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United Kingdom: CMA imposes penalty for late response to notice to provide information

Matthew O'Regan (St Johns Chambers, United Kingdom) · Wednesday, May 4th, 2016

In all competition investigations, it is inevitable that the parties under investigation, and often also third parties, will receive numerous information requests and demands to produce documents and provide information. Such requests may be either formal or informal in nature. These are often burdensome, requiring the provision of substantial information and documentation in a short space of time.

In a recent decision, concerning an on-going investigation under the Competition Act 1998 ("**CA 1998**") into a suspected abuse of a dominant position, the Competition and Markets Authority ("**CMA**") has imposed a penalty for failure to respond fully to a statutory notice to provide information within the time period allowed by it. This appears to be the first time that the CMA has imposed such a fine, using enhanced enforcement powers given to it in 2013.

Background

The CMA is presently investigating Pfizer and Flynn Pharma under Article 102 TFEU and Chapter II of the CA 1998. Pfizer manufactures phenytoin sodium capsules, an anti-epilepsy drug. During 2012, Pfizer sold the UK distribution rights for phenytoin sodium capsules to Flynn, a distributor of pharmaceutical products. Pfizer continues to manufacture the capsules and sells them to Flynn, which distributes them to pharmacies and hospitals.

On 6 August 2015, the CMA issued a Statement of Objections ("**S/O**") to Pfizer and Flynn alleging that they had abused a dominant position by charging excessive prices for phenytoin sodium capsules, which were many times higher than Pfizer's historic prices before 2012.

An oral hearing took place on 21 January 2016. During the hearing, Pfizer made an assertion that, "*for between 2 and 5 per cent of patients*", phenytoin sodium capsules and tablets can be used to treat the same patient. Subsequently, on 11 February 2016, the CMA sent Pfizer a formal notice under s.26 of the CA 1998 requiring it to provide further information relating to a number of statements made in its written and oral responses to the S/O. This included a question (Question 13) requiring Pfizer to provide all evidence in support of this statement. Pfizer had until 5 p.m. on 26 February 2016 to respond. It did not respond to Question 13 until it sent an email on 2 March 2016, in which it stated that "*the figure proffered […] previously by Pfizer (2-5%) was an internal estimate provided by the business. There is no additional data.*"

CMA powers to require the provision of information

Under s.26(1) of the 1998 Act, the CMA may require "*any person to produce to it a specified document, or to provide it with specified information, which it considers relates to any matter relevant to [an] investigation.*" This power shall be exercised by written notice: s.26(2). The notice (known as a 'section 26 notice') will specify a date by which the document shall be produced or the information shall be provided: s.26(5)(a).

If the recipient of a section 26 notice fails, whether intentionally or negligently and without reasonable excuse, to comply with its requirements, the CMA may impose a penalty: s.40A. This power was inserted in 2013 by s.40 of the Enterprise and Regulatory Reform Act 2013. The maximum penalties are £ 30,000 (fixed amount) and/or £ 15,000 (daily rate): The Competition and Markets Authority (Penalties) Order 2014. The CMA may impose a penalty that is either a fixed amount, calculated by reference to a daily rate or a combination of the two, up to the maximum for each type of penalty :s.40A(2) and (3).

The CMA has published guidance on the imposition of penalties, *Administrative Penalties: Statement of Policy on the CMA's Approach* (2014). Amongst the key factors to be taken into in setting the amount of any penalty are ensuring: that decisions are taken in accordance with statutory or other timetabled; that decisions are based on information that is accurate and complete; information is gathered as quickly as possible; and deterrence of future non-compliance, including by others. The Guidance states that "*the CMA will take failures to comply very seriously and will not hesitate to impose a penalty where appropriate*" (para. 3.3).

In relation to the concept of 'reasonable excuse', the CMA's Guidance states that "the circumstances that constitute a reasonable excuse are not fixed" and will be assessed on a case-by-case basis. It suggests that such an event should be "*a significant and genuinely unforeseeable or unusual event and/or an event beyond [a party's] control*" (para. 4.4). The example of a major IT failure is given. The CMA warns companies to inform, as early as possible, the CMA of any difficulties in responding (para. 4.6).

The CMA's decision to impose a penalty

The CMA found that Pfizer had intentionally and flagrantly failed to respond to Question 13 within the 15 day time limit and had done so without reasonable excuse. Whilst Pfizer had requested an extension of time to answer Question 13, it had not explained why it needed more time to respond, merely that it was "*unlikely to be able to do so before the deadline*". (By contrast, the CMA had granted an extension of time to answer other questions, as Pfizer had explained why it required more time to answer these.) Late on 26 February 2016 and shortly before expiry of the deadline for responding, Pfizer informed the CMA, without further explanation, that "*it needed more time to verify underlying data*" relating to Question 13. In particular, there was no explanation as to what data required verification, why such verification work had not already been done or why verification was necessary at all. Pfizer had therefore failed to show why it could not have answered Question 13 in the 15 day period allowed by the CMA, even when the CMA asked it to explain why it could not do so.

The CMA placed importance on Question 13 merely requiring information to substantiate an oral representation contained in a prepared presentation made by Pfizer in the oral hearing. This information should have been in Pfizer's possession. It should have known that it was an internal

business estimate and that there was no additional supporting data. The one line answer finally provided was "simple" and contained in a very short email; Pfizer had failed to explain why this answer could not have been provided within the deadline. The absence of any underlying data (which Pfizer had asserted required verification in order to provide "*as full an answer as possible*") appears also to have influenced the CMA.

The CMA imposed a penalty of £ 10,000. This reflected that the delay had caused some (although not significant) prejudice to its investigation and was necessary to achieve deterrence and to incentivise compliance with the CMA's investigatory powers, both as regards Pfizer specifically and more generally.

Commentary

This is the first time that the CMA has imposed a penalty for failure to respond to a formal notice to produce documents and/or provide information, whether under s.26 of the CA 1998 or under equivalent provisions in ss.109 and 174 of the Enterprise Act 2002, which apply to mergers and markets investigations (both of which have tight statutory deadlines). Whilst, in the overall context of a long-running investigation and the fact that the CMA had given Pfizer an extension of time to answer other questions contained in the section 26 notice (which had not expired when Pfizer belatedly answered Question 13), the imposition of a penalty (even a modest one), may seem harsh, it is a clear warning to companies that they must comply with formal notices served by the CMA.

It is also likely that the CMA will increasingly use formal statutory notices (such as section 26 notices), rather than informal information requests, to obtain information where there is a risk of non-compliance prejudicing the conduct of and timetables for its cartel, dominance, antitrust, merger and market investigations.

The following learning points should be borne in mind, to avoid the imposition of penalties:

• facts contained in written submissions and oral representations should be both verified carefully and substantiated: if they are not substantiated contemporaneously, the CMA will doubtless routinely require substantiation

• deadlines set by the CMA should be respected and complied with

• if there is any doubt as to what documentation or information the CMA requires, early clarification should be sought from the CMA

• if there is likely to be any difficulty in meeting a deadline, the CMA should be informed as early as possible and not at the last minute

• if there are difficulties in meeting a deadline, the CMA should be told what these difficulties are and they should be substantiated: if they are not, an extension will be refused

The CMA has indicated that it will continue to be "*pragmatic and flexible in its approach to deadlines*", provided that good reasons are given for an extension. However, companies should not expect (as has often been the case in the past) that extensions will be routinely agreed by the CMA. As even short extensions can have a cumulative adverse impact on an investigation, the CMA will likely grant extensions of time only where good reason is give to justify this.

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