Reckitt Benckiser fined £10.2 million by UK competition authority for withdrawing a product which faced generic competition

Pharma giant Reckitt Benckiser was fined £10.2 million ($16.2 million) by the UK Office of Fair Trading on October 15 for abusing its dominant position by withdrawing heartburn medicine Gaviscon Original Liquid after the product’s patent expired and it faced competition from generic equivalents. This decision is another example of competition authorities investigating pharma company patent strategies which they consider are designed to impede generic competition.

Dominant position

The Office of Fair Trading (“OFT”) found that Reckitt Benckiser (“Reckitt”) was dominant in the market for the prescription supply of alginate and antacid heartburn medicines in the UK. Although dominance itself is not problematic under competition law in Europe, it is prohibited under both UK and EU law for companies to ‘abuse’ their dominant position. Where a company is found to have abused a dominant position it can be fined up to 10% of worldwide revenue.

Product withdrawal considered abusive

Reckitt withdrew heartburn medicine Gaviscon Original Liquid from the prescription channel in the UK after the product’s patent expired in 2005. This meant that doctors could no longer prescribe it and, as a result, pharmacists could no longer supply its generic equivalent products. The OFT alleged that, as a result, doctors prescribed Reckitt’s alternative medicine, Gaviscon Advance Liquid. As that medicine was still patent-protected there were no generic equivalents for pharmacists to prescribe.

Reduction for cooperation

Reckitt had its fine reduced in this case by 15% from £12m to £10.2m because it agreed to admit the infringement and cooperate with the UK authorities under an ‘early resolution agreement’. Entering into an early resolution agreement with the OFT can speed up the investigation process and the OFT is keen to encourage these types of settlements.
Comment

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- In its July 2009 pharmaceuticals sector report the European Commission indicated that both it and EU national competition authorities should take enforcement action where branded drug manufacturers were using anti-competitive means to prevent or delay the entry of generic equivalents.

- Earlier this year the European General Court confirmed a fine of EUR52.5 million (US$84 million) against AstraZeneca for allegedly misleading patent offices when applying for patent extensions with the aim of keeping manufacturers of generic drugs away from the market.

- The US Federal Trade Commission has challenged pharma companies for seeking to shift customers to next generation patented products to avoid generic competition ('evergreening') and also for paying generic competitors to delay the launch of their products ('pay to delay').

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