner Margrethe Vestager said that Meliá "*prevented tour operators from freely offering hotel accommodation everywhere in Europe*" ensuring certain consumers had access to different offers and prices. The Commission found that these clauses may have partitioned the European Single Market by restricting the ability of the tour operators to sell the hotel accommodation in all EEA countries without constraint and to respond to direct requests from consumers who were resident outside the defined countries. As a result, consumers were not able to see the full hotel availability or book hotel rooms at the best prices with tour operators in other Member States.

Meliá's cooperation with the Commission, through both its express acknowledgment of the facts of the infringement and its provision of evidence, resulted in a 30 per cent reduction to its fine. In determining the level of the fine, the Commission took into account inter alia the value of sales relating to the infringement, the gravity of the infringement and its two year duration, as well as the fact that Meliá cooperated with the Commission during the investigation.

As regards the antitrust investigation opened against the four tour operators, the Commission decided not to further pursue the case.

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