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Laga Newsflash

EU report reinforces competition law enforcement in the pharmaceutical industry

Ten years after its pharmaceutical sector inquiry, the European Commission ("EC") published, on 28 January 2019, a comprehensive report on pharmaceutical competition enforcement activities by both the EC and EU member states' national competition authorities ("NCAs") in the period between 2009 to 2017 (the "Report").

The Report provides a timely and in-depth analysis of anticompetitive practices within the pharmaceutical sector, amidst growing concerns about patients' access to affordable and innovative medicines. These concerns have been voiced by different stakeholders, notably national health ministries and the European Parliament.

Key findings

The Report singles out several types of competition concerns, in particular:

- Restrictive horizontal agreements between originators and generics such as pay-for-delay agreements;
- Outright cartels (e.g. bid rigging in hospital tenders; market sharing between pharmacies);
- Vertical agreements (e.g. clauses prohibiting distributors from promoting and selling products of competing manufacturers; parallel trade restrictions);

- Conduct that affects the incentives to innovate or hinder the entry of generics and biosimilars (through patenting, interventions before national health and medicines authorities, producing misleading information about off-label use, etc.);

- Excessive prices for medicines which amount to an abuse of dominant position;

- Preventing competition on the merits by restricting the supply of active ingredients, or by offering certain rebate and discount schemes to supply chain partners and healthcare professionals and organisations.

The Report also highlights the importance of M&A review by the EC and NCAs and possible competition concerns related to pharma deals such as harm to innovation (e.g. by acquiring competing technologies) or price increases for medicines.

Aside from direct enforcement activities, NCAs also increasingly take on more market monitoring investigations (e.g. retail and wholesale distribution of medicines; penetration of generics) and advocacy activities (e.g. ad hoc advice to lawmakers and to national health and medicines authorities).

Next steps

The Report provides a solid basis for the EC and NCAs to continue and intensify their enforcement efforts in the pharmaceutical sector. Industry participants should thus expect no let-up in the scrutiny that the EC and NCAs already place on pharmaceutical companies when they engage in mergers and acquisitions, or in conduct that is susceptible to concerns about anti-competitive effects. The Report will also provide insights for the different NCAs when it comes to prioritising competition law investigations within the pharmaceutical industry.

Laga can help

If you have any concerns relating to certain business practices as described in the Report, we can help by:

- Reviewing your commercial arrangements and strategies and providing practical guidance as to how to minimise any competition and regulatory law risk;

- Providing guidance on the interplay between specific life sciences-linked legislation and general competition law;

- Reviewing your compliance policies and providing refresher training;

- Responding to any information requests you may receive from the EC or any NCA; and/or

- Assisting on any investigations you may face from the EC, NCA as well as national health and medicines authorities.

If you would like to receive more EU competition and regulatory news, please subscribe through our form.

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