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A Hard Pill to Swallow

Markus Röhrig and Laura Stoicescu report on the latest developments from the European capital of competition law.

In line with the spirit of the time, it seems that the European Commission has set its sights on the pills industry. The legit one, that is. Moving away from its usual take on Article 102 TFEU cases, the Commission is not only targeting the pharma industry with cartel investigations, but also ramping up its antitrust scrutiny. It seems that the Covid honeymoon is over. So, can we expect an enforcement overdose in the coming months and years? Let's discuss. .

An offer one cannot refuse

The run-of-the-mill pharma cases so far were the pay-for-delay sagas - where originator and generic companies colluded to keep generics off the market and share the originator's profits from doing so. The poster case *Servier* (case COMP/39.612) was an artfully crafted case blending an Article 102 TFEU infringement (shutting out a competing technology and buying out competitors that had developed cheaper medicines, to avoid competing on their own merits) with several Article 101 TFEU infringements (each of the settlements between Servier and its generic competitors).

But even so, there is still space to explore. The latest twist in the *Teva* case, for instance, occurred in January 2024, with Teva appealing to the Court of Justice (case C-2/24 P) the General Court judgement concerning the Commission fine it had received for striking side-deals with Cephalon to provide Teva with a net gain for dropping a generic challenge to Cephalon's blockbuster sleeping-disorder treatment. More precisely, Teva is challenging the application of the legal test whereby the Commission should have assessed whether there was a plausible alternative explanation for the contractual arrangement. The Commission has won before the General Court, it remains to be seen what the Court of Justice will think about the case.

Cartels all the way

Cartels in the pharma industry were not exactly the Commission's biggest fish to fry in the last years. Actually, the relationship between the enforcer and the industry hit an all-time high in April 2020, when the Commission issued its comfort letter regarding cooperation aiming at responding effectively to shortages of medicines in the EU as a result of the Covid outbreak.

However, the tide seems to have turned in the aftermath of the pandemic, including for the pharma industry. For instance, October 2023 saw the first time that a cartel in the pharma industry was sanctioned by the Commission, and in relation to an active pharma ingredient (case AT.40636). More precisely, the Commission fined six companies for having coordinated and agreed to fix the minimum sales price to customers of an input material used in the abdominal antispasmodic drug Buscopan and its generic versions.

Also, in October 2023 and respectively March 2024, clinical laboratory Synlab was investigated in Portugal and was raided by French antitrust enforcers regarding anticompetitive behavior. The Portuguese investigation is focusing on illegal exchanges of sensitive information when negotiating with public health authorities for prices of Covid test kits, as well as no-poaching agreements regarding their workers.

Lie to me

The Commission's new focus on cartels in the pharma industry is not the only new blip on the radar. The enforcer took things one step further and started looking into potentially abusive disparagement – a phenomenon apparently on the rise.

The issue has been tentatively tackled by a French court in 2023, which criticized a 2020 landmark decision from the French competition authority against Roche and Novartis regarding their criticizing their rivals. Interestingly, the French judgment analyzes the correct enforcement of the concept of abuse of dominance through the lens of the limits of the freedom of expression.

On the EU level, since sectoral enforcement concerning abusive disparagement has not exactly worked, the Commission is now considering using the antitrust toolbox via Article 102 TFEU but aiming at more than pay-for-delay. So far, it has already charged Teva with, amongst other things, communicating doubts regarding the safety of competitors' drugs. In 2022, it also opened an investigation into Vifor Pharma for disparaging a rival's iron treatment, and in which communication commitments are currently being discussed (case AT.40577). An ongoing informal inquiry into Edwards Lifesciences might also involve allegations of disparagement.

Since abusive disparagement is new territory, the Commission is trying to calm the markets by promising guidance from an antitrust perspective in the near future.

No pain, no game

Also breaking new ground and picking up on its theory of harm developed during the *Dow / DuPont* merger (case M.7932), the Commission opened an investigation in the field of veterinary-use painkillers regarding an abuse of dominant position through discontinuing R&D of a pipeline drug.

More precisely, in 2017 Zoetis purchased Nexvet Biopharma, which included the acquisition of a pipeline product called ranevetmab, for treating pain in dogs with osteoarthritis. Zoetis said at the time that, if approved, this would become the industry's first injection-based pain treatment for the disease. However, after acquiring Nexvet, Zoetis developed ranevetmab for two years but then terminated it, focusing its attention instead on a separate drug that ended up as Librela, now its market-leading treatment for canine osteoarthritis pain. The discontinued drug was due to be commercialized exclusively in the EU by a third company.

The Commission is concerned that Zoetis may have engaged in exclusionary behavior by terminating the development of this alternative pipeline product and refusing to transfer this pipeline medicine to the third party which had exclusive commercialization rights in the EU (case AT.40734). It is the first time the Commission looks into suspicions around blocking a pipeline product set to be commercialized by another company.

No news on the western front?

Looking back, it seems that the recent investigations can hardly be considered an unexpected development.

For example, in January 2024, the Commission published its second four-year report concerning the enforcement of EU antitrust and merger rules by the Commission and the national competition authorities in the pharma sector for 2018-2022.

The latest report confirms that (especially during the pandemic) it was the active enforcement of antitrust and merger rules that kept the prices down and the medicines innovative. Overall, since 2018, the Commission and the national competition authorities adopted 26 decisions in the field of anti-competitive agreements and cases of abuse of dominant position, imposing fines of over EUR 780 million. The anti-competitive practices concerned harmed innovation and prices and included: the misuse of the patent system and abusive litigation to prolong patent exclusivity, the disparagement of a competitor's products to protect the dominant company's sales, pay-for-delay agreements, and excessive prices charged for off-patent medicines.

In terms of mergers, the Commission reviewed more than 30 mergers in the pharma sector and found concerns in five cases, where mergers could have led to price increases, patients and national health systems being deprived of some medicines, or a reduction in innovative efforts to develop new medicines. The Commission cleared four of these mergers only after the companies offered remedies to address the Commission's concerns and preserve the existing degree of competition. One case was abandoned after the Commission raised initial competition concerns.

Health is wealth

While the number of live cases is certainly going to keep us entertained for the coming months, it is the newly launched concepts that will be the talk of the town. The Commission's loose handling of the abusive disparagement concept and its alleged propensity to extend it to other medical fields, for instance, will likely see it on a collision course with the European Court of Human Rights, sooner or later, concerning the limits of the freedom of expression. And the Commission's take on the *Zoetis* case will see the industry fighting back for control over its R&D decision-making process.

Until next time, don't forget to take your multi-vitamins and to follow us on LinkedIn for your favorite EU Competition Law topics!

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