

Potential EU-UK competition law divergence post-Brexit highlighted by conflicting approaches of UK Competition Appeal Tribunal in recent pharma cases

The UK Competition Appeal Tribunal (the “CAT”) has recently issued two judgments relating to anti-competitive practices in the pharmaceutical sector, namely: (1) ‘pay for delay’ agreements in *GlaxoSmithKline PLC v Competition and Markets Authority* [2018] CAT 4 (the “**Paroxetine Case**”); and (2) excessive pricing in *Pfizer Inc. and Pfizer Limited v Competition and Markets Authority* [2018] CAT 11 (the “**Phenytoin Case**”).

The Paroxetine Case represents the first time that the CAT has made a preliminary reference to the Court of Justice of the European Union (“**CJEU**”) under Article 267 Treaty on the Functioning of the European Union (“**TFEU**”). Article 267 TFEU provides that national courts and tribunals may make a preliminary reference to the CJEU concerning the interpretation of EU law, where such interpretation is unclear. This should be read in conjunction with the duty on the CAT under s60 Competition Act 1998 (“**CA98**”) to ensure that, broadly speaking, UK competition law is applied consistently with EU competition law.

In light of the above, it is striking that the preliminary reference procedure was not used in the later Phenytoin Case even though the latter represents a significant development in – and, arguably, a divergence from – well-established principles of EU law in respect of excessive pricing abuses.

Whilst the judgments form part of a significant surge in activity by the UK Competition and Markets Authority (the “**CMA**”) in the pharma sector, they also offer perhaps a final opportunity (from a competition law perspective) to consider the preliminary reference procedure prior to the UK’s projected withdrawal from the EU in 2019. More broadly, the Phenytoin Case, in particular, may be seen as shedding some light on how UK and EU competition law might interact in a post-Brexit world.

Background

The Paroxetine Case was an appeal against a decision of the CMA on 12 February 2016 holding that GlaxoSmithKline plc (“**GSK**”), a supplier of branded paroxetine (an anti-depressant medicine), agreed to make payments and value transfers to certain of its competitors which were aimed at deferring the potential entry of so-called ‘generic’ competitors into the UK market. Such agreements are commonly termed ‘pay for delay’ agreements. The CMA imposed a fine on GSK of £37.6 million for entering into an anti-competitive agreement; the generic competitors were also fined approximately £7.4 million.

The Phenytoin Case was an appeal against a decision of the CMA issued on 7 December 2016 holding that Pfizer Inc. and Pfizer Limited (together, “**Pfizer**”) and its distributor in the UK, Flynn Pharma Limited (“**Flynn**”), had charged excessive and unfair prices in the UK for phenytoin sodium capsules (an anti-epilepsy drug), following the drug’s de-branding and removal from price regulation. The CMA imposed what were record fines of £84.2 million on Pfizer and £5.2 million on Flynn, for abuse of their respective dominant positions.

The preliminary reference procedure and the Paroxetine Case

Article 267 TFEU provides that national courts and tribunals may make a preliminary reference to the CJEU concerning the interpretation of EU law, where such interpretation is not clear. In such cases where a matter is before a national court/tribunal against which there is no appeal, that body is under a duty to refer such matters to the CJEU. The CAT is not a tribunal from which there is no judicial remedy and, as such, the CAT is not under an obligation to make a preliminary reference.

In the Paroxetine Case, the relevant conduct was considered by the CMA as primarily an infringement of UK competition law. The CAT however acknowledged that decisional practice of the European Commission (the “**Commission**”) and the jurisprudence of the EU courts were of “*direct relevance*” to the application of the domestic provisions, as well as highlighting the fact that the CAT is subject to a clear legislative obligation under s60 CA98, broadly, to ensure that UK competition law is applied consistently with EU competition law. Accordingly, particularly in light of pending appeals on similar ‘pay for delay’ issues before the CJEU,¹ the CAT considered it appropriate to make a preliminary reference to the CJEU on interpretation of the relevant issues under EU law (notwithstanding its detailed consideration of these issues in its judgment).

Excessive pricing and the Phenytoin Case

In sharp contrast to the Paroxetine Case, the CAT in the Phenytoin Case refrained from making a preliminary reference in circumstances where it both critiqued and developed well-established CJEU jurisprudence concerning excessive pricing. For these purposes, it is useful to establish briefly the legal framework against which the CAT adopted its judgment.

Excessive pricing is a notoriously difficult infringement for competition authorities and the courts alike to grapple with, which perhaps explains why, until the recent surge of pharma cases, there has been a notable lack of proceedings for over a decade. However, it can clearly constitute an infringement of Article 102 TFEU following the CJEU’s seminal judgment in *United Brands*.² The CJEU held that: “*charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be an abuse.*”³

In *United Brands*, the CJEU framed the analysis of whether an undertaking has charged excessive prices primarily under the following two-limbed test:

1. Whether the difference between the costs actually incurred and the price actually charged is excessive (the “**excessiveness limb**”); and (if so)
2. Whether a price has been imposed which is either unfair in itself or when compared to competing products (the “**unfairness limb**”).⁴

The *United Brands* test, though difficult in practice for competition authorities to satisfy, has been followed in subsequent EU and UK decisions.⁵ However, in the Phenytoin Case, the CAT significantly advanced – and, arguably, diverged from – the CJEU’s judgment, maintaining that the *United Brands* test was “*deceptively simple*” and “*not easily applicable*”.⁶

We do not propose to set out the CAT’s refined test in its entirety here; however, the extension of the *United Brands* test may be summarised as follows:

1. Development of the excessiveness limb:
 - (a) Competition authorities must establish a benchmark price or range to allow examination of suitable comparator products. The CAT was critical of the CMA’s “*almost total reliance*” on the reasonable rate of return methodology – which led to a result that “*owes more to a theoretical concept of idealised or near perfect competition, than to the real world (where normal, effective competition is the most that should be expected)*”;⁷ and
 - (b) The differential between the benchmark price (or range) and the price charged in practice must be “*significant and persistent to be excessive*”. Such examination should utilise a “*weighted*” rather than binary approach to establish whether a comparator is helpful to the analysis, requiring a competition authority to assess relevant comparators and ascribe to them differing degrees of influence.
2. Elevation of a distinct ‘economic value limb’ to general application in all cases:
 - (a) Following satisfaction of the excessiveness limb and the unfairness limb, the competition authority must further assess the economic value of the product itself (by reference to a *qualitative* assessment of benefits to consumers), and:
 - (i) whether the price charged in practice bears no reasonable relation to it; and
 - (ii) whether the dominant undertaking is reaping trading benefits that it would not reap under conditions of normal and sufficiently effective competition.

1 Appeals from Commission Decision of 9 July 2014 – AT.39612 – Servier and others – Perindopril (Servier) C(2014) 4955 final.

2 Judgment of 14 February 1978 in *United Brands v Commission*, C-27/76, EU:C:1978:22.

3 *United Brands*, paragraphs 248 and 250.

4 *United Brands*, paragraph 252.

5 See, e.g. *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* [2002] CAT 1; Commission Decision 2001/892/EC of 25 July 2011 – COMP/36.915 – *Deutsche Post AG – Interception of cross-border mail* [2001] OJ L 331/40; Judgment of 11 December 2008, *Kanal 5 Ltd v STIM upa*, C-52/07, EU:C:2008:703; Judgment of 14 September 2017, *AKKA/LAA*, C-177/16, EU:C:2017:689.

6 Phenytoin Case, paragraph 289.

7 Phenytoin Case, paragraph 318.

In doing so the CAT recognised explicitly “*the difficulties inherent in seeking to formulate a generally applicable framework or test*” for excessive pricing.⁸ Moreover, the CAT acknowledged the CJEU’s observations in *United Brands* (and cases since) that there may be other methods of assessing excessive pricing under Article 102 TFEU. It is therefore somewhat surprising that the CAT went on to prescribe its own test (summarised above) as a precedent of *general* application, rather than being of limited application to the immediate facts or even the broader pharma sector.⁹ The CAT’s prescriptive approach would seem to undermine (at least implicitly) any latitude afforded to competition authorities by *United Brands* to establish alternative methods of assessing cases of excessive pricing.

It is perhaps for this reason that the Commission’s Director-General of Competition, Johannes Laitenberger, has already expressed concern at the CAT’s application of *United Brands*:

*“Looking at the very restrictive criteria applied by the CAT and the high barriers to finding an infringement they entail, further discussion will be needed as to whether competition authorities would actually be able to continue ensuring the effective enforcement of competition law in this area if they were to base themselves on a test that appears to go beyond the requirements of current [CJEU] case-law.”*¹⁰ (emphasis added)

Whilst the CAT is not under an obligation to make a preliminary reference, as noted above, it is subject to a clear legislative duty under s60 CA98 to ensure consistency between UK and EU competition law. In such circumstances, the CAT’s decision not to make a preliminary reference seems to be somewhat of a missed opportunity – not only with respect to its duty to ensure consistent interpretation, but also in light of the ongoing investigations in the pharma sector of both the CMA¹¹ and the Commission (the latter is currently investigating Aspen in respect of excessive pricing¹²). In the CAT’s own words:

“In a matter as important for government, for the public as patients and as taxpayers, as well as for the pharmaceutical industry itself, the law should be clear

*and any decisions made should be soundly based on proper evidence and analysis. It is important that there is a good legal foundation for any future action in this area.”*¹³ (emphasis added)

In our view, the Phenytoin Case represented a potential opportunity to promote convergence – rather than divergence – between the practice of the CMA and Commission (and indeed other EEA competition authorities) in respect of excessive pricing cases. The preliminary reference procedure offers a clear path for national judicial bodies to ensure a consistent interpretation of competition law across the EU.¹⁴ It now remains to be seen what approach the Commission will adopt in its excessive pricing investigation against Aspen, and how the CMA will reflect the CAT’s approach in its remaining pharma investigations.

Better late than never? Brexit and potential divergence of UK-EU competition law

At the time of writing, the proposed Withdrawal Agreement between the UK and the EU (the “**Draft Agreement**”) – and specifically the provisions regarding future judicial cooperation that do not concern citizen’s rights – remains to be agreed.¹⁵ Provisionally, the so-called ‘transition period’ which is governed by the Draft Agreement will expire on 31 December 2020.

The CJEU’s response to the CAT’s first ever preliminary reference in the Paroxetine Case will almost certainly be handed down post-UK withdrawal. The Draft Agreement does, however, currently make provision for the continued jurisdiction of the CJEU to provide rulings where the matter commenced before withdrawal (Article 82(2)). If this text is retained in the Withdrawal Agreement, the CAT would presumably consider itself bound to apply the correct interpretation of EU law as provided by the CJEU in the preliminary reference even though such judgment would be handed down after the UK’s withdrawal from the EU on 11pm, 29 March 2019 (“**Exit Day**”).¹⁶

8 Phenytoin Case, paragraph 442.

9 Phenytoin Case, paragraph 443.

10 Laitenberger, ‘Competition assessments and abuse of dominance: Remarks on the two themes of the EUI Competition Workshop, Florence 22 June 2018’ (22 June 2018) http://ec.europa.eu/competition/speeches/text/sp2018_11_en.pdf.

11 E.g. the CMA’s investigations into excessive pricing (and other infringements) against: (1) Actavis (March 2017); (2) Aspen (October 2017); (3) Concordia (November 2017).

12 Commission, Case 40394 Aspen (May 2017).

13 Phenytoin Case, paragraph 5.

14 A recent noteworthy example is the Frankfurt Higher Regional Court’s preliminary reference in the *Coty* case, where the CJEU’s judgment has drawn together diverging national practices with regard to online platform sales bans in selective distribution systems. Judgment of 6 December 2017, *Coty Germany GMBH v Parfümerie Akzente GmbH*, C-230/16, EU:C:2017:941.

15 Commission, ‘Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community’ (19 March 2018) https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf.

16 s20(1) European Union (Withdrawal) Act 2018.

On the other hand, the Phenytoin Case presents an unusual dilemma: the CAT has remitted the CMA's decision to be retaken by the CMA in line with the CAT's revised excessive pricing test. However, at the time of writing, all parties in the case are reportedly seeking an appeal of the judgment directly to the Court of Appeal of England and Wales (the "CA") – having been refused leave to appeal by the CAT.

This presents a number of potential tensions regarding the future interaction of UK and EU competition law:

1. If the Draft Agreement is not entered into before Exit Day, there will be no legal basis for the CJEU's jurisdiction to give preliminary rulings on requests from UK courts and tribunals. The CJEU's response in the Paroxetine Case will, in such circumstances, be of no authoritative value to the CAT.
2. It is unclear when the Phenytoin Case would be heard before the CA (if at all); however, any appeal would likely be heard following Exit Day, so the CA could not make a preliminary reference to the CJEU, based upon the current position under UK statute.¹⁷ This is in contrast with the position under the Draft Agreement, which provides for until the end of the transition period to make a preliminary reference.¹⁸
3. It is also unclear at what stage the Government intends to amend s60 CA98, the timing of which would be determinative as to whether the CA (and, potentially, the UK Supreme Court) would be bound to review the Phenytoin Case consistently with EU competition law and practice.

¹⁷ s1 European Union (Withdrawal) Act 2018 repeals the European Communities Act 1972 on Exit Day. Further to s6(1)(b) European Union (Withdrawal) Act 2018, no matters can be referred to the European Court on or after Exit Day.

¹⁸ Draft Agreement, Article 83(2).

To what extent, therefore, can it be said that the UK and EU competition law regimes are *already* diverging? The CAT's potentially 'mixed messages' regarding its use of the preliminary reference procedure are revealing – though the acid test of whether the CAT adhered to s60 CA98 in the Phenytoin Case could yet be decided by the CA on appeal. The CAT's first preliminary reference to ensure consistent and correct interpretation of EU law in the Paroxetine Case will undoubtedly aid interpretation of a highly complex area of competition law for the pharma sector. However, in our view that has been overshadowed by the CAT's unilateral reshaping of the excessive pricing landscape in the Phenytoin Case.

The irony now apparent is that whilst we wrestle with the extent and impact of divergence in EU-UK competition law *post*-Brexit, the CAT may already have taken its first step towards autonomy *pre*-Brexit.

If you have any questions or comments in relation to the above, please contact Ian McDonald, Warsha Kalé, Catherina Yurchyshyn or James Harrison, or your usual Mayer Brown contact.

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