

Competition in the Pharmaceutical Sector

Sydney, 23-25 May 2017



In May 2017, the OECD/KPC annual sector workshop took place in Sydney, Australia. This year's event was devoted to the application of competition policy and rules to a very important sector in most societies: the pharma sector and where the role of competition agencies in many jurisdictions has increased in the last few years.

This was an event co-hosted and co-organised with the ACCC and its CLIP programme and was represented at top level by Mr. Roger Featherstone, Commissioner and Mr. Marcus Bezzi, Executive General Manager, Competition Enforcement of the ACCC and the number of the ACCC staff, as both presenters and attendees.

The event focused not only on enforcement actions but also undertook a wider view, examining the intersection between competition policy and the role of R&D and patents and other regulations. One of the initial sessions focused on the importance of Intellectual Property (IP) in these markets, as without IP margins on pharmaceutical products and the incentives for R&D investment would decline with imitators free riding on innovators' R&D efforts, leading to less investment and less new drugs over time. This is particularly relevant nowadays where the development of new pharmaceuticals is an increasingly lengthy and costly business fraught with significant risk – after years of testing and millions of dollars the vast majority of drugs are



found not to be safe or effective for human use and therefore never see the light of day in the marketplace. More generally, this is a sector where regulation is crucial to ensure that the market failures of patent induced market power, information asymmetry, and market accessibility are tackled, whilst at the same time competition plays a vital role as it is in the words of the World Health Organization “in the last instance the key tool to drive prices down and improve access to medicines.”¹

For this workshop a wide array of experienced speakers with extensive experience in the sector were made available by the authorities of Korea (KFTC), EU Commission and the ACCC as well as two speakers from the OECD.

The event started with an examination by Mr. Ruben Maximiano of the OECD of main features of the pharma sector and of the main competition issues found across jurisdictions. This was followed by a session lead by Mr. Pedro Caro Sousa on the role of IP and antitrust in Pharma, and of their interplay and compatibility, namely with the role of competition to place limits on the permissible scope of exclusion based on IP. Mr. Caro Sousa also identified the main competition infringements that include attempts to manipulate the IP and the regulatory regime.

The afternoon sessions were devoted to analyzing more specific issues when dealing with enforcement cases, starting with market definition, in a session presented by Mr. Ruben Maximiano, that by examining a number of cases in a number

of different jurisdictions identified some common threads and principles that underwrite the identification of relevant markets in the pharmaceutical sector. The remaining sessions all dealt with anti-competitive agreements. First up was Mr. Paul Csiszar, Director at the European Commission, that shared the experience of the European Union in a session on horizontal agreements in the sector, including the sector inquiry undertaken in 2009 and then the recent pay for delay cases of Lundbeck, Fentanyl, Servier and Cephalon. Mr. Pedro Caro Sousa continued the theme of anti-competitive agreements by looking in depth at a number of cases of cartels and bid rigging cases in pharma that affected the public purse with the increase of the price of medicines sold to public hospitals. Ms. Sunjoeng Lim, Deputy Director of the KFTC then presented in detail the reverse payment agreement case between GSK and Dong-a Pharm in Korea. The final case study of the day was brought by Mr. Frans Adiatma Senior investigator of the KPPU on the Amlodipine Therapy case where two companies shared information about price and production planning and thus reduced or removed risks of competition between them.

The second day was dedicated to abuse of dominance cases, first by Mr. Csiszar examining the main aspects of abuse of dominance cases in pharma in the EU, and then analyzing the Servier and Astra Zeneca cases. The ACCC then presented on a case where it was alleged that Pfizer had a strategy to bundle offers prior to the expiry of the its patent over atorvastatin (Lipitor) – a cholesterol lowering product in the statin family of molecules, and thus attempt to delay the exposure of competition before suppliers of generic pharmaceuticals were able to enter

1. WHO “Public health, innovation and intellectual property rights”, Report of the Commission on Intellectual Property Rights, Innovation and Public Health, Geneva, April 2006.



* Commissioner Roger Featherstone leading a hypothetical case

the market. The following session was dedicated to an issue that has been again making its resurgence in certain jurisdictions and that is of great relevance to Asian jurisdictions: the issue of excessive pricing in pharmaceutical products. This session led by Mr. Caro Sousa looked at the difficulties in reaching a finding of prices being excessive and thus constituting an abuse of dominance, and then analysed some cases which had some particularities that allowed the UK (Pfizer and Flynn case) and Italy (Aspen case) in 2016 reach such findings. Two cases in the pharma sector were then shared by Mrs. Wu of the NDRC (allopurinol cartel) and Ms. Feiyini of SAIC (hospital and pharmacy case), respectively.

The day was closed with a Hypothetical case prepared by the ACCC and presented by Mr. Roger Featherstone, Commissioner of the ACCC and worked through a number of smaller teams.

The last day of the workshop served to set out the merger control issues in the Pharma sector, with presentations from Mr. Ruben Maximiano of the OECD as well as Mr. Stewart McKechnie, Assistant Director of the Mergers Investigations Branch of the ACCC. Mr. Tsai from Chinese Taipei then presented a merger

case that was analysed between Pfizer and Allergan and that involved the analysis of the miotics and anti-glaucoma markets. Finally Ms. Candice Lee from the Competition Commission of Singapore presented the GSK Trading services acquisition of UCB, which had anti-histamines, anti-epileptics as some of the areas of overlap requiring closer analysis.

The workshop's final session started with Mr. Ruben Maximiano making the case for the importance of the role that competition advocacy by the competition authority can play both in the design of regulation as in the public procurement of medicines. He was seconded by a presentation by Ms. Dian Retno Sari on the role that the KPPU has played in strengthening the role of the pharmacist with a recent policy recommendation it issued to the Ministry of Health in Indonesia. Mr. Marcus Bezzi also shared the experience in advocacy in the context of the sector in Australia and the role that the ACCC has had in shaping regulation.

This was an event that allowed participants to explore in depth a sector that has many specificities can be a rather daunting one for newer agencies in particular. Drawing upon some very experienced speakers it was possible to show that, where relevant, this is a sector where competition authorities may intervene effectively.

