The CAT also criticised the CMA for not sufficiently considering economic value, which is after all the point of the NHS at considerably higher prices (>25%) than the price of the capsules – a price set by the Department of Justice (2002) that a price can be unreasonably excessive when there is no reasonable relation between the economic value of the product and the price.
The CAT’s conclusions

The CAT upheld the CMA’s findings as to market definition and dominance. Specifically, the CAT accepted that the relevant markets were defined as (i) the manufacture of Pfizer-manufactured phenytoin sodium capsules distributed in the UK for Pfizer, and (ii) the distribution of Pfizer-manufactured phenytoin sodium capsules in the UK for Pfizer. The CAT agreed with the CMA that phenytoin sodium capsules from other manufacturers did not meet a sufficient competitive condition as Pfizer and Flynn initially proposed to be included in the relevant market. The CAT also agreed that there was no meaningful competition between tablets and capsules (that is, the products of Pfizer and Flynn), and that there was no meaningful competition between capsules and tablets (that is, the products of Pfizer and Flynn). This decision was based on the CAT’s finding that there was no meaningful competition between capsules and tablets. Though capsules were also distinguished from tablets (for example, in terms of customer convenience), the CAT concluded that that competition was not significant and hence could not result in the lowering of prices.

The problems of the CMA’s decision were the fundamental legal errors in the above parts of the CAT’s words.

"The CMA’s conclusions as to an abuse of dominance were in error. The CMA did not sufficiently apply the legal test for finding that prices were unfair. It did not appropriately consider what was the right economic value for the product at issue, and it did not take sufficient account of the situation of other, comparable products, in particular of the phenytoin sodium tablets. This means that the CMA’s findings on abuse of dominance in this case cannot be upheld.”

The CAT had the power to replace the CAT’s conclusions on abuse with its own judgment, but it chose not to, because the failure of the CMA to investigate the relevant facts made it impossible for the CAT to take a decision. Hence the CAT expressly declined to send the case back to the CMA for further consideration in line with the judgment. Before making a final order to this effect, the CAT invited the parties to present their views as to whether to remit the matter to the CMA and the scope of any such remittal.

The broader principle: unfair pricing cases should be in competition law

The CAT’s judgment underscores that “cases of pure unfair pricing are rare in competition law” and that “in past price regulation through the medium of competition law presents many problems”. Judges should therefore be “very wary of casting themselves in the role of price regulators” that carry the primary responsibility for price regulation. This follows similar warnings contained in the Opinion of Advocate General Wahl in the AKKA/LAA case.

The judgment (together with Advocate General Wahl’s Opinion) should send a warning signal to the European and other competition authorities which have recently focussed on excessive pricing cases. For example, last year the Spanish competition authority fining Aspen EUR 5.2 million in 2016 for the pricing of the same drugs. Similar cases were also pursued in South Africa.

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