

# Competition Appeal Tribunal sets aside finding of abuse in CMA decision on excessive pricing

*25/06/2018 (EU/Competition)*

The Competition Appeal Tribunal (“CAT”) has handed down an important judgment on excessive pricing in the pharmaceuticals industry. The case concerned a decision of the Competition and Markets Authority (“CMA”) finding that two pharmaceutical companies, Pfizer and Flynn, had breached competition law by charging excessive prices for an epilepsy drug, phenytoin sodium capsules, to the NHS. The CAT upheld the CMA’s decision in respect of dominance, but set aside the CMA’s findings on abuse together with the penalties imposed on Pfizer and Flynn.

As to dominance, the Tribunal upheld the CMA’s findings that Pfizer and Flynn were dominant on their respective markets. This was “essentially on the grounds that they were able to set and sustain high prices for phenytoin capsules throughout the Relevant Period, and that they did not face sufficient competitive pressure...to constrain behaviour”. The Tribunal also dismissed arguments by Pfizer and Flynn that their conduct was effectively constrained by buyer power on the part of the DH.

However, on abuse, the Tribunal found that the CMA did not correctly apply the legal test for finding that prices were unfair, did not appropriately consider what was the right economic value for the product at issue, and did not take sufficient account of the situation of other, comparable products.

In so doing, the Tribunal set out a framework for the approach to be taken by an authority when applying the two-limb test in *United Brands*. In particular, it found that:

The CMA’s approach of seeking to identify a “reasonable” rate of return for phenytoin “owed more to a theoretical concept of idealised or near perfect competition than to the real world”.

The CMA should instead have identified a benchmark price (or range) based on the price that would have been established in conditions of normal and sufficiently effective competition.

In identifying the price which would be obtained under normal and effective competition, the CMA should have investigated more carefully the comparators advanced by Pfizer and Flynn, in particular the prices of phenytoin sodium tablets.

The CMA should also have taken account of the therapeutic value that epilepsy patients attach to phenytoin, in its assessment of the economic value of the product.

# BRICK COURT CHAMBERS

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## BARRISTERS

The Tribunal emphasised that the judgment “does not imply any finding by the Tribunal as to whether there has been an abuse by Pfizer or Flynn of their respective dominant positions”. The Tribunal indicated its provisional view that the decision should be remitted to the CMA for further consideration, but has invited further submissions from the parties on this point.

The judgment is [here](#).

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Mark Hoskins QC, David Bailey, Hugo Leith and Jennifer MacLeod acted for the CMA.

Robert O’Donoghue QC and Tim Johnston were instructed for Pfizer by Clifford Chance.

Kelyn Bacon QC and Tom Pascoe were instructed for Flynn by Macfarlanes.

### RELATED BARRISTERS

- Mark Hoskins QC
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