ACQUISITIONS (PHARMACEUTICALS): THE PFIZER CASE

Subject: Acquisitions
Conditions

Industry: Pharmaceuticals

Parties: Pfizer Inc
Pharmacia Corporation

Source: Commission Statement IP/03/293, dated 27 February 2003

(Note. This is a classic instance of divestment in the interests of securing an acquisition. Without the divestments proposed by the parties, it is highly unlikely that the acquisition would have been approved.)

The Commission has authorised the acquisition of Pharmacia Corporation (Pharmacia) by Pfizer Inc (Pfizer) in a deal which creates the largest pharmaceutical company in the world. The approval follows an investigation into a number of treatment areas both in human pharmaceuticals and in animal healthcare, where the transaction raised serious doubts as to its compatibility with the common market. In reaction to the serious doubts raised by the Commission, the parties undertook to alleviate competition concerns. In the absence of such remedies, the merged entity would have been in a position to exploit its likely dominant positions to the detriment of consumers within the community.

The operation, as initially notified to the Commission, raised serious competition concerns in human pharmaceuticals, more particularly, in G4B4 Urinary Incontinence, G4B3 Erectile Dysfunction and C2A Antihypertensives (of Non-Herbal Origin) Plain, and in animal health in the market for Oral Penicillin for Companion Animals, that is, cats and dogs. In examining pharmaceutical markets, the Commission uses the Anatomical Therapeutic Chemical classification (ATC) system, which subdivides medicines into different therapeutic classes. The ATC system is hierarchical and has 16 categories (A, B, C, D, etc.) each with up to four levels. The first level (ATC 1) is the most general and the fourth level (ATC 4) the most detailed.

In the market for G4B3 Erectile Dysfunction, Pfizer markets the blockbuster drug Viagra and commands a very strong market position - up to almost 100% - across the EEA. While no competition concerns were identified at the level of the parties' existing products, the Commission was concerned that the adding of Pharmacia's two pipeline products would have further strengthened Pfizer's existing strong market position. The Commission's concerns were further increased by the fact that Pfizer had begun patent litigation proceedings in the United States against a number of competitors, who are developing similar drugs to Viagra. Although Pfizer's European patent has been held invalid by the European Patent Office, Pfizer has appealed this decision. The Commission

considers that broad patent coverage in the United States and the pending patent issue in Europe create uncertainty among competitors and may affect adversely the development and future launch of competing products.

On the market of G4B4 Urinary Incontinence, Pharmacia has an existing product, Detrusitol, for the treatment of over-active bladder. Detrusitol attains high market shares - ranging from 40% to almost 100% - in most EU Member States. Pfizer is not active on the market but has a compound, Darifenacin, in Phase III development. In the absence of effective actual or potential competition, adding Pfizer's pipeline product to Pharmacia's existing strong market position would have led to serious doubts about this product market.

In the market for C2A Antihypertensives (of non-herbal origin) Plain in the Netherlands, the new entity would have attained a strong market position with a significant increment of market share. The operation would have brought the number one and two market operators together, while the remaining competitors would have been relatively small. The Commission considered that the transaction would give rise to serious doubts, because Pfizer had recently introduced a new patent protected version of its leading product and because it would face only limited competition from the remaining competitors.

As regards Oral Penicillin Antibiotics for Companion Animals in Germany, the parties would have achieved a high combined market share and the transaction would have removed Pfizer's second largest competitor from the German market.

To meet the Commission's concerns about the effects on competition, the parties proposed a set of undertakings. With regard to Erectile Dysfunction, the parties proposed to divest Pharmacia's two products in development: the dopamine D2 receptor (PNU-142774E) and Apomorphine hydrochloride nasal spray, which is being developed by Pharmacia in cooperation with Nastech Pharmaceutical Company, Inc. As regards the market for Urinary Incontinence, the parties proposed to divest Pfizer's Phase III compound Darifenacin world-wide. With regard to Antihypertensives (of Non-Herbal Origin) Plain in the Netherlands, the parties proposed to discontinue selling Ketensin and transfer the rights or assets to the original licensor or to third parties. Finally, with respect to animal health, the parties proposed to divest Pharmacia's product Parkemoxin in Germany. The Commission considers that these undertakings are appropriate to remedy competition concerns and, subject to full compliance with the undertakings, has declared the concentration to be compatible with the common market.

Pursuant to the bilateral agreement of 1991 on antitrust co-operation between the Commission and the United States of America, the Commission has closely co-operated with the Federal Trade Commission (FTC) in the analysis of a number of issues, notably in the areas of urinary incontinence and erectile dysfunction, where the parties have agreed to carry out divestments on a world-wide scale. The investigation of the case in the United States has not yet been concluded and the Commission's decision in this case does not prejudge the outcome of the assessment in the United States. ■

The SBS Incubation Fund

The Commission has decided to open a formal investigation procedure into the United Kingdom's SBS Incubation Fund aid scheme. The Fund would provide soft loans to undertakings which intend to develop and operate office premises meeting the special needs of small firms (so-called "incubators"). Since this scheme does not fulfil the existing regional guidelines, in particular in terms of aid intensity and in terms of its beneficiaries, the Commission has doubts on whether this aid measure can be approved. The opening of the procedure does not prejudge the outcome of the investigation, but intends to give interested parties the opportunity to express their views on the project.

The objective of this measure is to facilitate the development of office infrastructure for small firms during their start-up phase. The Fund, which will have a €115 million budget over four years, will be able to grant soft loans to undertakings that intend to set up and operate this infrastructure, but could not get funding for such a project on the capital markets. The loans will cover up to 50% of the investment costs of the infrastructure projects, but may also cover part of the working capital necessary during the initial operation of the infrastructure projects. Loans would be available throughout England. Aid provided to the incubators may be transferred in part to the end-users of these incubators, i.e., small firms in their start-up phase. The UK authorities, however, undertook to keep this possible aid to the end-users below the applicable Commission Regulation's de minimis threshold of €100,000 over a three year period.

Under the current proposal, the Fund could grant aid even to large firms setting up office infrastructure in the most developed areas of the United Kingdom. This is not in line with the Guidelines on national regional aid, which provide that investment aid to large enterprises should be limited to the most needy regions. Furthermore, the scheme provides that the aid granted to an individual incubator will always be limited to the minimum necessary. It is unclear whether this provision will enable the UK to respect the aid intensity ceilings applicable under the regional guidelines or Commission Regulation EC/70/2001 on State aid to Small and Medium-sized Enterprises. Finally, the loans will cover part of the working capital of the incubators, which may constitute operating aid. Under the regional aid guidelines, operating aid is allowed only in the least developed regions in a Member State. For these reasons, the Commission has doubts on whether the envisaged aid measures are in line with State aid rules. Finally, the British authorities argued that the notified arrangements were justified because the aid to the end-users was de minimis and that the aid to the companies operating the incubators is kept to the minimum necessary. At this stage, it is not clear by which means fulfilment of these conditions should be ensured.

Source: Commission Statement IP/03/176, dated 5 February 2003