



April 2019

Irish Pharmaceuticals – An Allegation of Predatory Pricing

Recently, pharmaceutical companies have rejected allegations that they have been pursuing “predatory pricing” for new medicines. The National Centre for Pharmacoeconomics alleged that pharmaceutical companies were offering discounts of up to 40% and 60% in negotiations to bring their drugs to the market. This serves as a reminder to all companies, whether in the pharmaceutical industry or not, that it is important to be cognisant of competition law when carrying out business.

The Competition and Consumer Protection Commission (“**CCPC**”) is responsible for enforcing Irish and EU competition law. The relevant legislation in Ireland is the Competition Acts 2002 – 2017 (the “**Acts**”) which reflects the Treaty on the Functioning of the European Union (the “**TFEU**”). The Acts prohibit anti-competitive behaviour such as the abuse of a dominant position that a company may hold in the market. Predatory pricing would constitute such an abuse. Predatory pricing is classed as selling a product or service below cost to drive out competition.

Abusing a dominant position must be distinguished from holding a dominant position, the latter being permitted legally. The Acts do not provide a definition for a “dominant position”. However, the Court of Justice of the European Union in the cases of *United Brands* and in *Hoffmann-La Roche* have provided guidance in this regard.

In those cases, it was deemed that a dominant position was:

“a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to

For further information on any of the issues discussed in this article please contact:



Adrian Benson

DD: + 353 (0)1 673 1705

adrian.benson@dilloneustace.ie



Owen Brayden

DD: + 353 (0)1 673 1828

owen.brayden@dilloneustace.ie

behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers...”

This definition has been adopted by the Irish Courts and the CCPC. Dominant positions are common in an array of industries such as the pharmaceutical industry, the aviation industry and the tech industry. In terms of predatory pricing, if a dominant company excludes competitors by charging a sufficiently low price then it can monopolise the market resulting in it being the sole seller of its goods. As such, it is clear why such an abuse is prohibited by the Acts.

Section 5 of the Acts sets out examples of what abuse may consist of:

- a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- b) limiting production, markets or technical development to the prejudice of consumers;
- c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
- d) making the conclusion of contracts subject to the acceptance by other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts.

These are just some of the examples of what constitutes anti-competitive behaviour. The recent allegation in the pharmaceutical industry highlights the importance of ensuring that you, as a company, are not in breach of the Acts or the TFEU and, in any event, highlights the need to protect your own business from anti-competitive behaviour.

Dillon Eustace
April, 2019

DILLON  EUSTACE

Dublin

33 Sir John Rogerson's Quay, Dublin 2, Ireland. Tel: +353 1 667 0022 Fax: +353 1 667 0042.

Cayman Islands

Landmark Square, West Bay Road, PO Box 775, Grand Cayman KY1-9006, Cayman Islands. Tel: +1 345 949 0022 Fax: +1 345 945 0042.

New York

245 Park Avenue, 39th Floor, New York, NY 10167, U.S.A. Tel: +1 212 792 4166 Fax: +1 212 792 4167.

Tokyo

12th Floor, Yurakucho Itocia Building, 2-7-1 Yurakucho, Chiyoda-ku, Tokyo 100-0006, Japan. Tel: +813 6860 4885 Fax: +813 6860 4501.

DISCLAIMER:

This document is for information purposes only and does not purport to represent legal advice. If you have any queries or would like further information relating to any of the above matters, please refer to the contacts above or your usual contact in Dillon Eustace.

Copyright Notice:

© 2019 Dillon Eustace. All rights reserved.