

## International Developments in Healthcare Antitrust Litigation

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This article provides an overview of several recent developments in healthcare antitrust litigation in the United Kingdom, the European Union (EU), Brazil, and Japan.

**United Kingdom:** *The CMA considers whether separate agreements among pharmaceutical companies formed an overarching anticompetitive scheme.*

In the Spring of 2021, the Competition and Markets Authority (CMA) expects to issue a final decision on its case alleging that four pharmaceutical companies agreed not to compete to supply Prochlorperazine, an anti-nausea drug, in the United Kingdom.<sup>1</sup> The CMA's decision will be based only on the UK Competition Act 1998 because, following the end of the EU Exit Transition Period on December 31, 2020, EU law no longer applies to this case.<sup>2</sup>

On May 23, 2019, the CMA issued its statement of objections, making the provisional finding that Alliance Pharmaceuticals, Focus, Lexon, and Medreich agreed to a scheme in which Lexon and Medreich would not launch their jointly-developed Prochlorperazine product in exchange for receiving a share of the profits from Focus's on-market Prochlorperazine product, exclusively supplied by Alliance.<sup>3</sup> According to the CMA, the companies carried out their overarching scheme through two separate agreements: (i) an exclusive supply agreement between Alliance and Focus; and (ii) an agreement between Focus, Lexon, and Medreich to share profits.<sup>4</sup> The CMA alleged that Medreich did not launch Prochlorperazine until November 2017—a month after CMA opened its investigation—even though it had a license to supply Prochlorperazine in January 2014.<sup>5</sup> The provisional finding alleged that each of the separate agreements and the overarching agreement were anticompetitive.

While the CMA expects to make a decision on the overarching scheme soon, on January 22, 2021, it closed its investigation—based on administrative priorities grounds—into the individual agreements allegedly comprising the overarching scheme.

**European Union:** *The CJEU considers restrictions on the online sale of medicinal products between Member States.*

On October 1, 2020, the Court of Justice of the European Union (CJEU) considered whether a Member State can limit online advertising by pharmacists established in another Member State under EU e-Commerce laws.<sup>6</sup> A group representing French pharmacists alleged that a Dutch mail-order pharmacy (Shop-Apotheka), which targeted French consumers, engaged in unfair competition by unduly obtaining an

<sup>1</sup> *Pharmaceuticals: Suspected Anti-Competitive Agreements*, COMPETITION & MKTS. AUTH., available at <https://www.gov.uk/cma-cases/pharmaceuticals-suspected-anti-competitive-agreements#statement-of-objections>.

<sup>2</sup> *Id.*

<sup>3</sup> Press Release, Competition & Mkts. Auth., Drug Firms Accused of Illegal Market Sharing Over Anti-Nausea Tablets (May 23, 2019), available at <https://www.gov.uk/government/news/drug-firms-accused-of-illegal-market-sharing-over-anti-nausea-tablets>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*; *Pharmaceuticals*, *supra* note 1.

<sup>6</sup> Case C-649/18, A v. Daniel B., <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62018CJ0649> (Oct. 1, 2020) Eur. Ct. Justice).

advantage from failing to comply with French regulations on advertising medicines.<sup>7</sup> The CJEU case was initiated through a preliminary ruling request made by the Court of Appeal of Paris to the CJEU as part of the Court of Appeal's consideration of an appeal from Shop Apotheke challenging a decision of the Commercial Court of Paris that had ruled in favor of the French pharmacists. The CJEU maintained that an online service relating to medicinal products, such as that carried out by Shop-Apotheke, constitutes an information society service.<sup>8</sup> Therefore, to be compatible with EU law, a Member State will only be permitted to restrict the freedom to provide such services from another Member State if such restrictions are necessary and proportionate to achieve a public health objective.<sup>9</sup> The CJEU considered whether four of France's national restrictions were justified under this standard.

First, the CJEU found that an absolute prohibition of any advertising used by health professionals exceeds what is necessary to protect public health interests and is not justified.<sup>10</sup> Second, it determined that a prohibition on offering discounts is permitted if it is sufficiently circumscribed and targeted solely at medicinal products because such a prohibition serves to prevent the excessive consumption of medicines.<sup>11</sup> Third, the CJEU found that Member States can require the pharmacies of another Member State to include a health questionnaire when ordering medicinal products online because such a provision helps ensure the most appropriate dispensing of those products.<sup>12</sup> Finally, the CJEU determined that Member States cannot prohibit mail-order pharmacies established in another Member State from using paid referencing on search engines and price comparison websites to promote their service.<sup>13</sup> The French government argued that this rule is justified because such listings are likely to concentrate the marketing of medicinal products in the hands of large pharmacies thereby disrupting the balance of distribution of pharmacies throughout the national territory; however, without specific evidence to support this assertion, the CJEU concluded that this prohibition exceeds what is necessary to achieve the pursued objective.<sup>14</sup>

**Brazil:** *Companies should be wary of increased price gouging investigations.*

Before the wake of COVID-19, price gouging was rarely investigated by Brazil's antitrust authority, Conselho Administrativo de Defesa Econômica (CADE). Because risks of arbitrary price increases are elevated during health and humanitarian crises, CADE shifted its focus to preventing such conduct. In March 2020, an investigation into whether companies in the healthcare sector were charging excessive prices for laboratory tests, alcohol-based hand sanitizers and surgical masks became "CADE's number-one priority."<sup>15</sup> CADE requested invoices from at least 80 hospitals, health insurance companies, pharmacy chains, suppliers and manufacturers of surgical masks, hand sanitizers, and medicines used to treat the symptoms of COVID-19.<sup>16</sup> With pricing information from November 2019 through July 2020, CADE

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<sup>7</sup> *Id.* ¶ 22.

<sup>8</sup> *Id.* ¶ 33.

<sup>9</sup> *Id.* ¶¶ 60, 63.

<sup>10</sup> *Id.* ¶ 72.

<sup>11</sup> *Id.* ¶¶ 81, 114.

<sup>12</sup> *Id.* ¶¶ 96, 102.

<sup>13</sup> *Id.* ¶¶ 114-15.

<sup>14</sup> *Id.* ¶¶ 107, 112.

<sup>15</sup> Ana Paula, Candil, *Pharmaceutical, Medical Industry Scrutinized for Price Gouging in Brazil after Covid-19's Spread*, MLEX (Mar. 18, 2020), available at <https://mlexmarketinsight.com/insights-center/editors-picks/area-of-expertise/antitrust/pharmaceutical-medical-industry-scrutinized-for-price-gouging-in-brazil-after-covid-19s-spread>.

<sup>16</sup> Press Release, CADE, CADE Started Collecting Data to Support Investigation in the Medical-Pharmaceutical Sector (May 5, 2020), available at <http://en.cade.gov.br/cade-started-collecting-data-to-support-investigation-in-the-medical-pharmaceutical-sector>.

assessed whether sharp increases in prices and profit margins were indicative of illegal activity.<sup>17</sup> Violations could lead to criminal penalties. In January 2021, Brazilian President Jair Bolsonaro accused syringe manufacturers of price gouging after the government expressed an interest in buying syringes, forcing the government to suspend buying until prices normalize.<sup>18</sup> While an investigation has not yet been opened in response to President Bolsonaro's accusations, his words reflect the government's heightened scrutiny of an issue that was previously a "dormant theme in Brazilian competition policy."<sup>19</sup>

**Japan:** *JFTC actively pursues monetary fines and criminal prosecution against pharmaceutical companies for competition law violations.*

Competition law violations in Japan may give rise to administrative fines or criminal penalties. In March 2020, the Japan Fair Trade Commission (JFTC) ordered Torii Pharmaceutical Co., Ltd. (Torii) to pay JPY 2.87 million (approximately US \$27,000) for violating the Antimonopoly Act.<sup>20</sup> The JFTC determined that Torii and Nippon Chemiphar Co., Ltd. agreed to fix the wholesale price of CALVAN tablets, a branded pharmaceutical that treats high blood pressure.<sup>21</sup>

If the JFTC determines that a case is particularly egregious, it may lead to criminal prosecutions. For example, the JFTC found that three pharmaceutical wholesalers engaged in bid-rigging for contracts at 57 hospitals operated by the Japan Community Health Care Organization, in violation of the Antimonopoly Act.<sup>22</sup> As a result, in December 2020, the JFTC filed a criminal accusation with the Public Prosecutor-General against the three companies and seven individuals.<sup>23</sup> Criminal penalties may result in a fine of up to JPY 500 million (approximately US \$4.8 million) for each company or imprisonment of up to five years and a fine of up to JPY 5 million (approximately US \$47,000) for each individual.<sup>24</sup>



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<sup>17</sup> *Id.*

<sup>18</sup> *Brazil's Bolsonaro Accuses Syringe Makers of COVID Price Gouging*, ALJAZEERA (Jan. 6, 2021), available at <https://www.aljazeera.com/economy/2021/1/6/brazils-bolsonaro-accuses-syringe-makers-of-covid-price-gouging>.

<sup>19</sup> Carlos Ragazzo & Joao Marcelo Lima, *Price Gouging Under Brazilian Competition Law: Better Left Dormant?*, CPI ANTITRUST CHRON. (Sep. 22, 2020), available at <https://www.competitionpolicyinternational.com/price-gouging-under-brazilian-competition-law-better-left-dormant/>.

<sup>20</sup> Press Release, Japan Fair Trade Comm'n, The JFTC Issued Cease and Desist Order and Surcharge Payment Order to Torii Pharmaceutical Co., Ltd (Mar. 5, 2020), available at <https://www.jftc.go.jp/en/pressreleases/yearly-2020/March/200305.pdf>.

<sup>21</sup> *Id.*

<sup>22</sup> Press Release, Japan Fair Trade Comm'n, The JFTC's Criminal Accusation Against Pharmaceutical Wholesalers Over Coordination of Bids by Japan Community Health Care Organization (Dec. 9, 2020), available at <https://www.jftc.go.jp/en/pressreleases/yearly-2020/December/201209.pdf>.

<sup>23</sup> *Id.*

<sup>24</sup> *Cartels 2020 Japan*, GLOB. LEGAL INSIGHTS, available at <https://www.globallegalinsights.com/practice-areas/cartels-laws-and-regulations/japan>.