

**PROCEDURAL OFFICER DECISION
2019/3**

**APPLICATION BY
ADVANZ PHARMA
IN RELATION TO
THE CMA INVESTIGATION UNDER THE COMPETITION ACT 1998
INTO
THE SUPPLY OF LIOTHYRONINE TABLETS**

The Application

1. Advanz Pharma Corporation (Advanz) has requested a review of the CMA's decision to refuse to provide Advanz with six weeks to respond to the Supplementary Statement of Objections (SSO) dated 30 January 2019 and to require instead that Advanz respond within four weeks (the Application).

The SRO's Decision

2. The Senior Responsible Officer (SRO) for the CMA's investigation in relation to the alleged excessive and unfair pricing with respect to the supply of Liothyronine tablets (the Investigation) notified Advanz that 11 July 2019 was the deadline for Advanz's response to the SSO in a letter dated 17 June 2019 (the SRO's Decision), as set out in paragraph 1 above. The SRO's Decision provided reasons for this updated deadline and set out an overview of changes to the original deadline of 13 March 2019. The SRO's Decision was taken in light of the judgment handed down by Richard Clayton QC on 13 June 2019 in relation to Advanz's application for judicial review.

The Procedural Officer's Process

3. The Application was made on 19 June 2019.
4. I held a meeting with Morgan Lewis & Bockius, legal advisers to Advanz, on 24 June 2019. At the meeting, Advanz's legal advisers provided an updated version of the Application. I held a meeting with the CMA case team on 25 June 2019.
5. I have considered the representations and information provided in the meetings I held with Advanz's legal advisers and the CMA case team, together with the information set out in the Application. I have also seen an official transcript of the judgment handed down orally by Richard Clayton QC on 13 June 2019 and of the proceedings following the handing down which were provided to me by the CMA

case team on 21 June 2019. I have also taken account of the reasons set out in the SRO's Decision.

Scope for the Procedural Officer to consider the Application

6. The role of the Procedural Officer in a Competition Act 1998 (Competition Act) case is set out in the CMA Rules.¹ The CMA's view about the scope of complaints within the remit of the Procedural Officer is provided in the Guidance on the CMA's Investigation Procedures (the Guidance)² and also in the Procedural Officer content on the CMA's webpage.³ These each provide the same five bullet points setting out the issues to which, in the CMA's view, a procedural complaint may relate and which the Procedural Officer is able to review.
7. I note that the first bullet point relates to:
 - 'deadlines for parties to respond to information requests, submit non-confidential versions of documents or to submit written representations on the Statement of Objections or Supplementary Statement of Objections'.
8. The Application relates to the deadline for Advanz to submit written representations on the SSO.
9. I therefore consider that the Application falls within the Procedural Officer's remit. This was not disputed by the CMA case team.

Chronology of Key Events

10. The chronology of events is important in considering the Application. An overview of the deadline for the response to the SSO was provided in the Annex to the SRO's Decision and the events were considered in the Application. Set out below is a list of the key events, based on the Application, the SRO's Decision and the correspondence that I have seen provided with the Application. The Application is linked to the litigation which was brought by Advanz seeking a judicial review of the CMA's decision not to extend the time to respond to the SSO pending the judgment of the Court of Appeal in *Phenytoin*.⁴ Other recipients of the SSO were noted as interested parties to the judicial review (Cinven (Luxco 1) S.A. and Hg Capital LLP (the other parties)). The chronology set out below therefore also sets out the deadline for the response to the SSO and events related to those other parties to the extent that this is relevant to the Application.

¹ The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 SI 2014/458.

² Guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8), paragraph 15.4.

³ [CMA webpage](#).

⁴ *Flynn Pharma Limited and others v Competition and Markets Authority*.

- 21 November 2017: CMA issues Statement of Objections.
- 30 January 2019: CMA issues SSO. Deadline for representations on the SSO set as 13 March 2019.
- 7 February 2019: Advanz requests the deadline to respond to the SSO is stayed pending the judgment of the Court of Appeal in *Phenytoin*. Advanz notes if the request is refused, it will make an application to the Competition Appeal Tribunal seeking an order to this effect. Advanz seeks a response to this request by 5pm on 8 February 2019.
- 13 February 2019: CMA addresses points raised in Advanz's letter of 7 February and informs Advanz the deadline for response to the SSO remains 13 March 2019.
- 22 February 2019: CMA extends deadline for response to the SSO to 20 March 2019 for the other parties to the SSO and informs Advanz of the extended deadline.
- 27 February 2019: Advanz replies to points raised in the CMA's letter of 13 February and explains why it considers the CMA should agree a stay to the deadline. It states that if the CMA does not agree, an application will be made to the High Court to challenge the refusal to stay the Investigation pending final determination of the appeals in *Phenytoin*.
- 1 March 2019: CMA repeats points made in letter of 13 February and confirms deadline is 20 March, as extended on 22 February.
- 4 March 2019: Advanz issues application for judicial review of the CMA's 'decision to refuse to extend time (or suspend) next procedural steps in CMA's investigation into unfair pricing in relation to Liothyronine'.
- 5 March 2019: Order issued by Mr Justice Mostyn (5 March Order) extending deadline for Advanz to respond to the SSO 'until the determination of the claimant's application for permission to seek judicial review'. In observations in the Order, he stated this was to ensure the application for judicial review was not rendered 'nugatory or illusory.'
- 8 March 2019: CMA declines to extend revised deadline for Advanz to respond to the SSO to apply also to the other parties.
- 12 March 2019: Advanz refers to 5 March Order and notes 'it follows that the question of the deadline for response to the SSO is a matter for determination by the Court, and not by the CMA.'

- 14 March 2019: CMA extends deadline for the other parties to respond to the SSO until 27 March.
- 15 March 2019: Exchange of correspondence. CMA confirms that it has sought expedition in relation to Advanz's application for permission for judicial review. CMA extends deadline for Advanz's response to the SSO until 27 March 2019 and notes that this would only be relevant if the court decided the issue of permission on Advanz's application for judicial review before that date. Advanz replies noting the points made in the letter dated 12 March that this is now a matter for the court and the extension would 'subvert the interim relief' granted by the court.
- 22 March 2019: Order issued by Mrs Justice Thornton (22 March Order) granting Advanz permission to apply for judicial review, expediting the hearing and extending the deadline to file a response to the SSO 'until the hearing of the substantive claim'.
- 25 March 2019: CMA extends deadline for the other parties to respond to the SSO until the date of judgment in Advanz's judicial review claim.
- 11 June 2019: Hearing of substantive claim before Richard Clayton QC.
- 12 June 2019: Advanz asks the CMA to agree next steps in the event that its application for a stay is not upheld, proposing a period of six weeks to run from 14 June.
- 13 June 2019: CMA replies it is 'premature to address the timeframe' pending the outcome of the judicial review proceedings to be handed down that afternoon.
- 13 June 2019: Judgment in favour of CMA handed down orally. Following the handing down of judgment and ruling on costs, Advanz seeks a ruling on time for responding to the SSO. The judge declines to make a ruling since it was unclear if it would be within his powers to do so.
- 14 June 2019: Advanz asks CMA to agree next steps, seeking a period of six weeks for response to the SSO.
- 17 June 2019: SRO Decision.
- 17 June 2019: CMA informs other parties of the deadline of 11 July 2019 for responding to the SSO.

Background to the Application and the issues raised

Summary of the Application

11. The Application relates to the deadline for Advanz to respond to the SSO. It seeks a review of the CMA's refusal to provide six weeks for Advanz to do so and requiring a response within four weeks instead.
12. The Application sets out the background to the issue of the SSO, the application for judicial review, points in response to the reasons set out in the SRO's Decision for the deadline of 11 July and submissions why the refusal to provide the requested six weeks is unfair. The points made are set out below, under headings covering these four sets of issues, followed by the proposals for next steps in the Application.

Issues raised in the Application

The SSO

13. The Application explains that 'the SSO concerns an alleged historic abuse of a dominant position by firms acquired by Advanz for which the CMA is proposing to hold Advanz liable', maintains the basis for the provisional finding of abuse set out in the Statement of Objections 'and makes a provisional finding of abuse on the basis of the CMA's interpretation of the CAT's judgment in *Phenytoin*.' It notes also that the Statement of Objections has been amended and updated and all but two sections have been changed. The Application states that Advanz requested an extension of time pending the outcome of the judgment of the Court of Appeal in *Phenytoin* because:

'the CMA said that in reaching its preliminary findings in the SSO "*the CMA's assessment is based on the interpretation of the seminal United Brands judgment in the recent [Phenytoin] judgment*" [1.17], that the CMA was simultaneously appealing to the Court of Appeal.'

Application for judicial review

14. The Application sets out the steps taken by Advanz following receipt of the SSO to seek judicial review, the exchanges in relation to the deadline for representations, the comments and rulings made by the court and the steps taken by other addressees of the SSO. A chronology of the key events is set out above (see paragraph 10 above).

Response to the SRO's Decision

15. The Application makes a number of points in relation to the CMA's reasons for the time period set out in the SRO's Decision. The Application argues:

- 'there is no force in the CMA's argument' that 'the CMA's case remains in large part unchanged' in the SSO otherwise it would 'not have extended the other recipients' timeframe for response'.
- 'there is also no force' in the CMA's argument 'that the additional document disclosure is not as material as it appears', noting 858 documents have been disclosed 'some of considerable complexity'. It notes:

'Whilst the CMA says it does not directly rely on the material in the SSO, clearly Advanz and its experts must consider all of the material, for example, to cross check whether it affects aspects of the CMA's analysis or whether it supports Advanz's analysis. The documents must be analysed and considered by Advanz's legal and economic experts, regardless of the origin of the document. On any view, this is a substantial task, involving considerable professional resources.'

The Application also argues that since a significant number of documents relate to the question of abuse: 'On any view the time and resources required to respond to the SSO on the core issue of abuse will be very considerable'.

- Advanz was right to stop work on the SSO until the interim application for judicial review was decided because the basis for that application was 'to avoid costs being incurred unnecessarily' and the fact that an interim Order was granted made clear Advanz 'had a reasonable basis not to work on the SSO.'
- the only reason no Order was made setting a deadline following the judgment in the judicial review proceedings was because the judge was persuaded that he had no power to do so although the judge 'expressed surprise and disappointment that the CMA was not prepared to agree a six week deadline at least, which he thought would be consistent with due process'.
- a statement about timetable in Advanz's skeleton argument for the judicial review is irrelevant in considering the timetable for responding to the SSO because it addressed 'a time period following a judgment from the Court of Appeal in *Phenytoin* that Advanz will require to digest the correct legal test for a finding of abuse for excessive and unfair pricing.'

- the additional time the other parties have had to respond to the SSO raise issues of unequal treatment. The CMA's view that the additional time does not affect Advanz's rights of defence is dismissed, noting the CMA could have progressed its review of the other parties' responses 'pending the outcome of Advanz's judicial review application.'

The CMA's refusal to provide six weeks for response from the date of the judgment

16. The Application sets out six reasons why Advanz considers the decision not to provide it 'with the original six week period to respond to the SSO is unfair and is not respectful of due process.' These are set out below:

- i) 'The Orders clearly anticipate that the original timeline is stayed pending determination of Advanz's application for judicial review with the effect that if the application is not upheld, at least the original timeframe will apply'.
- ii) 'the CMA has accepted that this is the effect of Order', noting the wording in the CMA's witness statement in the judicial review 'the deadline for Advanz to respond to the SSO is automatically extended while its application for permission ... is considered'.
- iii) the time period for the other recipients of the SSO to respond has been extended following their complaints that the original period was 'a manifestly inadequate response period', a point it argued was not contested by the CMA in the litigation. This time period was extended to 'eight weeks and then to at least twenty weeks'.
- iv) the CMA has extended the deadline for the other recipients by a further four weeks, which the Application argues will provide them with twice the maximum time period envisaged in CMA guidance. In contrast with the 28 days for Advanz to respond: 'On any reasonable analysis the CMA's approach is grossly disproportionate and unfair and manifestly at odds with CMA8.'
- v) 'the CMA's approach is not consistent with the CMA's Rules nor with its Guidance': the CMA Rules require 'the CMA to "carry out its functions independently, impartially and fairly"', 'CMA8 requires the CMA "to carry out its investigations and make decisions in a procedurally fair manner according to standards of administrative law"', CMA8 [15.2] says that the CMA is not to treat business in a discriminatory manner and CMA6 [2.3] tasks the CMA with "achieving due process and ensuring that parties directly involved in a case are treated fairly".

- vi) 'the CMA is not conferring on Advanz a presumption of innocence, instead the CMA's approach is adversarial in nature ... manifestly inappropriate and unfair. On any objective basis it is to be expected that the CMA would be conducting itself on an impartial basis and be interested in getting to the truth of the matter. ... it is reasonably to be expected that the CMA would be wanting to afford Advanz a reasonable opportunity to respond to the SSO.'

17. In the updated Application provided at the meeting I held with Advanz's legal advisers, two additional reasons were put forward based on the wording of the 22 March Order and the relationship of the SSO with the litigation:

- i) since the CMA did not challenge the Order which expedited the hearing to be held on a date between May-June, 'the CMA accepted that there would be no prejudice caused to its investigation by the hearing not occurring until the end of June 2019'. Since the hearing was on 11 June, 'it follows that in reality a period of seven weeks for a response by Advanz to the SSO would have been perceived as acceptable by the CMA', arguing this is adding the three weeks between 11 and 28 June to the CMA's four week proposal.
- ii) in relation to timing and as observed in the Order 'it is not clear in any event that the CMA could fairly issue its final decision in this case prior to the Court of Appeal's determination in *Phenytoin*. It follows that on any objective basis there is no overriding reason for the CMA to insist on four weeks for a response'.

18. The Application sets out next steps, and proposes:

'...Advanz is provided with a period of six weeks, as originally provided by the CMA on 30 January 2019, to respond to the SSO. Meanwhile, if the case team is happy to receive Advanz's response piecemeal, Advanz will provide the CMA with its response on relevant market and dominance by 11 July 2019, that is within the twenty eight days the CMA has specified for a response to the entire SSO. This is on the basis that the CMA says that it has not materially altered its submissions on those matters.'

Meeting with Advanz's legal advisers

19. At the meeting I held with Advanz's legal advisers they highlighted the key issue in the Application: the refusal by the CMA case team to extend the original time period of six weeks to Advanz and instead to require it to respond to the SSO within 28 days and noted this was in the context of two Court Orders which both

extended the time period to respond pending the outcome in the judicial review application. A number of points were covered during the meeting, emphasising the points set out in the Application. The key points are summarised below.

- A plain reading of both Orders issued by the Court in the application for judicial review was that the judges considered the timeframe should be extended.
- Advanz was concerned about parity of treatment and due process. It was unfair and unreasonable for it to be required to respond within 28 days when the other parties had been given a total of 24 weeks. Moreover, the other parties had received an extension even before that granted by the 22 March Order. In the context of due process and unfairness they noted that they had raised the issue of determining a timeframe on the day before the judgment in the judicial review would be handed down (letter of 12 June). The CMA had replied it was 'premature to respond'. The CMA had no response in court when judgment was handed down. Advanz was concerned about any delay.
- The CMA had not disputed the correspondence provided to the Court by [X]'s legal advisers which stated the original deadline was extended on the basis that six weeks was 'manifestly inadequate'. If six weeks were such, it was clear that 28 days would be as well.
- The CMA had not treated all parties equally or transparently. Advanz had not been told about the extension of the deadline provided to the other parties and instead the CMA had informed it that the extension to 27 March was granted 'in the interests of pragmatism' (letter of 15 March).
- The 22 March Order which related to expedition set a floating date for the judicial review hearing between May and June. This was not challenged by the CMA. It had therefore accepted that the Investigation would not be prejudiced by a hearing which could be held as late as the end of June. The impact on the CMA's timetable of Advanz's request for six weeks for responding to the SSO would be no different from the potential for that judicial review hearing to have been held at the end of June.
- Advanz's legal advisers considered the remarks made by Richard Clayton QC following the handing down of the judgment demonstrated his displeasure with the CMA and its inability to be reasonable. They quoted his view from the transcript: 'the priority from the public interest perspective is to move things forward' and also quoted from the transcript to illustrate the judge's expectation of a six week extension, pointing to statements including 'Well, I

would have thought it should be six weeks from today' and 'It cannot be less than six weeks'.

- The CMA's procedural guidance and rules were noted, setting out the importance of the CMA carrying out its functions independently, impartially and fairly to achieve due process. Advanz's legal advisers argued that the CMA's overall approach therefore ought to be objective and should demonstrate the highest standards in what was a quasi-criminal investigation: the importance of getting to the truth would be underpinned by providing parties with a fair opportunity to respond without Advanz being put under an unreasonable deadline.
- Although an argument might be put forward that Advanz could have been working on the response to the SSO during the five week period up until the 5 March Order, the response to such an argument was that Advanz had a reasonable expectation that permission to seek a judicial review would be granted, an expectation reflected in the reasons provided by the judge granting the 5 March Order. During that period [X]. Since there was 'limited time in the day', they had focused on the judicial review application [X]. Advanz's legal advisers were concerned about their client's costs and resources. Moreover, this argument also did not alter the fact that the other parties had been given more time.
- The Observations of Mrs Justice Thornton in the 22 March Order supported Advanz's approach: 'It is not clear that the CMA would fairly issue its final decision in this case prior to the CA determination in the Pharma case'. It was argued that this statement still remained at large and had not been addressed by the judgment in the judicial review application.

20. At the meeting with Advanz's legal advisers, they also addressed questions I raised about the wording of the Orders and the request for a six week timeframe.

- They considered that the question of whether the Orders provided for a suspension of the timetable or a delay had been addressed by reference to the judge's views in the transcript which they had read out at the start of the meeting.
- They had been concerned about the timeframe from the time they had received the SSO. They noted the parallel they saw with the interchange fees litigation on which they were leading and where cases had been stayed pending litigation. It was appreciated that although there may be cases that the CMA wished to progress while *Phenytoin* was on appeal, this case was different. It raised a unique and seminal issue about the determination of

excessive and unfair prices. They argued that until this issue has been determined, the Investigation needs to be suspended. They pointed out that should the CMA proceed to an infringement decision, the parties would appeal and any appeal would be stayed pending the outcome of *Phenytoin*. So progress of the case would be delayed in such circumstances. They would not advise their client to accept liability before the issue of pricing was determined.

- In addressing why six weeks were required and what would be done during that period that could not be done within 28 days, they observed that a six week period was considered essential, arguing this was a pragmatic, sensible and reasonable approach. They pointed out that the CMA accepted this was a reasonable time period or it would not have granted the extension to the other parties. Six weeks would enable Advanz to focus on the seminal legal issue – one that was as ‘rare as hen’s teeth’ and the first case to go to the Court of Appeal. There would be insufficient time to consider this within four weeks. Although some time had already been spent looking at the SSO and identifying that this issue had been raised, the documents also needed to be reviewed and considered, even accepting that there were certain documents (for example in relation to parental liability) which would not be relevant to Advanz. It was also noted that a proposed staggered response, with Advanz’s response provided later than the other parties, would assist the CMA in handling responses and avoiding the need to consider several sets of representations at the same time.

Meeting with the CMA case team

21. At the meeting with the CMA case team, the points raised by the Application were considered. The key issues covered are set out below.

The public interest in the CMA progressing investigations

22. The CMA case team noted the CMA’s public interest in progressing investigations, and in progressing this Investigation. The issues were set out in the judicial review proceedings. Although Advanz argue that the alleged abuse is historic that does not negate the need to progress the Investigation. In particular, the alleged infringement was significant with an impact on the NHS and patient treatment and it remains an area of public interest, as reflected in press and Parliamentary attention.

23. The judicial review application had been an attempt to halt proceedings and had been rejected.

The deadline for responding to the SSO

24. The initial six week deadline for responding to the SSO had been set on the basis that this was an SSO and not an SO. This period had been extended by one week (see paragraph 34 below). After that, each of the additional extensions to this period had been made in the context of the judicial review proceedings.
25. The key issue which the CMA had considered was whether the addressees of the SSO had been given a reasonable time to respond. Setting this time period was an area of judgement and discretion for the CMA, taking into account the work that might be involved and the changes reflected in the SSO (see paragraph 30 below).
26. It was noted that the judicial review had been brought five weeks into the initial time period. There was no legal basis for Advanz 'putting down tools' on the response to the SSO up until the issue of the interim order: there had been no stay before that and no indication from the CMA about any change to the deadline.
27. The deadline of 28 days was calculated based on the fact that there were 16 days remaining from the original time period and a decision that it would be reasonable to provide a further 12 days. This was consistent with the position Advanz itself had taken in the papers presented in the judicial review, since it was noted that Advanz had asked for only a 28 day period following the handing down of the judgment by the Court of Appeal in *Phenytoin*. A 28 day deadline for the response to the SSO was a pragmatic and flexible approach. Overall, taking account of the period before the judicial review, this was a total of nine weeks for responding to the SSO. Even assuming that Advanz had done nothing in relation to the SSO during the judicial review proceedings, this seemed a reasonable period. Advanz however still requested an additional two weeks.
28. The decision to approach the period overall was based on a reading of the Orders in the judicial review proceedings. These provided for a stay or freeze of the next stage of the CMA Investigation, pending the judicial review proceedings, rather than putting the timetable back to the beginning with a restart once the proceedings were determined. This was based on a reading of the Orders, although it was acknowledged that this was not entirely clear. The Orders referred to a stay 'until determination' of the proceedings, which could have meant until the day judgment was handed down. On one reading of the Orders this might therefore have meant that the representations on the SSO were due as soon as the judgment had been handed down. The other parties had been uncertain about the timing implications of the Orders and had been in contact with the case team to confirm this and ensure that they would not be in breach of

their obligations to respond to the SSO. The case team considered that the stay or freeze reading of the Orders was appropriate and reflected the wording of the judge who referred to the 22 March Order as one that ‘holds the ring’ and the fact that the Orders stated they were granted to ensure that the judicial review hearing would ‘not be rendered nugatory or illusory’.

29. Moreover, the CMA case team noted that Advanz had not been in contact during the initial period to indicate that they were downing tools and had instead been in correspondence about possible dates for the oral hearings. It was also noted that Advanz had been in a position to provide estimates of detailed costs for responding to the SSO as part of the judicial review proceedings, which suggested that they had at least engaged in work to make that estimate. It was observed more generally that the Competition Act procedures provide an opportunity for making representations on an SSO although there was no obligation for Advanz to do so.
30. The original time period which was set for response to the SSO was based on a number of factors including precedent, the fact that this was an SSO, the size of the file and an assessment of what had changed since the issue of the SO. As had been explained in the SRO’s Decision, approximately 800 new documents were disclosed with the SSO of which 702 were new to Advanz. This was compared with the 2800 documents disclosed with the SO. The new documents which were disclosed set out the test in *Phenytoin*. This had been an area on which the parties had made submissions in response to the SO, including in establishing benchmarks for the appropriate test for calculating prices. The *Phenytoin* test built on the position set out in the SO. It was clear what the parties would be required to respond to, and the new analysis was based on the judgment which had been a matter of public record since June 2018. There was also additional material in relation to parental liability which would be relevant to [X] but not to Advanz.
31. It was acknowledged that, as set out in the Application, Advanz was involved in other CMA investigations. These other investigations were however at different stages and the CMA case team did not consider that this should of itself have had any impact on Advanz’s ability to respond to the SSO. It was also noted that Advanz was well resourced and well advised.

The comments of the judge

32. The comments of the judge in relation to the appropriate time period for the deadline for responding to the SSO were discussed. The CMA case team provided the context in which the comments were made, noting these followed the handing down of the judgment refusing the judicial review application and the

fact that the judge had not been aware any issues about timetable might be raised. This was reflected in the wording of the judgment which states:

'Having had more than three seconds to look at the two orders that have been granted ... it does appear that, in essence, both judges proceeded on the footing that they were dealing with what would be, in normal circumstances, a negative injunction to prohibit or avoid rendering the whole process nugatory.'⁵

33. In discussion about the wording which had been referred to by Advanz's legal advisers in the meeting I held with them, the CMA case team noted that this came at the start of the judge's consideration of the issues when he was trying to understand the points which had been raised. He noted that the 22 March Order 'holds the ring' and acknowledged that 'the difference between you is six against four weeks'.

Equal treatment

34. The CMA case team noted that all parties had been provided with the same deadline of 11 July and all parties had been provided with the same extensions. There was therefore no question of unequal treatment. It was noted that the original six week period had been extended by one week on 22 February (see paragraph 10 above) in light of matters relevant to the other parties, but this had not been because there was any acceptance by the CMA about any unfairness with the length of the original deadline as Advanz had suggested. This one week extension had also been given to Advanz at that time. The other extensions to the deadline had been provided against the background of the judicial review proceedings and the uncertainty that this created. The other addressees of the SSO were interested parties in the judicial review proceedings.

35. At the meeting with the CMA case team, I raised the suggestion which had been made on behalf of Advanz about the possibility of providing a two stage response (with a response on the relevant market and dominance first) and the suggested benefits of a staggered response from addressees of the SSO providing the CMA with the ability to review representations received from other parties first. The CMA case team noted that in light of the nature of the SSO it was representations on the abuse section that would be of most interest and that there was benefit in receiving all written representations at the same time, for example this provided the opportunity to look at themes.

⁵ Transcript of judgment handed down orally on 13 June 2019, paragraph 61.

Consideration of the Issues

36. In dealing with this Application, I have considered the procedures followed in dealing with Advanz's request for an extension of time for responding to the SSO following the determination of the judicial review proceedings. I have considered the reasons given to Advanz which were set out in the SRO's Decision and how the request was approached. In doing so, I have had regard to the nature of representations on an SSO. In particular, I have assessed if the procedures followed in dealing with Advanz's request were carried out in a fair and reasonable way.

Nature of representations on an SSO

37. The key point in considering this Application is whether the time period which was confirmed by the SRO's Decision for providing written representations on the SSO was a reasonable one for Advanz. There are a number of considerations which are relevant to this assessment.

38. I note that Advanz has argued that the CMA's decision not to provide it with 'the original six week period' following the judgment in the judicial review proceedings is 'unfair and is not respectful of due process'.

Rules and Guidance

39. The CMA Rules provide that if the CMA is proposing to make an infringement decision, it must give notice to a party under investigation which must state:⁶

'the period within which a relevant party may make written representations to the CMA on the matters referred to in the Notice'.

40. The Guidance⁷ sets out the approach the CMA will take when it has been decided to issue a Supplementary Statement of Objections in an investigation. This states:

'The CMA will give the Addressee an opportunity to make representations on the Supplementary Statement of Objections. The CMA will set the time frame for responding after taking into account the extent of the difference in the objections raised in the first Statement of Objections compared with the Supplementary Statement of Objections and allow the Addressees an opportunity to inspect new documents on the file.'

⁶ Rule 6(1)(c), CMA Rules, see footnote 1 above.

⁷ CMA8, paragraph 12.27, see footnote 2 above.

Reasons for setting the time period

41. The original six week time period was set taking into account a number of factors including precedent, the fact that this was an SSO, the size of the file and an assessment of what had changed since the issue of the SO, as the CMA case team explained at the meeting I held with them (see paragraph 30 above). This approach reflects the Guidance, set out above.
42. The original time period was extended in the context of the judicial review proceedings.
43. The time period set following the judicial review proceedings took account of the time which had already been spent from the original time period before the judicial review proceedings, the suspension provided by the judicial review proceedings, and the time from the original time period still left to run. There were 16 days left to run from the original time period. The CMA case team decided that 12 days should be added in addition to those 16. This provided a 28 day period for providing representations on the SSO. Overall, taking account of the original time period before the judicial review proceedings, this meant that Advanz had a total of nine weeks for responding to the SSO.
44. In the meeting I held with the CMA case team they explained why they considered the time that was set following the judicial review proceedings was pragmatic and flexible, providing a reasonable period for Advanz to make representations on the SSO. The SRO's Decision clearly sets out the reasons for this time period, referring to the CMA's Guidance and the particular circumstances of the case, as well as setting out an overview of the changes to the period. It states:

'In this case, the conduct which is the subject of the investigation set out in the SSO remains unchanged from that in the SO (dated 21 November 2017), large parts of the CMA's provisional conclusions remain unchanged and Advanz has already taken the opportunity to make representations on many of these matters. Other than Chapter 5 of the SSO, the CMA's case remains in large part unchanged.'
45. The SRO's Decision also explains that the majority of documents were disclosed with the SO and that for the SSO 'only 702 are actually new to Advanz'. The CMA case team explained in the meeting I held with them that the nature of the document disclosure and access to file was a consideration which had been taken into account in setting the time period (see paragraph 30 above).
46. The six week period which had been sought by Advanz and which was refused in the SRO's Decision represented an additional two weeks to the time period

proposed. I note that in Advanz's Skeleton Argument for the judicial review application hearing they had sought an order extending time for a 28 day period following the handing down of the Court of Appeal judgment in *Phenytoin*. Advanz argued that the 28 day period they had sought in the judicial review was in a different context from the time required for responding to the SSO now: it had been requested as the time required 'to digest the correct legal test for a finding of abuse for excessive and unfair pricing' (see paragraph 15 above).

47. I note also that at the meeting with Advanz's legal advisers and in the updated version of the Application provided at that meeting, it was argued that an additional period for Advanz to respond to the SSO as requested would not interfere with the CMA's timetable in the Investigation. This was on the basis that the CMA had not challenged the expedited timetable for the judicial review application to be heard between May and June 2019 which was provided for by the 22 March Order.

48. At the meeting I held with Advanz's legal advisers, I asked if there were specific matters in relation to preparation of the representations in response to the SSO that they could identify that could not be done within the 28 day deadline. They did not identify any such matters. I note also that in the Application although there is reference to the fact that review of the additional document disclosure 'is a substantial task, involving considerable professional resources', the main arguments set out to challenge the 28 day time period are presented by contrast to extensions granted to the other parties rather than in relation to what may be reasonable for Advanz itself in order to prepare its response.

49. I have not been provided with any reason why the proposed 28 day time period for responding to the SSO following the end of the judicial review proceedings was not reasonable in itself. I note that concerns were raised on behalf of Advanz about the extent of document disclosure and the resources required to consider all of the material (as set out in paragraph 15 above) but no explanation was provided why the period was insufficient to deal with the documents or why an additional two weeks would be sufficient to do so. I note also the explanation provided by the CMA case team at the meeting I held with them and the information provided in the SRO's Decision about the number and nature of the documents that were disclosed and the significance for Advanz (see paragraph 45 above).

50. I also do not see any force in an argument that a longer period of time is required now following the end of the judicial review proceedings than a time period that Advanz itself considered would be required following the anticipated Court of Appeal judgment in *Phenytoin*. I note Advanz's views about the timing of the judicial review and the consequent absence of any implications for the timetable

in this Investigation if it were to be granted an additional time period. I do not consider that this is a relevant factor in considering if the decision to provide a period of 28 days for Advanz to respond to the SSO and to refuse to provide the additional two weeks requested was reasonable.

51. In all the circumstances, there is nothing which suggests that the 28 day time period was determined or proposed by the CMA in a manner that was unfair or unreasonable or that the period was of itself unfair or unreasonable in any way. There is also nothing which suggests that it was unfair or unreasonable for the SRO to refuse Advanz's request for two additional weeks to respond to the SSO.

Other parties

52. In the Application and as noted above (see paragraphs 15-16 and 19 above), concerns were raised on behalf of Advanz about the treatment of the other recipients of the SSO, arguing that the fact that they had also received an extension so that their representations are due on the same date as those of Advanz is 'manifestly unfair' since they will have been provided with an extension of 'eight weeks and then to at least twenty weeks'. I note that the SRO's Decision explains that these timeframes reflected a 'pragmatic decision to align responses to the SSO' in light of the fact that the other parties were interested parties in the judicial review proceedings and that this was therefore 'a direct result of ... and the uncertainty arising from those proceedings.' This point was also explained at the meeting I held with the CMA case team.

53. I do not consider that a comparison with the other addressees of the SSO is relevant or necessary in considering the period of time which has been given to Advanz. I observe in relation to the other parties that, as set out in the SRO's Decision noted above (see paragraph 52 above) and by the CMA case team in the meeting I held with them (see paragraph 34 above), those other parties were also interested parties in the judicial review and that all parties were treated in the same way. The key point is whether Advanz has been given a reasonable time for making representations on the SSO.

54. The SRO's Decision notes also the wider context:

'Overall, this deadline allows for a response period for Advanz of nine weeks from the issuing of the SSO (when the period between the Mostyn Order and the Clayton judgment is excluded) and a total response period of more than 23 weeks since the SSO was issued.'

55. For the reasons set out above, I consider that the CMA case team gave Advanz a reasonable period of time to provide its response to the SSO and that the CMA case team took account of appropriate considerations in doing so. This period of

time was set in accordance with the CMA Rules and Guidance, taking into account the circumstances of this particular case. Clear reasons were set out in the SRO's Decision why the time period of 28 days was provided and why the request for an additional two weeks was refused.

Process for considering request for extension of time

The SRO's Decision

56. Reasons for the refusal to provide Advanz with an additional two weeks for responding to the SSO were clearly set out in the SRO's Decision and the annex provided a timeline explaining the context for the CMA's decision to provide 28 days.
57. This reflects the correspondence throughout the course of the judicial review proceedings that I have seen as part of the Application: it kept the parties informed of the deadlines and any extensions.

CMA's conduct

58. Advanz argued in the Application and as set out above (see paragraphs 16 and 19 above) that the CMA's approach was contrary to the requirement to act 'in a procedurally fair manner' and that it 'is not conferring on Advanz a presumption of innocence' and that the CMA should instead be 'conducting itself on an impartial basis and be interested in getting to the truth of the matter' and so 'be wanting to afford Advanz a reasonable opportunity to respond to the SSO.' It was also argued more generally on behalf of Advanz that the CMA had not acted in a fair and transparent way and had not treated all parties equally in setting the deadlines.
59. There is nothing in the correspondence that I have seen with the Application or in the meetings I have held in my consideration of the Application which suggests that the CMA case team has not acted in a fair and reasonable manner in setting a 28 day period for the response to the SSO following the judgment in the judicial review proceedings. Moreover, this period provides the opportunity for Advanz to make written representations on the SSO which will be considered by the CMA in accordance with Competition Act procedures. There is nothing that I have seen in considering the Application which suggests that the CMA case team acted otherwise than dealing fairly and properly with each of the parties involved.

Impact of the judicial review proceedings

60. I note also that as explained by the CMA case team, the proposed deadline was considered in the context of the judicial review proceedings. The timeframe

proposed acknowledged the period of time before the proceedings were brought and the fact that no work might have been done in relation to representations on the SSO during those proceedings. The CMA case team proposed an additional period to the time that it considered was still left from the original timeframe set when the SSO was issued. The CMA case team therefore proposed a period of 28 days following the judgment. This represented an additional period of 12 days as well as the 16 days which were still left to run from the original time period. I note that the period of 28 days also reflected a suggestion made by Advanz itself in its Skeleton Argument for the judicial review which sought an extension of time to respond following the handing down of the judgment of the Court of Appeal in *Phenytoin*.

61. In the Application and as noted above (see paragraphs 15-16 and 19 above), arguments were made on behalf of Advanz about how the judicial review proceedings influenced the deadline for responding to the SSO. It was argued that the Orders in the judicial review extended the time frame for responding and that the CMA had accepted this. Advanz also argued that in light of the fact that permission was granted for the judicial review, it was reasonable to have stopped work on the SSO and that the Orders acknowledged its wider position on the issue of abuse was still unresolved.
62. Interpretation of the Orders made in relation to the judicial review is relevant to the time period. I appreciate that there was some uncertainty over the impact of the Orders. It is clear from the Observations of the judges granting the Orders that these were designed to suspend the timetable during the judicial review proceedings so that the proceedings would not be rendered 'nugatory or illusory'. On a hawkish reading, as pointed out by the CMA case team, the Orders might simply have suspended the timetable until the handing down of the judgment in the judicial review proceedings, meaning that the representations on the SSO would have been due on that day. It appears however that the better reading is that the Orders suspended the period for responding to the SSO, reflecting the fact that the judge referred to the position as one that 'holds the ring'.⁸
63. It is appropriate that the time period set by the CMA acknowledged that Advanz may not have done any work on responding to the SSO during the period of the judicial review proceedings. It was nevertheless reasonable to assume that Advanz would have been working on the response before the judicial review application was made and before the interim order was granted. As the CMA case team explained in the meeting I held with them, Advanz's legal advisers were in a position to comment on the amount of work that would be required to respond to the SSO in providing estimates as part of the judicial review

⁸ Transcript of proceedings on 13 June 2019, page 19.

proceedings. Although Advanz may consider its position on the legal issues to be correct, this does not mean that any assumption could be made about court proceedings – both the outcome of the judicial review (permission and hearing) and of the Court of Appeal in the *Phenytoin* case – irrespective of any Observations made in the Orders.

64. I note from the transcript the points which the judge made following the handing down of the judgment and the critical comments which were pointed out by Advanz's legal advisers. I also note that, as pointed out by the CMA case team, the fact that in his judgment the judge referred to having 'more than three seconds' to look at the Orders, indicates that his initial comments were made without a full understanding of the nature of the issues relating to this time period. I also note nevertheless that once the judge had understood the points at issue, he appreciated the factual situation, noting 'the difference was between a period of six and four weeks.'⁹ I note also that he acknowledged that the four week period arose from Advanz's skeleton.¹⁰ I do not consider that the comments made by the judge are relevant to the process for determining the time period or indicate that the way in which this was done was unfair or unreasonable in any way.

Litigation and tactical gaming of the CMA investigation process

65. I recognise the importance for the efficiency and effectiveness of the Competition Act regime that timeframes are clear, understood and adhered to. This is of benefit to parties as well as to the CMA. It underpins the right to have a decision taken and for proceedings to be resolved within a reasonable time period.

66. There may be occasions where litigation affects the timeframes that have been set in a Competition Act investigation. It is nevertheless important that litigation is not improperly used as a gaming tactic in the context of an investigation.

67. I note the submissions in the Witness Statement made by the Project Director of the Investigation in support of the CMA's request to vary the 5 March Order and seeking expedition of the judicial review hearing. This was provided with the Application.

68. It states:¹¹

'Extension of deadline to respond to SSO and no expedition could encourage tactical judicial reviews to delay investigations

⁹ Transcript of judgment, paragraph 62, see footnote 5 above.

¹⁰ Paragraph 76 of Advanz's skeleton, referred to in transcript of judgment, paragraph 62, see footnote 5 above.

¹¹ Witness Statement of Ronan Flanagan on behalf of the Defendant dated 12 March 2019, paragraph 38.

There is a real danger that, if the Order is not varied and there is no expedition, the Court's approach runs the risk of encouraging parties to apply for judicial review in order to derail investigations by the CMA (and indeed by other law enforcers). Specifically, well resourced parties could bring judicial review proceedings in the expectation that they could obtain an eight to 12 week extension of their deadlines without the CMA having had any opportunity to state its case to the Court. Indeed...such a litigation strategy could also achieve a much longer-term delay to the investigation. This would not only be disruptive but also detrimental to the CMA's enforcement of competition law.'

69. Expedition was granted by the 22 March Order.

70. I note also the points that were made by the CMA case team about the importance of progressing this Investigation in the wider public interest.

71. I therefore consider that the procedures followed for determining the 28 day time period for providing representations on the SSO following the end of the judicial review proceedings and for refusing the extension requested by Advanz were fair and reasonable. I consider that the decision about that time period was clearly explained to Advanz.

Decision

72. After careful consideration, in light of the reasons set out above, on 26 June I decided to reject the Application.

73. My decision was communicated to Advanz's legal advisers and to the CMA case team on that date.

FRANCES BARR

PROCEDURAL OFFICER

16 July 2019