CMA accuses pharma firms of illegal pricing

Having gathered further evidence and after carefully assessing the facts, the Competition and Markets Authority (CMA) has reached a provisional view – known as a Statement of Objections – that Pfizer and Flynn broke competition law by charging unfairly high prices for phenytoin sodium capsules.

The CMA has provisionally found that the companies exploited a loophole by de-branding the drug – known as Epanutin prior to September 2012 – with the effect that the drug was not subject to price regulation in the way branded drugs are. As Pfizer and Flynn were the dominant suppliers of the drug in the UK, the NHS had no choice but to pay unfairly high prices for this vital medicine.

Following the overnight price increases by the companies, NHS spending on phenytoin sodium capsules rose from around £2 million a year in 2012 to about £50 million in 2013. For over 4 years, Pfizer's prices were between 780% and 1,600% higher than it had previously charged. Pfizer then supplied the drug to Flynn, which sold it to wholesalers and pharmacies at prices between 2,300% and 2,600% higher than those they had paid previously.

In December 2016, following an in-depth investigation, the CMA fined Pfizer and Flynn for breaking competition law by charging unfairly high prices for phenytoin sodium capsules.

The companies appealed against the CMA's decision that competition law had been broken and against the fine. In June 2018, the Competition Appeal Tribunal (CAT) upheld the CMA's findings on market definition and dominance but set aside the CMA's finding that the companies' prices were an unlawful "abuse" of dominance. The CAT referred the matter of abuse back to the CMA for further consideration – known as a remittal.

The CMA and Flynn then appealed to the Court of Appeal. In March 2020 the Court dismissed Flynn's appeal in its entirety and upheld aspects of the appeal brought by the CMA relating to the application of the legal test for unfair pricing. Following this, the CMA decided to re-investigate the matters remitted by the CAT and opened its current investigation in June 2020.

Andrea Coscelli, Chief Executive of the CMA, said:

> Thousands of patients depend on this drug to prevent life-threatening seizures as a result of their epilepsy. As the CAT recognised, this is a matter that is important for government, for the public as patients and taxpayers, and for the pharmaceutical industry itself. Protecting these patients, the NHS and the taxpayers who fund it, is our priority.

The CMA's findings are, at this stage, provisional. Pfizer and Flynn now have an opportunity to respond to the provisional findings set out in the Statement of Objections and the CMA will carefully consider their representations before deciding whether they broke the law.

The CMA remains committed to its work to tackle robustly any illegal behaviour by drug companies overcharging the NHS. It recently fined firms £260 million for competition law breaches in relation to the supply of hydrocortisone tablets and £100 million for competition law breaches in relation to the supply of liothyronine tablets. A number of other CMA investigations are continuing.

For more information see the phenytoin sodium capsules: suspected unfair pricing case page.

Media queries should be directed to press@cma.gov.uk or call 020 3738 6460.