



Flynn Pharma and Pfizer: the IP and competition aspects of Phenytoin Sodium Flynn

Speakers: James Killick, Partner at White and Case (Brussels)
Michael Silverleaf QC, Barrister at 11 South Square

Date: 7 July 2017 at 1pm

Venue: Arnold & Porter Kaye Scholer LLP

The purpose of the seminar was to learn more about the record fine imposed by the CMA on Flynn Pharma and Pfizer for charging excessive prices to the NHS. Then, we learnt about the related parallel import case concerning the use of Flynn's trade mark on the drug produced by Pfizer.

Mr James Killick's Presentation

JK introduced the case, which resulted in a £90 million fine imposed by the CMA. Pure excessive pricing cases have been historically rare, with competition authorities reluctant to get involved. However, a recent shift in attitude has seen cases in the UK and Italy as well as the opening of an investigation by the EU. JK set out the legal test for excessive pricing, as well as the facts and theories underlying the CMA's investigation. JK also discussed the policy considerations around excessive pricing cases and whether antitrust authorities risk becoming price regulators. JK noted that a recently opened South African investigation relates to innovative drugs, rather than off-patent drugs as was the case in *Flynn/Pfizer* and in the Italian case. In JK's view, this is a worrying trend.

Michael Silverleaf QC's Presentation

MSQC introduced the Flynn parallel import case, noting that this case was separate from the competition investigation; the only link was that the increase in price of Flynn's drug gave DrugsRUs an attractive opportunity to import the drug. MSQC identified the rules and jurisprudence on parallel importation, including the *BMS* conditions. MSQC went through the facts of the case, highlighting the unique facts that relate to the intervention by the MHRA (classification and branding/naming of the product) and the relationship between Pfizer and Flynn. It was ultimately held, in first instance, and on appeal, that 'Flynn' was not a reference to the characteristics of the goods but that it was a brand. Flynn could therefore prevent the parallel importation of DrugsRUs's drug. In the discussion, MSQC opined that the court had effectively inverted the reasoning in *Ideal Standards* by applying it to *Flynn/DrugsRUs*. He concluded that the sets of facts are so unique that the case is not likely to be a predictor of other cases.

Note

Both speakers used detailed slides, which should be used for further analysis of each presentation.