Penalty notice under section 40A of the Competition Act 1998 – Addressed to Pfizer Limited

Unfair pricing for phenytoin sodium capsules in the United Kingdom

Case CE/9742-13

12 April 2016

Confidential information and the names of individuals in the original version of this notice have been redacted from the published version. Redacted information in the text of the published version of the notice is denoted by [✂]**.**

Notice of a penalty

1. Pursuant to section 40A(9) of the Competition Act 1998 ('**CA98**') and section 112 of the Enterprise Act 2002 ('**EA02**'),[1] the Competition and Markets Authority (the '**CMA**') hereby gives notice of the following:

   (a) that on 31 March 2016, the CMA imposed a penalty on Pfizer Limited ('**Pfizer**') under section 40A CA98 (the '**penalty**') because Pfizer has, without reasonable excuse, failed to comply with a requirement imposed on Pfizer by the notice issued by the CMA under section 26 CA98 on 11 February 2016 (the '**Section 26 Notice**'). More specifically, Pfizer failed to provide the information requested in question 13 of the Section 26 Notice ('**Question 13**') by 26 February 2016, the required date, and Pfizer failed to provide a reasonable excuse for its failure to do so;[2]

   (b) the penalty is a fixed amount of £10,000;

   (c) Pfizer is required to pay this penalty in a single payment, by cheque or bank transfer, to an account specified to Pfizer by the CMA by close of banking business on 29 April 2016;

   (d) Pfizer may pay the penalty earlier than the date by which it is required to be paid;

   (e) pursuant to section 112(3) EA02, Pfizer has the right to apply to the CMA within 14 days of the date on which this notice is served on Pfizer for the CMA to specify different dates by which the penalty is to be paid;

   (f) pursuant to section 114 EA02, Pfizer has the right to apply to the Competition Appeal Tribunal against any decision the CMA reaches in response to an application under section 112(3) EA02, within the period of 28 days starting with the day on which this notice is served on Pfizer;

   (g) pursuant to section 114 EA02, Pfizer has the right to apply to the Competition Appeal Tribunal within the period of 28 days starting with the day on which this notice is served on Pfizer in relation to:

      (i) the imposition or nature of the penalty;

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[1] Section 112 of the Enterprise Act 2002 applies by virtue of section 40A(9) of the Competition Act 1998.
[2] This notice relates only to Question 13 of the Section 26 Notice. This is because: (a) the CMA granted an extension on 24 February 2016 for questions 1 to 12 of the Section 26 Notice, which changed the deadline from 26 February 2016 to 11 March 2016, and (b) the information requested by question 14 of the Section 26 Notice ('**Question 14**') was provided by Pfizer on 26 February 2016 albeit shortly after the 5pm deadline. Question 14 required Pfizer to provide sales and pricing data up to April 2015.

(ii) the amount of the penalty; or

(iii) the date by which the penalty is required to be paid; and

(h) where a penalty, or any portion of such penalty, has not been paid by the date on which it is required to be paid and there is no pending appeal against the decision, the CMA may recover the penalty and any interest which has not been paid; in England and Wales and Northern Ireland such penalty and interest may be recovered as a civil debt due to the CMA.

Factual background

2. The CMA is currently investigating the conduct of Flynn Pharma Limited, Flynn Pharma (Holdings) Limited, Pfizer and its ultimate parent Pfizer Inc for suspected breaches of Chapter II CA98 and/or Article 102 of the Treaty on the Functioning of the European Union ('**TFEU**') (the '**Investigation**'). The Investigation concerns alleged unfair pricing for phenytoin sodium capsules.

3. On 6 August 2015 the CMA issued a Statement of Objections to the above parties proposing to make a decision that the parties committed a breach of the prohibition contained in Chapter II CA98 and/or Article 102 of the TFEU.

4. On 20 November 2015 Pfizer and Pfizer Inc provided written representations on the Statement of Objections. These written representations were followed by an oral hearing held on 21 January 2016 in which Pfizer and Pfizer Inc submitted oral representations on the Statement of Objections.

5. One of the oral representations submitted by Pfizer and Pfizer Inc in their pre-prepared presentation at the oral hearing on 21 January 2016 was 'we know that for between 2 and 5 per cent of patients, they can treat the same patient.' This refers to Pfizer's claim that phenytoin sodium capsules and tablets are substitutable for new third line patients and the 2-5% is the proportion of the relevant market that such patients represent. Pfizer has confirmed the accuracy of the oral hearing transcript in which this representation is recorded.

6. Following the oral hearing the CMA issued the Section 26 Notice to Pfizer on 11 February 2016 requiring, *inter alia*, the production of further information relating to statements made in the written and oral representations. Specifically, Question 13 required Pfizer to provide all evidence that supported its statement at the oral hearing that new patients account for 2-5% of the relevant market. Pfizer was given a 15 calendar day deadline to respond to the Section 26 Notice – ie until 5pm on Friday 26 February 2016.

The Section 26 Notice was accompanied by an annex which explained the consequences of failing to comply with the notice including the CMA's powers to impose administrative penalties pursuant to section 40A CA98.[3]

7. Pfizer[4] requested an extension to the deadline on Tuesday 23 February 2016.[5] Pfizer provided some reasoning as to why it was unable to respond fully to the Section 26 Notice within the original deadline – however, those reasons did not apply to the responses to Question 13 and Question 14, nor were any specific concerns raised in relation to these questions. Accordingly, on Wednesday 24 February 2016, the CMA granted an extension of time in relation to questions 1 to 12 of the Section 26 Notice but maintained the original deadline for Question 13 and Question 14.[6] In light of the fact that Question 13 requested evidence supporting a representation made in a pre-prepared presentation at the oral hearing on 21 January, the CMA considered it was reasonable to assume that Pfizer was already in possession of this information and would thus be able to provide it to the CMA in short order, and certainly within 15 calendar days.

8. Pfizer responded by letter on the same day stating that it would endeavour to provide answers to Question 13 and Question 14 as soon as it was able to do so, but that the CMA should take the letter as further notice that it would be unlikely to be able to do so before the deadline on 26 February 2016.[7] No explanation was provided as to why Pfizer needed more time to respond to Question 13 or Question 14.

9. The CMA responded on Thursday 25 February 2016 noting that, in the absence of any reasons as to why further time was required to answer those specific questions, the CMA remained of the view that the 15 day deadline for responding to Question 13 and Question 14 was reasonable and did not merit an extension beyond the original deadline of 5pm on Friday 26 February 2016. In relation to Question 13, the CMA also took into account the fact that Question 13 simply required Pfizer to provide the evidence for a representation it made in its pre-prepared presentation during the oral hearing and that the evidence and analysis on which the representation was based should be readily available to Pfizer.[8]

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[3] Section 26 Notice sent by the CMA to Pfizer on 11 February 2016 (Annex 1).
[4] All references to correspondence and calls with Pfizer refer to correspondence and calls with Clifford Chance LLP, acting on behalf of Pfizer.
[5] Letter sent by Pfizer to the CMA on 23 February 2016 (Annex 2).
[6] Email from the CMA to Pfizer on 24 February 2016 (Annex 3).
[7] Letter sent by Pfizer to the CMA on 24 February 2016 (Annex 4).
[8] Email sent by the CMA to Pfizer on 25 February 2016 (Annex 5).

10. On Friday 26 February 2016 at 16:29 (approximately 30 minutes before the deadline), Pfizer informed the CMA that it needed 'more time to verify underlying data' in relation to Question 13. On this basis, Pfizer requested an extension in relation to Question 13 to close of business on the following Wednesday, 2 March 2016.[9] The email did not, however, explain (for example) what data was being verified, nor why the verification could not have been completed within the 15 day deadline, nor why further work was necessary to verify a fact that had been included in its oral representations over a month previously.

11. This correspondence was followed by a phone call shortly after the Friday 5pm deadline from Pfizer to [✂] of the CMA in which Pfizer requested that the CMA answer its request for an extension on that same day.[10] [✂] asked why the extension was required; however no further explanation was provided during the call as to why Pfizer required additional time to complete its response to Question 13.[11]

12. Having considered Pfizer's reiterated request of 16:29 on Friday, 26 February 2016 for an extension, the CMA responded later that same evening maintaining its previous decision not to extend the original deadline of 15 calendar days for responding to Question 13. The CMA reminded Pfizer that it had still failed to provide any reasons for requiring further time in addition to the original deadline of 15 calendar days or any details of its efforts to meet this deadline. At the same time the CMA also informed Pfizer that it considered Pfizer's failure to respond on time to constitute a failure to comply with the requirements of the Section 26 Notice without reasonable excuse.[12]

13. Pfizer responded on the Monday morning, 29 February 2016, noting that 'Pfizer does not accept that it is without a reasonable excuse as regards the timing of its reply to Question 13'.[13] In this email Pfizer did not give any further reasons as to why it had been unable to provide the information requested by Question 13 on time. The email noted that Pfizer had already indicated that it

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[9] Email sent by Pfizer to the CMA on 26 February 2016 (Annex 6).
[10] Note of call on 26 February 2016 between [✂] and [✂] (Annex 7). Following this phone call, Pfizer provided a response in relation to Question 14 (see Letter sent by Pfizer to the CMA on 26 February 2016 at Annex 8) but failed to provide any information in response to Question 13.
[11] As part of its representations on the Provisional Decision (see paragraphs 17 to 20 below), Pfizer asserted that it had also stated on this phone call that 'the reason that the verification of figures was being conducted was that Pfizer was looking to give as full an answer as possible to Question 13' and requested that the CMA amend its note of the call. This statement does not accord with the CMA's recollection of the call and it was not recorded in the CMA's note of the call. Having considered the issue, the CMA does not accept the request to amend the note in this regard. Pfizer also requested two other minor amendments to the note of the call which related to the statements about legal privilege and the CMA's availability to respond to the extension request. Having considered the requests, the former does not accord with the CMA's recollection of the call and it was not recorded in its note of the call and is therefore not accepted. The CMA accepts the latter request and has amended its note of the call accordingly. The version of the note at Annex 7 is this updated version.
[12] Email sent by the CMA to Pfizer on 26 February 2016 (Annex 9).
[13] Email sent by Pfizer to the CMA on 29 February 2016 (Annex 10).

did not expect to be able to provide the response to Question 13 before close of business on Wednesday 2 March 2016. Pfizer said it would, however, try to provide the response sooner if possible.

14. Pfizer finally provided a short response to Question 13 by email on Wednesday 2 March 2016, five calendar days (three working days) after the 15 calendar day deadline. Its response to Question 13 was that the evidence supporting its statement in the oral hearing was 'an internal estimate provided by the business'.[14] Pfizer also stated that '[t]here is no additional internal data'. No additional evidence was provided nor were any further details about the internal estimate given – for example, which part of Pfizer's business supplied the estimate, the relevant knowledge or expertise of the person or team who made the estimate, or the basis on which the estimate was made. The email went on to state that Pfizer had since taken steps to verify the estimate via third party data providers and, although this was 'outside the scope of Question 13', Pfizer would provide such data voluntarily to the CMA, hopefully in the next 24 hours, and accordingly no further section 26 notice would be required to cover this material.

15. On Thursday 3 March 2016, a short pdf document containing third party data relating to prescriptions for phenytoin and phenytoin sodium capsules for the period 2013-2015 was provided by Pfizer on Thursday 3 March 2016.[15] This email also confirmed that Pfizer's email of Wednesday 2 March 2016 was its formal response to Question 13. The third party data contained insufficient detail to substantiate the representation made at the oral hearing. Since this third party data falls outside the scope of Question 13 it is not relevant to this decision.

The CMA's provisional decision

16. Following careful consideration of all the relevant circumstances of the case and having regard to *Administrative penalties: Statement of Policy on the CMA's Approach* (CMA4, the **'Guidance**'), the CMA provisionally concluded that Pfizer had, without reasonable excuse, failed to comply with a requirement imposed on it under section 26 CA98 and that it was appropriate in this case to impose a penalty on Pfizer. In accordance with paragraph 5.2 of the Guidance, on 8 March 2016 the CMA gave Pfizer notice of its intention to impose a penalty under section 40A CA98 including the reasons, proposed approach and the nature and level of the proposed penalty (the '**Provisional**

[14] Email sent by Pfizer to the CMA on 2 March 2016 (Annex 11). The data was sourced from the IMS Medical Data Index and is dated September 2015.
[15] Email sent by Pfizer to the CMA on 3 March 2016 (Annex 12).

Decision'). The CMA informed Pfizer that should it wish to make representations on the Provisional Decision, such representations should be submitted by 5pm on 15 March 2016.

Pfizer's representations

17. On 15 March 2016, Pfizer sent two letters to the CMA in response to the Provisional Decision. The first letter, received at 4.56pm, contained general representations on the Provisional Decision (the '**first letter**') and the second letter, received at 7.06pm, contained 'minor factual corrections for the record' (the '**second letter**').

18. In the first letter, Pfizer expressed its disappointment with receiving the Provisional Decision. More specifically, Pfizer stated that in engaging with the CMA in the run up to 26 February 2016 it 'fully expected to receive a pragmatic response to a short three-day extension request. This is particularly in circumstances where the CMA has admitted that there was absolutely no prejudice to the CMA's investigation in agreeing to do so' and that 'the CMA's inflexibility on this one inconsequential extension request was, to our mind, unnecessarily dogmatic'.

19. Pfizer also referred to 'the context of a history of full and thorough responses and cooperation from Pfizer' and the fact that 'Pfizer has always taken its information production obligations extremely seriously and considers it has usually gone above and beyond strict compliance in order to ensure the CMA is as fully informed as possible.' Pfizer then said that 'Against that background, to issue Pfizer with a fine is excessive'. Pfizer also made a general statement asking the CMA to 'reconsider the issuing of a Provisional Decision as a matter of proportionality'.

20. The CMA has carefully considered Pfizer's representations. Pfizer has not disputed the fact that it failed to respond to Question 13 by the deadline of 26 February 2016. Pfizer has also not explicitly disputed the fact that it failed to provide a reasonable excuse although Pfizer did include a general statement in the first letter that '[f]or the avoidance of doubt, Pfizer rejects the characterisation of the fact pattern leading to the asserted breach'. The only specific comments made in this regard were included in the second letter which contained three 'minor factual corrections for the record' relating to the note of the call between Clifford Chance and the CMA on 26 February 2016, which had been provided to Pfizer with the Provisional Decision. As explained above[16], the CMA accepted one of these requests for correction, but in any

[16] See paragraph 11, footnote 11.

case, and as set out further at paragraph 32 below, the representations do not explain why Pfizer failed to provide the answer to Question 13 by 26 February 2016.

21. Following the Provisional Decision and Pfizer's two letters of 15 March 2016, the CMA has re-considered whether the imposition of an administrative penalty of £10,000 on Pfizer is appropriate in this case, and sets out its reasoning in this regard at paragraphs 23 to 39 below.

22. In accordance with paragraphs 5.2 and 5.9 of its Guidance, the CMA has consulted with the General Counsel's office on the reasons for the proposed approach to and the level of the penalty.

Legal Assessment

23. Section 40A CA98 provides that where the CMA considers that a person has, without reasonable excuse, failed to comply with a requirement imposed on the person under section 26 CA98, it may impose a penalty of such amount as it considers appropriate.

24. The CMA concludes that the statutory requirements for imposing a penalty under section 40A CA98 are met (see paragraphs 25 to 32 below) and that the imposition of a penalty of £10,000 is appropriate and proportionate in this case (see paragraphs 33 to 39 below).

Statutory requirements for imposing a penalty under s.40A

25. Pfizer is a person within the meaning of section 40A (1) and section 59 (1) CA98 and has failed to comply with a requirement imposed on it under Section 26. As set out above, and as recognised by Pfizer in its email of 29 February 2016,[17] and in its representations of 15 March 2016, Pfizer did not respond to Question 13 on time.

26. Furthermore, and for the reasons set out below, the CMA considers that Pfizer has no reasonable excuse for not responding to Question 13 within the 15 day deadline.

27. First, the deadline of 15 calendar days imposed for producing the information under Question 13 was reasonable. The purpose of Question 13 was to obtain the evidence supporting a pre-prepared representation Pfizer made at the oral hearing. Given this, the CMA considers, as previously explained to

[17] See email sent by Pfizer to the CMA on 29 February 2016 (Annex 10): '….we will of course get you the information as soon as possible.'

Pfizer,[18] that the factual information underpinning its own representation was readily available to Pfizer, or should have been, and consequently that Pfizer was in a position to provide it to the CMA in short order, and certainly within 15 calendar days.

28. This was shown to be the case by Pfizer's ultimate response to Question 13 on 2 March 2016, namely that the evidence supporting the statement was an 'internal estimate' provided by the business and that 'no additional internal data existed'. Pfizer must have known that the statement was based on an internal estimate, and at least should have known there was no additional internal data, since before the pre-prepared representation was made at the oral hearing on 21 January 2016. If Pfizer did not already know there was no additional internal data, it could have confirmed that fact comfortably within a 15 day deadline. These particular circumstances demonstrate that a deadline of 15 calendar days was reasonable. As noted above at paragraphs 17 to 20, Pfizer has not submitted any representations explaining why the original deadline did not provide sufficient time for it to provide a response to Question 13. Furthermore, Pfizer requested and was given an extension of time in relation to all but one of the other questions in the Section 26 Notice which should (if applicable) have allowed it to prioritise the response to Question 13.

29. Second, Pfizer has failed to comply with the Section 26 Notice without a reasonable excuse. As set out above, notwithstanding the fact that the CMA specifically asked on multiple occasions for an explanation for the request for an extension to the statutory deadline for responding to Question 13, Pfizer has failed to provide one. Pfizer also failed to provide any detail of the steps it was taking in relation to providing the answer to Question 13. The Guidance sets out at paragraph 4.4 that the CMA will consider whether a significant and genuinely unforeseeable or unusual event and/or an event beyond the company's control has caused the failure to comply. There is nothing to suggest that any such event has occurred here, which would have prevented Pfizer from providing its response to Question 13 on time.

30. None of the reasons given by Pfizer in support of its original extension request applied to Question 13. The CMA does not consider that Pfizer's assertion – made for the first time in an email sent approximately 30 minutes before the expiry of the deadline – that it 'needed more time to verify the data'[19] constitutes a reasonable excuse for the purposes of s.40A CA98. This is no more than a request for additional time, without explaining why this is necessary (eg what data? what kind of verification? why could this not have

[18] See email sent by Pfizer to the CMA on 24 February 2016 (Annex 3) and email sent by the CMA to Pfizer on 25 February 2016 (Annex 5).
[19] See email sent by Pfizer to the CMA on 26 February 2016 (Annex 6).

been done within 15 days given that the information should have been available before the oral hearing?).

31. Furthermore, this email does not explain why Pfizer's ultimate response to Question 13 on 2 March 2016 (that the evidence supporting the statement was an internal business estimate) could not have been provided by 26 February 2016. At no point in time in the run up to the expiry of the deadline on 26 February 2016 – or, as set out further below, at any time since then – and despite being directly asked by the CMA on more than one occasion to give an explanation, did Pfizer present any reasons as to why it was unable to provide this response within the 15 day deadline. When Pfizer finally responded to Question 13 on 2 March 2016 by way of a short email, again it did not explain why it was not possible for Pfizer to provide this response within the original 15 day deadline. Pfizer must have known the supporting evidence was an internal estimate since before the representation was made during its presentation at the oral hearing on 21 January 2016, and as a result could have been expected to inform the CMA comfortably within 15 days.

32. In the second letter sent in response to the Provisional Decision, Pfizer asserted that it stated on the 26 February 2016 call that the reason the verification of data was being conducted was that Pfizer 'was looking to give as full an answer as possible'. However, the CMA's contemporaneous attendance note of the call does not reflect this statement and it does not accord with the CMA's recollection of the call. Having considered the issue, the CMA has not included it in its note of the call. In any case, the CMA agrees with Pfizer that this is merely a minor factual correction and does not consider that this statement would have constituted a reasonable excuse for the purposes of section 40A CA98. It is vague and does not provide any of the details which the CMA would reasonably expect from a company seeking to provide an explanation for why it cannot comply with a statutory deadline. For example, it does not explain what data was being verified or by whom, and it does not explain what is meant by 'as full an answer as possible' when compared with Pfizer's email of 2 March 2016 which describes any additional data as outside the scope of Question 13. In this regard, it conflates the issues of responding to Question 13 and providing additional data voluntarily. Pfizer states in the second letter that the IMS data took longer to come through than it had hoped and therefore Pfizer was only able to provide this additional voluntary information thereafter. However, the IMS data is not relevant as regards responding to Question 13 and it had been accepted by Pfizer that this was outside the scope of Question 13. Finally, this does not explain why it was not possible for Pfizer to provide the actual response, namely that the supporting evidence was an internal estimate and that no additional internal data existed, within the original 15 day deadline.

The appropriateness of imposing the proposed penalty

33. Having had regard to its statutory duties and the Guidance, and having carefully considered all relevant facts and the representations made by Pfizer on the Provisional Decision, the CMA considers that, on balance, it is appropriate and proportionate to impose a penalty of £10,000 on Pfizer in these circumstances.

34. The Guidance sets out that the CMA will consider whether to impose an administrative penalty on a case-by-case, and may be more likely to impose a penalty where it considers one or more of a number of factors are present: for example whether the failure to comply is likely to have an adverse impact on the CMA's investigation and whether it was significant and/or flagrant.[20]

35. With that in mind, the CMA's reasoning as to why a penalty of £10,000 is appropriate and proportionate in this case is as follows:

(a) On one hand, the CMA recognises that Pfizer's failure to comply is, in itself, unlikely to have a significant adverse impact on the overall Investigation. This is because it failed to comply with only one question of the Section 26 Notice (Question 13), and it responded by way of a short email to this question on 2 March 2016, five calendar days after the expiry of the original deadline on Friday 26 February 2016. However, the CMA does not accept that Pfizer's failure to comply is 'absolutely without prejudice' to the Investigation, as asserted by Pfizer in its first letter. As emphasised below, if the CMA were to accept every unjustified request for an extension to a statutory deadline, albeit each short in itself, this would not incentivise timely responses which could have a significant impact on the overall investigation. The CMA is mindful that a lack of impact on the investigation is not a pre-requisite to imposing an administrative penalty for failure to comply with requirements imposed on an undertaking during an investigation. That being said, for the penalty to be proportionate, the lack of significant adverse impact on the Investigation supports a penalty at the lower end of the statutory maximum of £30,000 (see below at paragraph 39).

(b) On the other hand, it is of the utmost importance to effective competition law enforcement that the CMA incentivises compliance with its investigatory powers. This is a stated policy objective reflected in paragraphs 3.1 and 4.1 of the Guidance. The imposition of an administrative penalty under s.40A is critical to achieve deterrence, ie to

[20] Guidance, paragraphs 4.2 and 4.11.

impress both on the party under investigation, and more widely, the seriousness of a failure to comply with a statutory deadline, without a reasonable excuse.

In this case, the CMA considers that there is a need to specifically deter Pfizer from failing to comply with a statutory deadline, without a reasonable excuse. This is because Pfizer was entirely clear about what it was required to do; the evidence sought was in support of a representation that Pfizer made itself in a presentation during an oral hearing; the response it provided on 2 March 2016 demonstrates that this evidence was readily available because it was an internal business estimate; and notwithstanding multiple opportunities Pfizer provided no explanation for why it was unable to inform the CMA that the 2-5% figure was based on an internal business estimate within 15 days.

(c) Furthermore, Pfizer's failure to comply with the requirements imposed by Question 13 is flagrant:[21]

(i) Pfizer was clear about what it was required to do given that Question 13 was simple and well understood; namely to provide – as Pfizer eventually did on 2 March 2016 – the evidence underpinning the pre-prepared representation Pfizer made during the oral hearing on 21 January that new patients account for 2-5% of the relevant market.

(ii) The failure to comply was intentional. Pfizer was well aware that its conduct was of such a nature as to lead to a failure to comply: it had sought an extension of time on 23 February 2016, which was rejected on the following day with respect to Question 13 because the CMA considered (correctly, as shown by Pfizer's email of 2 March 2016) that the evidence supporting Pfizer's representation made during the oral hearing was readily available, and, despite the CMA asking for the reasons as to why Pfizer needed more time, no explanation was given. The CMA now knows from the 2 March 2016 email that the evidence supporting the representation was relatively simple as it was an internal estimate. Pfizer must have known that simple fact since before the representation was made during the pre-prepared presentation at the oral hearing on 21 January 2016.

(iii) As noted above at paragraphs 29 to 32, Pfizer has failed to provide a reasonable excuse to the CMA why it was unable to meet the 15 calendar day deadline specified in the Section 26 Notice for

[21] Guidance, paragraph 4.2.

responding to Question 13, notwithstanding multiple opportunities to do so. Despite two previous letters relating to the deadline for Pfizer to respond to the Section 26 Notice,[22] Pfizer only put forward an unsubstantiated difficulty specific to responding to Question 13 at 4.29pm, approximately 30 minutes before the deadline expired.[23] The difficulty was that Pfizer 'needed more time to verify the data'.[24] This statement does not explain why it was not possible for Pfizer to provide by 26 February 2016 the supporting evidence for the representation made during the pre-prepared presentation given by Pfizer during the oral hearing on 21 January, namely that it was an internal estimate. As noted above at paragraph 32, the representations made by Pfizer on the Provisional Decision do not alter this assessment.

(iv) Pfizer is part of a large multi-national corporation with significant resources that should have enabled it to respond to Question 13 within the time specified by the Section 26 Notice.

36. The CMA recognises that Pfizer has previously complied with the CMA's statutory deadlines, often when it had been granted an extension of time. However, in other situations, Pfizer has not responded on time to the CMA's non-statutory deadlines and has not provided 'full and thorough responses and cooperation' or gone 'above and beyond strict compliance' to ensure the CMA is fully informed as stated by Pfizer in its representations. In this instance Pfizer's formal response to Question 13 was that 'the figure proffered [...] previously by Pfizer (2-5%) was an internal estimate provided by the business. There is no additional data.' Pfizer has not explained how this estimate had been arrived at. For instance it did not set out which part of Pfizer's business supplied the estimate, the relevant knowledge or expertise of the person or team who made the estimate, or the basis on which the estimate was made. It is unclear therefore how much weight the CMA can attach to this figure of 2-5% (and as discussed in paragraph 15 above the third party data provided voluntarily on 3 March 2016 does not resolve the issue).[25]

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[22] See Annexes 2 and 4.
[23] See Annex 6.
[24] See Annex 6.
[25] In addition, on 4 February 2016, the CMA requested Pfizer's comments on a proposed disclosure and related draft confidentiality undertakings by 5pm on 10 February 2016. Pfizer did not provide any response. On 11 February 2016, the CMA asked Pfizer again whether it wished to provide any comments. No response was received. The CMA sent another email on 12 February 2016 which stated that in the absence of any response from Pfizer the CMA would proceed with the proposed disclosure and asked for an acknowledgement of receipt. Pfizer responded to say that the email had been received and Pfizer would revert 'today'. Later that evening, Pfizer emailed to say that it had no comments on the proposed disclosure. Also, the additional voluntary data

37. Finally, the CMA does not agree with Pfizer's written representations that requiring Pfizer to respect a statutory deadline in circumstances where the information required was readily available to Pfizer and no reasonable excuse had been given for the inability to comply with the deadline is 'unnecessarily dogmatic'. On the contrary, throughout the Investigation, the CMA has been pragmatic and flexible in its approach to deadlines, and it will continue to be so going forward. The CMA has previously granted Pfizer numerous extensions to deadlines upon presentation of a reasonable excuse. For example with respect to the Section 26 Notice, on 24 February 2016 the CMA granted a further two weeks for all of the questions in respect of which Pfizer had provided some reasoning as to why it needed more time.

38. For the purposes of assessing whether a penalty of £10,000 is appropriate and proportionate, the CMA has also had regard to certain key indicators[26] relating to the financial resources available to Pfizer:[27]

    (a) profit after tax – £40,071,000;

    (b) net assets with dividends added – £409,694,000; and

    (c) turnover – £1,256,543,000.

39. These indicators show that Pfizer has significant financial resources available, and will not be materially affected by a penalty of £10,000 in a disproportionate manner.

Philip Marsden

Case Decision Group Chairman, acting for and on behalf of the Case Decision Group

31 March 2016

Competition and Markets Authority

provided by Pfizer on 3 March 2016 was not accompanied by an explanation which enabled the CMA to fully understand the data.

[26] These indicators have been taken from Pfizer Limited's FAME report for the year ending 30 November 2014.

[27] Guidance, paragraph 4.11.

Schedule I

Correspondence relating to the Section 26 Notice

No.	Date	Document Description
Annex 1	11/2/16	Section 26 Notice of 11 February 2016 addressed to Pfizer Limited.
Annex 2	23/2/16	Email of 23 February 2016 (15:16) from [✂] (Clifford Chance), on behalf of Pfizer Limited, to [✂] (CMA) attaching a letter requesting an extension of the deadline for responding to the Section 26 Notice of 11 February 2016.
Annex 3	24/2/16	Email of 24 February 2016 (13:22) from [✂] (CMA) to [✂] (Clifford Chance), on behalf of Pfizer Limited, granting a partial extension of the deadline for responding to the Section 26 Notice of 11 February 2016.
Annex 4	24/2/16	Email of 24 February 2016 (17:16) from [✂] (Clifford Chance), on behalf of Pfizer Limited, to [✂] (CMA) attaching a letter responding to the CMA's decision of granting a partial extension of the deadline for answering the Section 26 Notice of 11 February 2016.
Annex 5	25/2/16	Email of 25 February 2016 (10:44) from [✂] (CMA) to [✂] (Clifford Chance), on behalf of Pfizer Limited, confirming that the deadline for responding to questions 13 and 14 of the Section 26 Notice of 11 February 2106 remained the original deadline of 5pm on 26 February 2016.
Annex 6	26/2/16	Email of 26 February 2016 (16:29) from [✂] (Clifford Chance), on behalf of Pfizer Limited, to [✂] (CMA) submitting an additional request for extension of the deadline for responding to question 13 of the Section 26 Notice of 11 February 2016.
Annex 7	26/2/16	Note of call on 26 February 2016 (17:10) between [✂] (CMA) and [✂] (Clifford Chance), on behalf of Pfizer Limited.
Annex 8	26/2/16	Email of 26 February 2016 (17:26) from [✂] (Clifford Chance), on behalf of Pfizer Limited, to [✂] (CMA) attaching letter containing the response to question 14 of the Section 26 Notice of 11 February 2016.
Annex 9	26/2/16	Email of 26 February 2016 (20:09) from [✂] (CMA) to [✂] (Clifford Chance), on behalf of Pfizer Limited, confirming the CMA's decision of not granting an

		extension for responding to question 13 of the Section 26 Notice of 11 February 2016 and informing that the CMA considered Pfizer's failure to respond on time a failure to comply with the requirements of the Section 26 Notice without reasonable excuse.
Annex 10	29/2/16	Email of 29 February 2016 (08:13) from [✂] (Clifford Chance), on behalf of Pfizer Limited, to [✂] (CMA), disagreeing with the CMA's refusal to grant an extension and not accepting that it was without reasonable excuse as regard the timing of Pfizer's reply to question 13.
Annex 11	02/3/16	Email of 2 March 2016 (17:25) from [✂] (Clifford Chance), on behalf of Pfizer Limited, to [✂] (CMA) providing the formal response to question 13 of the Section 26 Notice of 11 February 2016 and informing the CMA that Pfizer Limited would be providing additional data from third parties on a voluntary basis in the following 24 hours.
Annex 12	03/3/16	Email of 3 March 2016 (17:40) from [✂] (Clifford Chance), on behalf of Pfizer Limited, to [✂] (CMA) providing on a voluntary basis the additional data from third parties.