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UK COMPETITION AND MARKETS AUTHORITY BACKS OFF FROM LOYALTY REBATE ABUSE PROBE

On 26 June 2015, the Competition and Markets Authority (CMA) announced its decision to close an investigation into loyalty-inducing discounts/rebates offered by an (unnamed) pharmaceutical firm potentially in breach of the abuse of dominance prohibition (Article 102 TFEU and Chapter II of the UK Competition Act 1998 (CA98)). The CMA closed its file because the case "no longer fitted with the CMA's casework priorities". While this case suggests a continuing reluctance on the part of the CMA to devote resources to complex abuse of dominance probes whose outcome is uncertain, the fact that the CMA investigated this for a year, together with the more active enforcement by other European competition authorities of such cases, shows that firms which may be dominant cannot afford to be complacent and need to ensure their conduct can withstand such regulatory scrutiny. The CMA's announcement also provides a useful summary of the CMA's approach to when a dominant firm's discount/rebate scheme may be an abuse.

When Are Volume Discounts/Rebates Abusive?

The CMA's statement includes a succinct summary of "some of the circumstances in which the provision of rebates or discounts by a dominant company may raise concerns". In particular, the CMA's statement:

- confirms that so-called "incremental" rebates/discounts, where the customer gets the lower price only on purchases of additional units above the applicable volume threshold, are "in general, unlikely to raise competition concerns, even when they are offered by a dominant company"
- clarifies that the lawfulness of retroactive rebates/discounts offered by dominant firms will depend on whether they have the potential to exclude or limit the ability of competing firms to operate in the market, in particular by reference to the extent to which the rebate impacts rivals' ability to profitably compete for customers' "contestable" purchases
- indicates that the CMA will focus on whether, to be price competitive with respect to such contestable sales (including compensating the customer for the loss of the rebate), a rival would have to price at a level that is less than the dominant firm's production costs, meaning that an "as-efficient" competitor could not profitably compete for the contestable portion of the market
- identifies those rebates/discounts that lead to negative incremental prices for contestable sales (i.e., where the more the customer buys once its sales volumes have reached the contestable portion of its demand, the less it pays overall), as particularly likely to be an abuse

In short, the CMA's statement closely follows the approach set out in the European Commission's 2009 guidelines on its enforcement priorities in applying Article 102 – indicating that the CMA is only likely to regard a rebate scheme as infringing the abuse of dominance prohibition where the resulting net pricing makes it impossible for as-efficient competitors to compete profitably. This is despite the recent reluctance by the European Court of Justice (in the 2014 *Intel* judgment and Ad-G Kokott's May 2015 opinion in *Post Danmark A/S*) to endorse the "as-efficient competitor" (AEC) test.

In any event, while the CMA statement provides a useful (if somewhat brief) indication of how the CMA is likely to approach the question whether a volume rebate has a loyalty-inducing effect, the practical reality is that the CMA's approach is complex and can be challenging to apply in practice with any certainty. Further, in structuring their rebates, firms will also need to bear in mind the risk that a court (or a competition authority, notwithstanding the European Commission's 2009 guidelines) may seek to rely on the more per se approach reflected in much of the European Court of Justice/General Court case law (e.g., in the *Michelin II* judgment).

What Does This Case Tell Us About the CMA's Appetite for Abuse of Dominance Cases?

The CMA's predecessor body, the Office of Fair Trading (OFT), was regarded by many as noticeably reluctant to actively enforce abuse of dominance cases, with a greater focus on suspected anticompetitive agreements and market studies. Since the CMA replaced the OFT in April 2014, we have been waiting to see whether it has a greater willingness to take on abuse cases. In a speech at King's College London on 30 March 2015, Alex Chisholm, the CMA's chief executive, referred to abuse of dominance cases as "that rare form of UK case". Now, the CMA's decision to close its file in this case further reinforces the impression that the CMA shares the OFT's traditional reluctance to devote enforcement resources to abuse of dominance cases.

This was the first – and only, to date – abuse of dominance investigation publicly launched by the CMA since it was formed in April 2014. The CMA inherited four abuse investigations from the OFT. Of these, two are ongoing (*Paroxetine pay-for-delay* and *Supply of Pharmaceutical Products*), and two (*Road Fuel Distribution in the Western Isles* and *Epyx SMR platform*) concluded with the CMA accepting commitments, without making an infringement decision or imposing any fine.

One key factor driving the CMA's creation was the perceived need to improve the speed and robustness of the competition enforcement regime. In his March 2015 speech, Alex Chisholm pointed to the recent Hampshire estate agents case, where the CMA reached a settlement within 15 months of the case opening, as an example of the CMA's ability to "deliver cases quickly". This focus on the speedy processing of enforcement cases may partly be behind a reluctance on the CMA's part to get dragged into highly complex and uncertain abuse cases.

The European Commission and Other National Competition Authorities

Other competition regulators or authorities in the EU have been much more active in enforcing the abuse of dominance prohibition in recent years.

For example, the Bundeskartellamt (the German competition authority) published in its annual report on 30 June 2015 that in the previous two years it had concluded 79 abuse control proceedings. The Autorité de la concurrence (the French competition authority) has concluded 17 abuse of dominance investigations since the beginning of 2014. The European Commission has also shown that it is not afraid – and is indeed eager – to take on some of the world's biggest players, and currently has 21 investigations ongoing into suspected abuses of a dominant position, including against companies such as Amazon, Google and Gazprom.

What Does This Mean for Companies in the UK Who Believe They May Be "Dominant"?

Despite the closure of this particular investigation, the fact that the CMA launched the investigation at all, and persevered with it for a year, means that firms which may be dominant cannot assume the CMA will not investigate such cases in the future, as the CMA has been keen to emphasise. In any event, the European Commission also has jurisdiction – and the evident appetite – to investigate suspected abuses of dominance, as do many of the national competition authorities in member states outside the UK.

Therefore, any company that thinks it is or may be dominant in any product market would be well advised to ensure that its business practices and conduct can withstand scrutiny by the competition authorities. Such companies should consider conducting an audit of their policies and practices (by external counsel, to ensure the resulting report is privileged) in order to identify any areas of exposure.

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