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Competition Law insight

Antitrust law and policy in a global market

Mixed messages

The UK regulator's closure of a pharma discount scheme case raises lots of questions

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In June 2015, the UK's Competition and Markets Authority closed a case on administrative priority grounds (Case CE/9855-14). Nothing unusual about that. The case page shows that it was an article 102/Chapter II case involving a discount scheme in the pharmaceutical industry. According to the case page, the CMA had opened the formal investigation broadly a year earlier; presumably it must have been investigating the case for some months beforehand. Again, pretty routine stuff. However, the content of the case closure decision is an interesting read, in terms of points of process as well as substance.

Process

The CMA explains in its decision that, in parallel with the case closure, it has sent a warning letter to the parties. At the same time, it stresses that none of this should allow any assumption to be made as to whether competition law has been infringed. Hmm. Moreover, the CMA then spends two pages of prose and one page of footnotes explaining the hypothetical circumstances in which discounts and rebate schemes can be problematic.

What does this mean to the competition lawyer sitting on the Clapham omnibus? The CMA must have had a case involving loyalty discounts. It was unhappy about it and opened formal proceedings. It thought long and hard about the case and, after a year, it decided that it still had some way to go to reach an infringement finding. For some reason, it did not want to do that. Why not? We don't know. We only know that the CMA believes that in "the particular circumstances of the case, [an infringement finding would] have had limited, if any, impact on consumer welfare."

But the CMA was unhappy enough about what it saw that it wanted the company to stop it or not to do it again (or both). Why? We don't know that either. Similarly, the CMA also did not want anyone to think that discounts of that particular kind were acceptable. So the CMA thought it had better set out very clearly – over two pages of prose and one page of footnotes – that it is not the case.

This sends some distinctly contradictory messages to companies and their advisers. Clearly, the CMA has an issue with some discount schemes. Neither the old Office of Fair Trading nor the new CMA has an established case record on the issue. The pharma industry is one which the CMA regards as a key focus area. Given that, one would think that developing an administrative case practice would be beneficial in the interests of transparency. Yet the message that the CMA is sending is that, although it does not like these particular discount regimes, it is extremely hesitant to use its resources to pursue such cases.

So in what circumstances will the CMA pursue such a case? Will it do so when the criteria set out in the second part of the decision are met? If so, were they not met in the case at hand? If yes, why not pursue it? If not, what is the need for a warning letter? What would it take for it to become an administrative priority? All of these questions are unanswered.

Appropriateness of CMA's approach

All of this raises a more fundamental question about the appropriateness of case closures on administrative priorities in such circumstances and so late in the process. Administrative priority grounds seem a reasonable tool to allow an authority to apply a first filter in cases early in the process. It also seems a particularly useful tool to bring about a change in companies' behaviour in the very early stages of an

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investigation so that further investigative steps become redundant.

However, it is a questionable tool in circumstances where a significant amount of work has already been undertaken and the CMA must be in a position to decide whether an infringement is likely to have taken place (even if it does take more work to bring the case to an infringement finding or settlement).

Where the CMA issues warning letters and a formal (albeit hypothetical) piece of analysis such as in the current case, the implication is that the CMA has come to the view that the behaviour does involve a competition breach, despite the CMA's insistence that third parties should not read anything into such warning letters. For the CMA then to close a case on the basis of a decision that is not appealable is wholly unsatisfactory (other than, of course, for the company under investigation). In such circumstances, the CMA should bring the case to a formal end, either by pursuing the competition law breach, by reaching a formal settlement with the company or by issuing a "no grounds for action" decision.

This case also raises issues about the appropriateness of what is, in effect, quasi-guidance without any form of consultation on the back of a decision that says nobody is allowed to draw any inference that there might have been a competition law breach in the case at hand. This is particularly so where, as appears to be the case here, the quasi-guidance is not entirely congruous with EU case law.

Substance

The facts contained in the decision are scant. One needs to take care when speculating about the content but the CMA has put us in that position so I will speculate a little. The content of the CMA's explanation, together with the fact that this was a pharmaceutical case, suggests that this involved some form of "brand equalisation" deal.

What is brand equalisation? Typically, it occurs where the market for a particular product has become generic but where branded products still play a role. Where scripts are written by brand, they have to be dispensed by brand. But if they are prescribed generically, then the pharmacist can dispense any product with the same molecule (ie branded or generic).

A brand-equalisation deal means that the originator offers a blended (discounted) price for both branded (ie non-contestable) requirements and generic (ie contestable) requirements. This allows the pharmacist to fulfil both requirements from one source and often is conditioned on exclusivity, quasi-exclusivity or specific order volumes for both requirements. The issue for generic suppliers is that they will have to match the discount but only over the generic portion of the requirement (as the pharmacist will, of course, still need to order the branded product for the non-contestable branded scripts).

In the past, the OFT had little appetite to investigate brand equalisation deals. If this case actually involved such a deal, it would have been the first of its kind in the UK. So the precedent value would have been significant.

The case law that would be applicable to such deals seems relatively clear and established: *Hoffman La Roche* (Case 85/76) and *Michelin II* (Case T-203/01) would make a promising start. There is very little flexibility in the approach from the European courts and AG Kokott's opinion in the current *Post Demark* preliminary reference (Case C-23/14) suggests that this is unlikely to change in the near future. Of course, each case turns on its specific facts but the legal foundations seem pretty clear, even if they continue to draw fire from antitrust economists.

Interpretation

One interpretation of the admittedly scant facts in the not so scant CMA press release is that the CMA was faced with a dilemma in this case: it had a loyalty-enhancing rebate scheme that fell squarely within the European Court's jurisprudence, so it was hard to conclude that there were "no grounds for action". Yet, it failed the as-efficient competitor test, which would mean that an infringement decision would have brought criticism from economic quarters.

If that interpretation is correct (and I readily concede that it might not be, given that I was not involved in the case), this would raise a further question: is it appropriate for an authority to use administrative tools that cannot be challenged before a court to achieve results that are not in line with the European courts' case law if the reason is that it does not agree with that case law?

Of course, an alternative interpretation may be that this was one of those heritage cases from the OFT that the CMA should have solved early in the process, and that the case decision group sought to correct that omission as soon as it possibly could. Maybe it was a planned discount scheme that was never put into effect and abandoned as soon as the OFT/CMA investigated it. We will never know.