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

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Please refer to the past or, genes (2010), Assessment on Vitamin, (Noti 18010516, April Schuh), "The CMA Remicade decision: discount schemes and abuse of dominance - effects matter!

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) relating to its treatment for autoimmune disease Remicade. In essence, the EU court underscored that, if evidence is adduced that rebates are not capable of foreclosing access to the market when the discount scheme was introduced in March and April 2015. The CMA clarified that "the likelihood of exclusionary effects matters. Since it found no such likelihood, the investigation was closed.

Background
In December 2015, the CMA opened a formal investigation, alleging that MSD had abused its dominant position by offering a discount scheme for the sale of Remicade in the UK, contrary to section 18 of the Competition Act 1998 and Article 102 of the Treaty on the Functioning of the European Union (TFEU).

MSD's Remicade (molecule: infliximab) was the only product used in the UK to treat autoimmune inflammatory conditions before March 2015. After its patent expired on 24 February 2015, a number of biosimilar infliximab products were approved for use in the EU and placed on the market. Remicade is administered in hospitals and clinics by intravenous injection. Other TNF alpha inhibitors were administered in the market for inflammatory disorders before March 2015. After its patent expired, a number of biosimilar infliximab products entered the UK market (and specifically Inflectra by Hospira, Resmina by Napp, and Flixabi by Samsung Biopis). Infliximab is a prescription-only medicine purchased by the National Health Service (NHS) for use through tenders. The CMA examined the rules applicable to the discount scheme and considered that it was designed with the intention of disincentivising the NHS to switch to biosimilar products. The idea was that biosimilar infliximab products would be too expensive for hospitals and clinics if patients switched from Remicade to biosimilars, it would be too costly for hospitals and clinics if patients switched from Remicade to biosimilars.

The role of the as-efficient competitor test

In reply to MSD's arguments, the CMA justified the choice not to apply the as-efficient competitor test (AEC) price/cost test) in the Statement of Objections, by stressing that – despite being informative and useful – it did not need to be applied. The CMA also clarified that it was focused on the importance of assessing the likelihood of exclusionary effects for the period from 1 April 2015 to 31 December 2015.

The CMA Decision

Market definition and dominant position

Although there was no doubt on the definition of the relevant market and on MSD's alleged dominance, it was not necessary given the absence of games for action, the CMA worked on the assumption that the relevant market was the supply of infliximab products in England, and that MSD held a dominant position.

The relevant market product was defined as Remicade and infliximab biosimilars. The CMA considered adding a more generic aspect of the products therapeutic substitutability. This conclusion would have been a “wider product market, encompassing other biological medicines and IFP injection therapies. However, the CMA chose a narrower market, reliable because of the way the products were administered. Remicade was not (i) that treatment administered in hospitals and clinics on intravenous injection. Other TNF alpha biosimilars were administered in the same market for inflammatory disorders before March 2015. The CMA decision did not intend to apply the as-efficient competitor test in the CMA's assessment of the allegedly abusive conduct was implemented rather than at some point after the allegedly abusive conduct.

Conclusions

The CMA concluded that if evidence is adduced that rebates are not capable of foreclosing access to the market when the discount scheme was introduced in March and April 2015. The CMA clarified that "the likelihood of exclusionary effects matters. Since it found no such likelihood, the investigation was closed.

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See the CMA's 'Closing all'

https://assets.publishing.service.gov.uk/media/5c8a353bed915d5c071e1588/Remicade_No_Grounds_For_Activity.pdf

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In the Court of Justice 2013, the Court of Justice broke with its more formalistic previous case law on rebates and stipulated that, in essence, the Court of Justice believes that rebates are not capable of foreclosing access to the market. On the other hand, dominant undertaking can be accused of any anticompetitive effects in the absence of any evidence. The basis was essentially that that evidence is adduced that rebates are not capable of foreclosing access to the market, the dominant undertaking can be accused of any anticompetitive effects in the absence of any evidence.

The CMA clarified that since it found no such likelihood, the investigation was closed.