The CMA Remicade decision: discount schemes and abuse of dominance – effects matter!

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Summary

On 14 March 2019, the UK Competition and Markets Authority (CMA) decided to close its investigation into a discount scheme by Merck Sharp & Dohme Limited (MSD) on the basis that there were no grounds for it to take action. In essence, the CMA’s discount strategy was not likely to lead to exclusionary effects. Since it found no abuse of dominance, the investigation was closed.

Background

In December 2013, the CMA opened a formal investigation into a discount scheme by MSD that had cleared the CMA’s standard barrier by offering a discount scheme for the sale of Remicade in the UK. The starting point of the CMA’s investigation was that MSD had offered a discount scheme for Remicade in March 2011, which had been in place since February 2012. The CMA confirmed that effects matter. The CJEU spelled out that the effects-based approach in unilateral conduct cases was the starting point for assessing whether an undertaking’s conduct was capable of restricting competition.

The CMA Decision

Market definition and market position

Although the CJEU had stated that the relevant market was the supply of infliximab products in England, the CMA’s investigation considered a broader market. The CMA’s starting point was that "the relevant market was defined as Remicade and infliximab biosimilars. The CMA’s reasoning defined it more widely based on the products’ therapeutic substitutability. This criterion would have led to a wider relevant market, encompassing other biologic medicines and THF agonist biologics. However, the CMA chose a narrower market, namely that of the way the products were administered. Remicade was the only product used in the UK to treat autoimmune inflammatory disorders before March 2015. After the patent expired on 14 October 2015, there were numerous biosimilar infliximab products that entered the market. There was no abuse of any dominant position since it could not practically lead to exclusionary effects. Thus, the CMA concluded that even if the discount scheme may have allegedly intended to exclude competitors from the market, it had been in place for it to take action, since MSD’s discount strategy was not likely to limit competition in anticipation of the entry of new products.

Discount schemes by dominant undertakings are not per se abusive

In terms of abuse, and in line with the CJEU’s case law, the CMA’s starting point was that "not all discounts granted by undertakings in a dominant position are abusive. Rather, a variety of factors need to be assessed in order to determine the existence of an abuse. These factors include the terms applied as well as the discount as a whole. The CJEU held that a dominant undertaking’s conduct could lead to exclusionary effects.

On that basis, the analysis of the CMA focused on the likelihood of exclusionary effects. Thus, the CMA, in line with Intel, highlighted the importance of the effects-based approach for the assessment of the effects on competition of the applicable discount.

The likelihood of exclusionary effects matters

The CMA examined the relevant conditions to the discount scheme and concluded that it was freed from the stigmatic effect of discounting by the CMA’s starting point was that "the relevant market was defined as Remicade and infliximab biosimilars. While the CMA’s reasoning defined it more widely based on the products’ therapeutic substitutability, the CJEU’s judgment was not less to the dominant undertaking’s conduct and for influencing purchasing behaviour.

On that basis, the analysis of the CMA focused on the likelihood of exclusionary effects. To that end, the CMA examined the relevant conditions to the discount scheme and concluded that it was freed from the stigmatic effect of discounting. Nonetheless, the turning point for the CMA’s reasoning was the objective assessment of the likelihood of exclusionary effects. Since it found no such likelihood, the investigation was closed.

Conclusions

The CJEU’s decision that there were no grounds for action in respect of Remicade is a development that endorses the effects-based approach in unilateral conduct cases. The CJEU’s starting point was that "the relevant market was defined as Remicade and infliximab biosimilars. That is exactly what the CMA has done in the current case. Without over-relying on the volume specified in the matrix mentioned above in the investigation of cases, the CJEU examined whether MSD’s discount scheme was likely to exhibit excluding effects. Since it found no abuse of any dominant position, the investigation was closed.

In reply to MSD’s arguments, the CMA justified the choice not to apply the as-efficient competitor test (AEC test) in the Statement of Objections, by stressing that – despite being informative and useful – it was not required here. While this may not entirely reflect the framework of analysis set out in the CJEU’s judgment, it was the CMA’s starting point in the current case. The CMA’s reasoning was based on the EU’s more informalistic approach to abuse of dominance: a conduct is not abusive if it is not likely to cause exclusionary effects. The CJEU’s judgment thus provides a tool for the CMA to assess whether a granting of a discount as well as the discount’s tendency to bar competitors from accessing the market, to strengthen the dominant position of the undertaking concerned and to influence purchasing behaviour.

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