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UK Competition Law Newsletter

Highlights

- Pfizer and Flynn Pharma win appeal against record CMA fines
- Mastercard settles follow-on damages claim with British Airways
- Secretary of State accepts undertakings in Sky bid
- CMA consults on updating its investigation procedures

Excessive Pricing: How Much Is Too Much?

The Competition Act prohibits dominant firms from imposing “*unfair purchase or selling prices*,” mirroring the language of Article 102 TFEU. This provision has been enforced only rarely in the UK and elsewhere in the EU, although enforcement activity has increased markedly in recent years. More than 40 years after the leading EU case, *United Brands*, Commissioner Vestager has signalled a readiness to pursue excessive pricing cases.¹ And, in the UK, two important decisions have been rendered since 2000, *Napp* (2002), which concerned morphine prices, and *AtTheRaces* (2007), which concerned prices for horse-racing data.

In December 2016, the Competition & Markets Authority (**CMA**) imposed record fines of approximately £90 million on Pfizer and Flynn,² two producers of pharmaceuticals, and issued statements of objections in two other cases involving pharmaceutical companies.³ Given the paucity of UK and EU precedent, and the CMA’s pipeline of excessive pricing investigations, the appeal of the *Pfizer/Flynn* decision was highly significant. On 7 June 2018, the Competition Appeal Tribunal (**CAT**) overturned the CMA’s decision.⁴ The judgment raises important questions about the relevant legal test, future enforcement, and – critically for dominant firms – when will a “high” be considered “excessive” or “unfair”. In other words, how much is too much?

Background

The *United Brands* precedent establishes that it is abusive for a dominant firm to charge prices that have no reasonable relation to the economic value of the products supplied. This involves a two-stage test. First, the price must be “excessive.” Second, the price must be unfair either in itself or compared to prices of

¹ Commissioner Vestager, “Fighting for European values in a time of change,” June 14, 2017 (“*a fair society has to begin with fair markets. That’s why we get involved when we see that drug companies may have been engaged in price gouging. Just a few weeks ago, we launched an investigation into Aspen Pharma, which seems to have raised the price of some cancer medicines by several hundred percent – medicines that sufferers literally can’t live without*”).

² CMA Case CE/9742-13, *Pfizer/Flynn*, 7 December 2016.

³ *Hydrocortisone tablets: suspected excessive and unfair pricing*, SO issued in December 2016; and *Liothyronine tablets: suspected excessive and unfair pricing*, SO issued in December 2017.

⁴ Judgment of 7 June 2018, *Pfizer/Flynn*, Cases 1275-1276/1/12/17, [2018] CAT 11.

competing products. The Office of Fair Trading (the CMA's predecessor) previously took the position that “[a]n undertaking's prices in a particular market can be regarded as excessive if they allow the undertaking to sustain profits higher than it could expect to earn in a competitive market.”⁵

Pfizer/Flynn concerned phenytoin capsules that had been sold in the UK since 1938, but at levels that were loss-making or only marginally profitable in recent years. In 2012, Pfizer transferred its marketing authorisation for these capsules to Flynn. The price at which those capsules were sold to the NHS subsequently increased by several thousand percent. The CMA considered that the increased prices were unfair, meriting the largest fine that the CMA has ever imposed.

When Is A Price Excessive?

In *United Brands*, the Court was cautious not to prescribe a single methodology for excessive pricing, noting that economists would without doubt come up with various possible tests. What matters is to find an appropriate benchmark price and to test whether the difference between that benchmark and the price charged was “significant and persistent.”⁶

Competition authorities and courts have typically applied a “cost-plus” test, identifying the costs of supplying the product and adding a reasonable rate of return to give a benchmark price. Other methodologies are available too, though, such as comparisons with other products, prices charged by other companies, and the prices of the same product in other countries.

In *Pfizer/Flynn*, the CMA considered it sufficient to use a “cost-plus” methodology. It applied a 6% “reasonable” rate of return, based on a voluntary pricing scheme – the Pharmaceutical Price Regulation Scheme (**PPRS**) – that allowed participants to make an overall 6% profit on a portfolio of drugs that they sell to the NHS.

The CAT found fault with this approach, determining that the CMA's cost-plus analysis had been

designed to establish a benchmark of perfect or “idealised” competition, rather than a benchmark price under “normal” competitive conditions. The CAT criticised the use of the 6% figure, taken from the PPRS, which it noted had diminishing relevance in the pharmaceutical sector and was based on a return over a supplier's portfolio of drugs; not individual drugs, such as Pfizer's phenytoin capsules.

The CAT also criticised the CMAs failure to examine other potential comparators, such as prices charged for other products or by other companies. Even if these alternatives did not perfectly “mimic” the products at issue, the CMA could have attributed appropriate weight to them, rather than disregarding them entirely under a binary “relevant or not relevant” approach.

When Is A Price Unfair?

For excessive prices to be abusive, they also have to be unfair, either in and of themselves (**Limb A**) or compared to the prices of other products (**Limb B**). Advocate General Wahl, in a recent case before the Court of Justice, described this stage as a “sanity check.”

In *Pfizer/Flynn*, the CMA considered the challenged prices to be unfair in and of themselves, given the size of the price increases and the absence of recent innovation or investment in the product. Having satisfied itself under Limb A, the CMA considered that it had absolute discretion to disregard evidence relating to Limb B.

Again, the CAT disagreed, finding that where a party makes a *prima facie* case that its pricing is fair under one limb, that evidence cannot be ignored; the CMA has to consider whether the parties' *prima facie* demonstration of fairness under Limb B calls into question a finding of unfairness under Limb A, and to produce a reasoned explanation of its assessment.

Pfizer and Flynn put forward a *prima facie* case that Teva's phenytoin tablets were a relevant comparator that – they claimed – showed that the

⁵ “Assessment of Individual Agreements and Conduct”, The Competition Act 1998, Office of Fair Trading Guidelines, OFT 414, September 1999, para. 2.7.

⁶ Judgment of 14 February 1978, *United Brands*, C-27/76, EU:C:1978:22, paras. 250-253; and Judgment of 14 September 2017, *AKKA/LAA*, C-177/16, EU:C:2017:689, para. 61.

prices for Pfizer's phenytoin capsules were not unfair when compared with competing products. They pointed out that phenytoin tablets were sold at a higher price than the Pfizer's capsules and contended that the CMA should have investigated this proposed comparison, which it failed to do.

What Does This Mean For Future Enforcement?

On one view, the CAT's ruling increases the burden borne by the CMA when it brings unfair pricing cases. Johannes Laitenberger, Director-General of DG COMP, has criticised the "*very restrictive criteria applied by the CAT and the high barriers to finding an infringement they entail*," suggesting that the judgment goes beyond the existing law and risks undermining effective enforcement.⁷

There are reasons, though, to question this assessment. The CMA's decision preceded the recent case of *AKKA/LAA*, in which the Court of Justice and the Advocate General provided important statements of principle on which the CAT relies expressly. The CAT was also at pains to emphasise that the conduct at issue might well have been unfair and that a proper assessment of the relevant benchmarks and evidence could still result in a conclusion of excessive pricing. It found, however, that the case advanced by the CMA was not made

out. The CAT therefore remitted the assessment of abuse to the CMA (having upheld the CMA's findings on dominance), and, as noted below, denied requests for an appeal of its judgment, so that the remittal could be immediate.

Insofar as the judgment *does* increase the CMA's burden, it does so by reference to sound principles, including that (i) the prices charged should be compared with prices under normal (not idealised) competitive conditions; (ii) competition authorities should not exclude arbitrarily a review of potentially relevant comparators; (iii) potential comparators can be considered with appropriate weightings, rather than being treated under a binary "relevant or not" appraisal; and (iv) where parties make a *prima facie* case that conduct was fair, the CMA is required to engage with the parties.

These principles ought to help avoid the risk of over-enforcement – in particular, the concerns of not setting up antitrust authorities as pricing regulators and not distorting price signals that might otherwise encourage investment or market entry. The CAT's judgment reduces authorities' discretion to deem a price "fair" or "unfair", and in so doing brings a greater level of clarity and certainty to the law. The CAT refused the CMA, Pfizer, and Flynn permission to appeal, though they may seek permission directly from the Court of Appeal.

Judgments, Decisions, and News

21st Century Fox Inc./Sky plc. On 19 June, the then Secretary of State, Matt Hancock, announced that he had received undertakings from 21st Century Fox and Disney in connection with the proposed public bid by 21st Century Fox for the remaining shares in Sky plc that 21st Century Fox did not already own. Under the undertakings, 21st Century Fox would divest Sky News to Disney, following completion of its bid for Sky plc. The objective was to ensure maintenance of media plurality, considering the interests of the Murdoch Family Trust in both 21st Century Fox and various newspapers. The undertakings included a commitment by Disney to operate Sky News for 15

years, and various financial assurances to support the Sky News business. Following a statutory consultation period, the newly appointed Secretary of State, Jeremy Wright, [announced](#) on 12 July his decision to accept the proposed undertakings with only minor clarificatory amendments.

Court Judgments

Unlockd v Google. On 18 June, the High Court transferred all issues regarding *Unlocked v Google* to the CAT, with the exception of a claim for declaratory relief. Unlockd argues that Google abused a dominant position by withdrawing

⁷ Director-General Laitenberger, "Competition assessments and abuse of dominance," Florence, 22 June 2018.

Google Admob services from Unlocked's app and removing the app from Google Play Store. The transfer has led to an expedited trial on issues of abuse and objective justification, with the question of whether Google is dominant in the relevant markets being reserved. In the meantime, Unlocked Limited has entered into voluntary administration. The CAT has therefore extended the deadline for disclosure.

British Airways v Mastercard. On 18 June, British Airways plc and Others withdrew a claim against Mastercard brought under section 47A of the Competition Act 1998 after the two sides came to an undisclosed settlement. The claim followed the European Commission's 2007 decision that found Mastercard in breach of Article 101 of the Treaty on the Functioning of the European Union in relation to the level of multilateral interchange fees for card payment transactions. The follow-on damages claim was withdrawn by consent.

Antitrust/Market Studies

Market Study into Funeral Market. On 1 June, the CMA [announced](#) that it had launched a market study into the supply of funeral services in the UK. Concern had been expressed to the CMA about to the rising cost of funerals – particularly cremations – as well as significant discrepancies in pricing and a lack of transparency in the sector. The CMA's investigation will consider, in particular, how competitive the sector is and whether there is insufficient transparency for customers. The CMA must issue its provisional findings, including its provisional decision on whether to make a market investigation reference, within six months.

FCA Strategic Review of Retail Banking Models. The FCA published a June 2018 [update](#) on its Strategic Review of retail banking, focusing on personal current accounts (PCAs) and fintech developments. The review has found that larger banks' networks of PCAs result in lower funding costs and increased opportunities to sell lending and business products to existing customers. Open banking and digital channels appear to have had little effect on these advantages, but the review is ongoing in this area.

CMA Consults on Competition Act Investigation Procedures. The CMA is [considering](#) updates to its 2014 guidance on its Competition Act investigation procedures. In doing so, the CMA has noted an anticipated increase in enforcement activity in light of Brexit. Amongst other proposals, the consultation proposes streamlined access to file, updated guidance to reflect current best practices around the submission of representations on the confidentiality of information, more flexibility in responding to deadlines (for example, when responding to information requests) depending on the circumstances of each case, and a single unified process for handling complaints.

FCA Assessment of Retirement Income Market. On 28 June 2018, the FCA published its [final report](#) on its retirement outcomes review that examined how competition is developing in the retirement income market. The FCA concluded, that there were low levels of switching amongst providers and that it was not always easy to switch between providers. Complexity around drawdown charges means that it can be difficult for consumers to make meaningful comparisons even where prices between service providers are substantially different.

Merger Developments

PHASE 2 INVESTIGATIONS

Rentokil Initial/Cannon Hygiene. On 18 June, the CMA [announced](#) that it had referred the acquisition of Cannon Hygiene Limited by Rentokil Initial plc to Phase 2. The parties are two of the UK's largest suppliers of washroom products and services, including air sanitisers, bins and soap dispensers. The CMA considered that the merger may result in a substantial lessening of competition for the supply of washroom services to national and regional customers.

Nielsen Holdings plc/Ebiquity plc. On 25 June, the CMA [announced](#) that it had referred Nielsen's anticipated acquisition of Ebiquity's advertising intelligence business to Phase 2. The parties compete in the provision of advertising intelligence services. The CMA was concerned that the merger

might result in a loss of competition in the market for “granular” advertising intelligence to UK customers.

Ausurus Group/Metal & Waste Recycling. On 4 June, the CMA published its provisional findings that the transaction has or may be expected to result in a substantial lessening of competition in five markets. Since publication of those findings, the CMA received additional evidence from industry participants and, in the light of this evidence, issued new provisional findings on 19 July 2018, concluding that no substantial lessening of competition is expected in the market for ferrous and non-ferrous metal in London.

Electro Rent Corporation/Test Equipment Asset Management and Microlease. On 17 May, the CMA found that the merger between Electro Rent and Microlease may give rise to competition concerns in the rental supply of testing and measurement equipment in the UK. On 26 June 2018, the CMA gave notice of the proposal to accept undertakings requiring Electro Rent to divest its UK business so as to remedy the CMA’s concerns.

PHASE 1 CLEARANCE DECISIONS

Tarmac Trading/Alun Griffiths (Contractors). On 29 June, the CMA cleared the completed acquisition by CRH plc through its subsidiary Tarmac Trading Limited of Alun Griffiths (Contractors) Limited. The CMA had previously issued an initial enforcement order in March which was subsequently revoked on 6 June.

Sibanye Gold/Lonmin plc. On 28 June, the CMA cleared the anticipated acquisition of Lonmin plc by Sibanye Gold Limited. Sibanye Gold is one of the largest producers of platinum-group metals, while Lonmin has gold-producing

assets in South Africa.

Trinity Mirror/Northern & Shell Media

Group. On 20 June, the CMA cleared the completed acquisition of certain assets of Northern & Shell by Trinity Mirror. The CMA found that the parties’ titles differed in audience and tone, and were not close competitors. The CMA also found that the parties had a minimal presence in the supply of news and advertising online and, to the extent that they did overlap in the printing of newspapers, they faced significant capacity constraints. On the same date, the Secretary of State announced that he would accept Ofcom’s conclusion that the merger did not raise concerns as to the either plurality of views or free expression of opinion in newspapers. That decision followed his issue of a Public Interest Intervention Notice on 1 May.

Meadow Foods/Roilvest. On 18 June, the CMA cleared the completed acquisition of Roilvest by Meadow Foods. Meadow Foods manufactures butters, creams, milks, and related dairy products. Roilvest manufactures concentrated butter and ghee.

ONGOING PHASE 1 INVESTIGATIONS

Parties	Decision due date
Motor Fuel Group/MRH	22 August
Restore plc/TNT UK Limited	16 August
ION Investment Group/ Fidessa	13 August
Sims Group UK/Morley Waste	10 August
Menzies Aviation (UK) Limited/Airline Services Limited	7 August
Moneysupermarket.com Financial Group Limited/ Decision Technologies Limited	7 August

Other Developments

Progress on UK-EU withdrawal agreement.

On 19 June, UK and EU negotiators published further agreed terms of the draft withdrawal agreement. The most significant points include: (i) civil and commercial judicial cooperation between the UK and the EU, which will continue post-Brexit; and (ii) the non-discrimination principle and EU review principles, which will continue to apply to public procurement procedures.

Royal Assent to European Union

(Withdrawal) Act 2018. On 26 June, royal assent to the European Union (Withdrawal) Act 2018 was received. The Act will repeal the European Communities Act 1972, but retain EU-derived domestic legislation as well as direct EU legislation. The Act provides that existing EU law will become domestic UK law immediately following the UK's exit from the EU, unless specifically amended. Future EU law will not bind the UK and UK courts will not be bound by future decisions of the European Court (although UK courts may have regard to those decisions).

FCA approach to competition and innovation.

On 11 June, the FCA Executive Director of Strategy and Competition, Christopher Woolard, gave a speech on the FCA's approach to competitive markets and innovation. Mr Woolard's analysis focused on the dichotomy of tempered intervention in the market with managing equitable consumer outcomes, and emphasised the objective of fostering competition in consumer financial services.

CMA Draft Guidance on Merger Remedies.

On 12 June, the CMA published a consultation on remedies in Phase 1 and Phase 2 merger investigations, seeking views on, amongst other matters: (i) Phase 1 undertakings where a substantial lessening of competition can be easily addressed; (ii) the use of multiple undertakings; (iii) upfront buyers; and (iv) international constraints. The CMA will also consider submissions on the effectiveness and cost of merger remedies.

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