UNITED STATES

Legality of conditional discounts in the U.S.: effects test assessment

Eisai v. Sanofi (Lovenox Suit)

Eisai, Inc. v. Sanofi/Aventis U.S., LLC, No. 14-2017 (3d Cir. May 4, 2016)

On May 4, 2016, the Court of Appeals for the Third Circuit affirmed a lower court's decision dismissing an antitrust suit brought by the pharmaceutical company Eisai Inc. against rival Sanofi-Aventis U.S. LLC ("Sanofi"). Eisai Inc. alleged that Sanofi's marketing and sales tactics for Lovenox, its market-leading anticoagulant drug, were anticompetitive.

Sanofi sold Lovenox to hospitals using a threshold-based discount program and allegedly aggressive sales tactics. If a hospital bought 75% or more of its anticoagulants from Sanofi, it received a progressively increasing 9% to 30% discount.[1] If, however, the hospital bought less than 75% of its anticoagulants from Sanofi or favored competing drugs over Lovenox, the hospital received a flat 1% discount.[2]

Eisai Inc. marketed a competing anticoagulant called Fragmin and sued Sanofi, alleging that Sanofi's practices constituted illegal monopoly maintenance. Lovenox maintained a market share of 81.5% to 92.3% during the relevant period, while Fragmin had the second-largest market share at 4.3% to 8.2%.[3]

In March 2014, the lower court granted summary judgment for Sanofi.[4] The lower court applied the defendant-friendly "price-cost test," under which the plaintiff must show that the defendant sold its product below the relevant measure of cost and was likely to recoup its initial losses through subsequent sales at supracompetitive prices.[5] The parties did not dispute that Sanofi never sold Lovenox to hospitals at a price below its cost.[6]

The Third Circuit affirmed, albeit under a different analysis. Instead of applying the price-cost test, as had the lower court, the appeal judges analyzed the discounting scheme as an exclusive dealing arrangement and applied an effects test under the rule of reason.[7] The Third Circuit stated that, in determining the proper legal standard to apply, the court must consider "whether the conduct constitutes an exclusive dealing arrangement or simply a pricing practice."[8]

Here, Eisai Inc. alleged that Sanofi obtained a unique "indication" (i.e., medical use) and offered a discount that bundled incontestable and contestable indications.

1 *Eisai, Inc. v. Sanofi/Aventis U.S., LLC*, No. 14-2017, at *6 (3d Cir. May 4, 2016) ("*Eisai*").
2 *Eisai* at *6-7.
3 *Id.* at *5.
4 *Eisai, Inc. v. Sanofi/Aventis U.S., LLC*, No. 08-cv-4168, at *1-2 (D.N.J. Mar. 28, 2014).
5 *Id.* at *35, 40.
6 *Id.* at *10, 35.
7 *Id.* at *4, 12-13.
8 *Id.* at *25.

The Third Circuit found that Sanofi's bundle resembled a multi-product bundle and that the bundling – not the price – served as the primary exclusionary tool. Accordingly, the appeal judges followed the rule of reason/exclusive dealing analysis.[9]

To determine whether substantial foreclosure occurred, and thus whether the conduct constituted an illegal exclusive dealing arrangement, the *Eisai* court asked whether competing products were available to consumers, not whether consumers ultimately chose to purchase a competitor's product.[10] Here, the Third Circuit concluded that hospitals were free to switch to other anticoagulants and would not be penalized beyond the loss of the discount.[11]

The decision is in apparent conflict with the European courts' analysis in the Court of Justice's 2015 Post Danmark II (C-23/14) and the General Court's 2014 Intel (T-286/09; on appeal before the Court of Justice) cases on rebates. For example, the *Intel* court found that the so-called exclusivity/loyalty rebates at issue, when offered by a dominant company, "are incompatible with the objective of undistorted competition within the common market" and therefore applied a by-object analysis.[12] The *Intel* court added that the term "exclusivity rebates" will also be used for rebates that are conditional on the customer's obtaining "most of its requirements" from the dominant undertaking, suggesting that purchasing obligations covering 75% or 80% of a customer's requirements are sufficient to constitute "most of its requirements".[13]

Accordingly, it appears that, in the United States at least, the Third Circuit assesses under an effects test forms of conditional discounting that would likely be prohibited in Europe as a by-object violation. Companies operating in both the United States and Europe should tailor their discount programs to the laws of each jurisdiction with care.

9 *Id.* at *27.
10 *Eisai* at *14.
11 *Id.* at *21.

12 *Intel* at § 77.
13 *Id.* at §§ 76, 135.