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QUICK LINKS

CAT upholds CMA decision that Lexon acted anti-competitively in sharing information about the supply of nortriptyline

On 25 February 2021 the Competition Appeal Tribunal (CAT) delivered its judgment upholding the decision of the UK Competition and Markets Authority (CMA) last year that Lexon (UK) Limited and a number of pharmaceutical suppliers had acted anti-competitively by exchanging information regarding the supply of the anti-depressant nortriptyline in the UK. The CAT dismissed each of Lexon's grounds of appeal, upholding both the CMA's finding that Lexon had breached competition law and the fine of £1,220,383 imposed by it upon Lexon.

BACKGROUND

On 4 March 2020 the CMA issued two infringement decisions following on from its investigation into potential anti-competitive behaviour in respect of the supply of nortriptyline, which began in late 2017. The second of these found that Lexon, which operates primarily as a pharmaceutical wholesaler, had engaged in 17 exchanges of information with two suppliers, King Pharmaceuticals Limited and Alissa Healthcare Research Limited, between 2015 and 2016, which included commercially sensitive information regarding pricing, volume and timing of supplies of nortriptyline. The CMA held that this constituted a "concerted practice" by Lexon and the other undertakings involved, the overall objective of which was to maintain, or at least slow the decline of, the price of nortriptyline (which had been falling as a result of new market entrants in the supply of the drug amongst other factors) (the "Price Maintenance Objective"). On this basis Lexon was found to have committed an "infringement by object" of both Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Chapter I of the Competition Act 1998. By reference to the nature and duration of the infringement, the CMA therefore imposed a fine of £1,220,383.

Lexon appealed this decision to the CAT on a number of grounds, the primary ground being that the CMA had erred in finding that there had been an "infringement by object".

JUDGMENT

In respect of that primary ground of appeal, Lexon argued that the content of the information exchanged with King and Alissa did not support an object of maintaining the prices of nortriptyline or slowing their decline, particularly when assessed in the relevant economic context. It argued that the conduct alleged against it did not and could not, in the relevant market conditions, have had a sufficiently adverse effect on competition as, *inter alia*, (i) the nature of the market and its structure with wholesalers and retailers

For further information on any EU or UK Competition related matter, please contact the Competition Group or your usual Slaughter and May contact.

Square de Meeûs 40
1000 Brussels
Belgium
T: +32 (0)2 737 94 00

One Bunhill Row
London EC1Y 8YY
United Kingdom
T: +44 (0)20 7600 1200

prevented any possible impact on competition in that market arising from the exchanges; (ii) the information exchanged did not refer to the specific "Price Maintenance Object" alleged by the CMA; and in any case, (iii) the parties' weak market positions and other competitive restraints meant that the exchanges could not have had any significant influence on the prices of nortriptyline.

The CAT dismissed this ground of appeal. It found that the CMA had not erred in assessing the economic context: nortriptyline was a "commodity product", meaning that it was very sensitive to price differences and, as there was evidence that customers readily switched suppliers on the basis of cheaper prices, there was a "*high potential to expand sales by being marginally more competitive on price than a competitor*".

As against that context, the content of the exchanges had no obvious, legitimate, commercial purpose but instead demonstrated an anti-competitive object involving "*at the very least, reducing uncertainty in the market, reducing customers' ability to play one supplier off against another and providing reassurance as to the actual and likely future intentions of actual or potential suppliers of Nortriptyline*". The CAT suggested that this conduct could by its very nature be expected to have an effect on price levels in the market and thereby affect competition. As such, the CMA was entitled to rely upon the Price Maintenance Objective whether or not the exchanges explicitly referred to specific price information.

Having concluded that the CMA had not erred in finding an infringement of competition law, the CAT went on to affirm the quantum of the fine imposed upon Lexon. This was on the basis that (i) the CMA was justified in setting the starting point for its penalty assessment at 20 per cent of annual turnover, given the practice in question involved the exchange of commercially sensitive market information between actual or potential competitors over a significant period; and (ii) an uplift of 75 per cent was not disproportionate. Consequently, the CAT concluded that the overall penalty of £1,220,383 was amply justified given Lexon was a business that realised "*very substantial profits over a significant period in clear breach of the law*".

CONCLUSION

This is not the first time a pharmaceutical company has made competition law headlines in recent weeks: on 10 February 2021 the European Commission announced that it had accepted legally binding commitments offered by Aspen following the Commission's investigation into alleged excessive pricing by it for critical off-patent cancer medicines.

Speaking on the Lexon decision, Chief Executive of the CMA Andrea Coscelli remarked, "*[w]e welcome the decision…Lexon illegally exchanged competitively-sensitive information to try and keep prices up, meaning the NHS – and ultimately the UK taxpayer – could have been paying over the odds for this important drug. Such behaviour is unacceptable. We will continue to crack down on companies that seek to break the law and will be keeping a close eye on this sector*".

Following on from the judgment, the CMA is now free to continue its application to disqualify Mr. Pritesh Sonpal, a director of Lexon, as a director. Mr. Sonpal was directly involved in the exchanges, but the application for his disqualification was put on hold in the High Court pending the outcome of the appeal before the CAT.

OTHER DEVELOPMENTS

MERGER CONTROL

COMMISSION CONDITIONALLY APPROVES ACQUISITION OF VARIAN BY SIEMENS HEALTHINEERS

On 19 February 2021 the European Commission announced that it has conditionally cleared at Phase I Siemens Healthineers' $16.4 billion acquisition of Varian, paving the way for Siemens AG to become a cancer care therapy world

leader. The Commission assessed how the merger would affect both the EEA and the UK as the parties notified the transaction before the end of the Brexit transition period.

Siemens Healthineers is one of the largest suppliers of medical imaging solutions used in radiotherapy. Varian is a leading supplier of radiotherapy solutions. The Commission raised concerns that the merger, as notified, could lead to the companies foreclosing competitors in the EEA and the UK by degrading the interoperability between Siemens Healthineers' imaging solutions and third-party radiotherapy solutions, and between Varian's radiotherapy solutions and third-party medical imaging solutions. In response to the Commission's concerns, Siemens Healthineers committed to:

- continue to support the industry-wide interoperability standard (DICOM); and
- provide technical assistance and information to third parties and customers to ensure interoperability between certain of its radiotherapy solutions and its competitors' imaging solutions, and *vice versa*.

The Commission's clearance is conditional upon full compliance with the commitments. These will initially be binding for ten years, with the possibility of a further five-year extension. The US Federal Trade Commission and the Competition Commission of India have unconditionally cleared the transaction.

ANTITRUST

COURT OF JUSTICE ISSUES JUDGMENT ON REFERENCE FOR PRELIMINARY RULING FROM SLOVAK COURT REGARDING APPLICATION OF NE BIS IN IDEM PRINCIPLE

In December 2007 the Slovak Competition Authority adopted a decision finding that Slovak Telekom (ST) had abused its dominant position. In 2009 the Board of the Antimonopoly Office amended the decision and fined ST for squeezing out rivals from the telecommunications market. On 15 October 2014 the European Commission found that ST had abused its dominant position, consisting of a margin squeeze and refusal to supply strategy as regards access to its local loops and fined the company and its parent €38.8 million. ST brought a case before the national court, which led to the Slovak Supreme Court to make a reference for a preliminary ruling to the European Court of Justice (CJ) in relation to the interpretation of the *ne bis in idem* principle, as enshrined in Article 50 of the EU Charter of Fundamental Rights (Right not to be tried or punished twice in criminal proceedings for the same criminal offence).

In a preliminary ruling in case C-857/19 issued on 25 February 2021 the CJ ruled that a national competition authority (NCA) is (pursuant to Article 11(6) of Regulation 1/2003) relieved from its competence to apply Articles 101 and 102 TFEU in the case where the European Commission initiates proceedings for the purpose of adopting an infringement decision in so far as it relates to the same alleged infringements of Articles 101 and 102 TFEU, committed by the same undertaking(s) on the same product market(s) and the same geographical market(s) during the same period(s) as those concerned by the proceeding or proceedings previously brought by the NCAs. The CJ observed that in this case, it appears that the proceedings conducted by the Commission and by the Slovak Competition Authority against ST had as their subject abuses of a dominant position allegedly committed by ST on separate product markets.

The CJ further ruled that the principle *ne bis in idem* must be interpreted as meaning that it applies to infringements of competition law, such as the abuse of a dominant position referred to in Article 102 TFEU, and precludes an undertaking from being found liable or proceedings from being brought against it afresh on the grounds of anti-competitive conduct for which it has been penalised or declared not liable by an earlier decision that can no longer be challenged. The CJ further clarified that in this case the principle *ne bis in idem* does not apply. That is because the abuses found by the Commission and the Slovak Competition Authority, appear to relate to different product markets.

GENERAL COMPETITION

FIRST REGIONAL DIGITAL SUPERVISION SYSTEM FOR THE PLATFORM ECONOMY SECTOR LAUNCHES IN CHINA

On 26 February 2021 the competition regulator for the Chinese region of Zhejiang (Zhejiang AMR) launched a digital supervision system (System). It is the first of its kind in China.

The System aims to monitor anti-competitive and monopolistic behaviour, including exclusive dealing arrangements, "big data"-based price discrimination, selling below cost, vertical monopoly agreements and gun-jumping. It will target online trading platforms and use technologies such as "big data", cloud computing, and artificial intelligence.

Zhejiang is home to 310 online platforms that host over nine million online shops, accounting for almost 50 per cent of online shops and nearly 70 per cent of platform transactions in China. It is expected that more than 20 online platforms, 500 brands and 100,000 products will be monitored by the System during its initial phase.

Rules and models for data collection will be tailored by the System according to the types of anti-competitive behaviour. For instance, public opinion will be the major source of information for "big data"-based discrimination against regular customers.

The Zhejiang AMR will continue to update the System, expand its coverage and improve its efficiency. It is anticipated that the System will be connected with other digital tools used by the Chinese government for supervision and enforcement of anti-competitive behaviour in the online sector (such as the complaint-filing system) to achieve greater synergies.

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650