On 17 November, the Office of Fair Trading ("OFT") announced that it had decided that it had no grounds to take action against IDEXX Laboratories Limited ("IDEXX") under EU or UK competition law for alleged abuse of a dominant position in the veterinary diagnostic testing sector.

The OFT opened its formal investigation of IDEXX in November 2010, following a complaint alleging that IDEXX was abusing a dominant position in the market for the supply of "in-clinic companion animal diagnostic testing equipment". The OFT has now published its 65 page decision setting out why it reached this conclusion. In issuing such a detailed explanation, the OFT has provided an interesting insight into its approach to abuse of dominance cases.

Dominance
The OFT first assessed IDEXX’s market power to establish whether it is dominant. In doing so, it considered IDEXX’s market shares, constraints from existing competitors and any barriers to entry for new entrants. It also considered the barriers to expansion and the buyer power of vets. The OFT found that IDEXX has a high market share (60-70%) of in-clinic testing, which was combined with significant barriers to entry and expansion, barriers to customer switching and relatively low buyer power. As a result, the OFT provisionally concluded that IDEXX was likely to be dominant on each in-clinic testing market it identified.

In contrast, the OFT found that, on balance, IDEXX was not dominant on the external lab test market, given its share of that market (30-40%) and the low barriers to customers switching and multi-sourcing. The OFT found that IDEXX was likely to have a dominant position on the distinct markets for two specialist external lab tests, however, for which it was the monopoly supplier.

Abuse of Dominance
In assessing abuse, the OFT examined three possible ‘theories of harm’:

1. Theory 1: IDEXX engaged in anti-competitive bundling of in-clinic testing equipment with external laboratory services.
2. Theory 2: IDEXX attempted to engage in predatory pricing in the market for in-clinic testing equipment and consumables by selling these products to customers below cost.
3. **Theory 3:** IDEXX engaged in anti-competitive bundling of certain specialist external laboratory tests with standard external laboratory tests.

In relation to Theory 1, the OFT considered that it was unlikely that IDEXX's conduct would lead to the foreclosure of actual or potential competitors such as to impair effective competition in the external lab market. The OFT found in particular that an equally efficient competitor could replicate IDEXX's discounted price.

In relation to Theory 2, analysis of the cost data revealed that IDEXX had not priced below average avoidable costs. Further, most of IDEXX's competitors used leasing arrangements which enabled them to offer a competitive alternative to IDEXX's business model. The OFT therefore considered that IDEXX's conduct was unlikely to have an adverse impact on effective competition.

In relation to Theory 3, among the OFT's considerations was that any bundling on a worse case scenario amounted to less than 15% of the relevant external lab market. The OFT therefore concluded that IDEXX's conduct was unlikely to lead to the foreclosure of actual or potential competitors, such as to impair effective competition in the external lab market.

**Decision**

On the basis of the above analysis, the OFT therefore considered that it had no grounds for action, since it was unlikely that IDEXX's conduct would restrict or impair effective competition in the relevant markets.

**Comment**

Since the entry into force of the UK Competition Act in March 2000, the OFT has issued relatively few decisions concerning the abuse of a dominant market position, which is prohibited under Chapter II of the Competition Act 1998 ("CA98") and/or Article 102 of the Treaty on the Functioning of the European Union ("TFEU"). Interestingly, however, since the start of 2010, five out of a total of only six CA98 decisions that have been issued by the OFT and sectoral regulators have concerned abuse of dominance. Only one of these five was an infringement decision, however, and that was the first case in which the OFT took action against an abuse of dominance since 2003. The remaining four were all decisions that no further action would be taken.

This latest decision is consistent with this trend and shows the OFT continuing to take a hands-off, effects-based approach to abuse of dominance cases. In particular, it shows the OFT assessing alleged abuses by reference to identified 'theories of harm', rather than an objective 'per se' standard of abusive conduct. It also demonstrates a clear requirement for anticompetitive foreclosure before taking action, which is consistent with the European Commission's own Article 102 guidance, if not with the arguably more interventionist EU administrative practice and case law.
The hiring of a lawyer is an important decision that should not be based solely on advertisements. Prior results do not guarantee a similar outcome.