OFFICE OF FAIR TRADING

Competition Act 1998

No Grounds for Action Decision

CE/9322/10

Alleged abuse of a dominant position by IDEXX Laboratories Limited

November 2011

OFT1387

Please note that [ ] indicates figures or text which have been deleted or replaced in ranges at the request of the party or third parties for reasons of commercial confidentiality.

CONTENTS

1 SUMMARY OF FINDINGS

1.1 In April 2010, the OFT received a complaint alleging that IDEXX Laboratories Limited ('IDEXX') was abusing a dominant position in the market for the supply of in-clinic companion animal diagnostic testing equipment in order to foreclose competition in the market.

1.2 The OFT analysed three theories of harm, namely whether:

- IDEXX engaged in anti-competitive bundling of in-clinic testing equipment, which constitute a market (or markets) in which IDEXX holds a dominant position, with its external laboratory service, which constitutes a separate market in which IDEXX is not dominant

- IDEXX attempted to predate competitors in the market (or markets) for in-clinic testing equipment and consumables by selling these products to customers below cost, and

- IDEXX engaged in anti-competitive bundling of certain specialist external laboratory tests, which constitute markets in which IDEXX holds a dominant position, with standard external laboratory tests, which constitute a separate market in which IDEXX is not dominant.

1.3 Having considered each of these theories of harm and taking all of the available evidence in the round, in the absence of sufficient evidence to demonstrate that IDEXX's conduct tends to or is likely to restrict or impair effective competition in the relevant markets, the OFT considers that it has no grounds for action in relation to IDEXX's current conduct.

1.4 Consequently, the OFT does not consider that all the conditions of the prohibition contained in Section 18 of the Competition Act 1998 and/or Article 102 of the Treaty on the Functioning of the European Union are met.[1]

[1] While the OFT finds no grounds for action against IDEXX, this does not constitute a non-infringement decision. On 3 May 2011, the Court of Justice issued a judgment which clarified that

2 BACKGROUND

Introduction

2.1 In April 2010, the OFT received a complaint alleging that IDEXX Laboratories Limited was abusing its dominant position in the market for the supply of in-clinic[2] companion animal diagnostic testing equipment in order to foreclose competition in the market.

2.2 Companion animal diagnostic testing services comprises two key segments:

- the supply of diagnostic testing equipment to veterinary practices to enable veterinarians to carry out on-site diagnostic tests within their practices (the 'in-clinic' segment), and
- the provision of diagnostic testing services to veterinary practices by external laboratories whereby the practice sends samples (for example, of blood, urine etc) by post or courier for the relevant tests to be carried out and the test results provided to the practice, typically by phone, email or fax (the 'external lab' segment).

2.3 The OFT estimates that the companion animal diagnostic testing sector in the UK generates a total annual turnover of around £54 million, with the in-clinic segment worth approximately £20 million a year and the external lab segment worth approximately £34 million a year.[3]

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only the European Commission is empowered to make a finding that there has been no breach of Articles 101 and/or 102 of the Treaty on the Functioning of the European Union and that national competition agencies can only decide that there are no grounds for action on their part (Case C-375-09, *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele 2 Polska sp. z o.o., now Netia SA w Warszawie*.

[2] Reference to 'in-clinic' means the supply of analysers, consumables and test kits to veterinary practices for on-site testing.

[3] Figures derived from 2009 revenue data obtained by the OFT from companies operating in the sector.

IDEXX Laboratories

2.4 IDEXX Laboratories Inc ('IDEXX Inc') describes itself as 'the global leader in diagnostics and information technology solutions for animal health and water and milk quality'.[4] IDEXX Inc is headquartered in the United States and conducts operations through more than 60 locations worldwide. In 2010, IDEXX Inc's global turnover was just over USD 1 billion.[5]

2.5 In the UK, IDEXX Laboratories Limited ('IDEXX') describes itself as 'the world leader in veterinary diagnostics'[6] and is active in both the in-clinic and the external lab segments. IDEXX's total turnover in the UK in 2010 was just under £33 million.[7]

The complaint

2.6 On 21 April 2010, the OFT received a complaint from [ ]. It subsequently provided the OFT with a more detailed briefing note on 30 June 2010 and met with the OFT on 28 July 2010 to discuss the complaint.

2.7 In summary, it was alleged that IDEXX was abusing a dominant position in the market for the supply of companion animal diagnostic testing in order to foreclose competition in the market by:

- offering in-clinic analysers at no cost, or considerably reduced cost, in return for a minimum monthly guaranteed spend by the customer on

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[4] www.idexx.com/view/xhtml/en_us/corporate/about-idexx.jsf.

[5] USD 1,103,392,000 for the year ended 31 December 2010. See IDEXX's Form 10-K at www.idexx.com/pubwebresources/pdf/en_us/corporate/sec/10k2010.pdf.

[6] www.idexx.co.uk/animalhealth/index.jsp.

[7] IDEXX accounts filed with Companies House on 29 September 2011: turnover for the year to 31 December 2010 was £32,822,356.

'consumables' for the analyser and, in some cases, for exclusivity in relation to external lab[8] services, where IDEXX is not dominant

- offering customers retroactive rebates on its external laboratory services, and

- refusing to supply other external laboratories with two diagnostic tests that it had previously supplied.[9]

2.8 On 24 February 2011, [ ] requested Formal Complainant Status, which, in light of the information that had been provided by [ ] during the course of the investigation, was granted on 4 March 2011.

The OFT's investigation

2.9 After meeting with the Complainant on 28 July 2010, and as part of its streamlining initiatives to investigate matters with greater transparency and agility, the OFT wrote to IDEXX on 6 August 2010 enclosing a redacted copy of the 21 April complaint and setting out the OFT's view that, if true, the alleged conduct may amount to an infringement of the Competition Act 1998 (the Act). Further to receiving written representations from IDEXX and having subsequently met with IDEXX representatives on 13 September 2010 to discuss some of the issues raised by the complaint, the OFT opened a formal investigation into IDEXX's alleged conduct on 4 November 2010 and sent a request to IDEXX under section 26 of the Act on 9 November 2010.

2.10 During the course of the investigation, the OFT sent a total of five section 26 requests to IDEXX and several formal requests for information under section 26 of the Act to competitors in the veterinary diagnostic testing

[8] Reference to 'external lab' means the provision of outside reference laboratory services.

[9] The retroactive rebate and refusal to supply elements of the investigation were closed as the OFT did not consider that they met its prioritisation principles. They are not considered further in this decision.

sector (both in-clinic and external lab competitors). In addition, the OFT received a number of submissions from IDEXX.

2.11 The OFT also gathered information from certain parties without using its formal powers. For example, the OFT undertook a market testing exercise[10] comprising of the 10 largest customers of IDEXX and the Complainant, as well as some other veterinary practices, and also used a range of publicly available information, such as information published by the Royal College of Veterinary Surgeons.

2.12 The OFT is also aware of an on-going investigation in the United States of IDEXX Inc by the Federal Trade Commission (FTC) concerning 'unfair methods of competition through pricing or marketing policies for companion animal veterinary products and services, including but not limited to exclusive dealing or tying arrangements with distributors or end-users of those products or services.'[11]

2.13 [ ].

[10] The OFT received responses from 19 veterinary practices and groups of practices (referred to in this decision as 'market testing exercise'). The OFT did not receive any customer survey evidence from IDEXX regarding the relevant market. Due to the limited sample of respondents, it should be noted that the responses to the market testing exercise may not be fully representative of all veterinary practices and accordingly, it is not statistically appropriate to use critical loss analysis when analysing the responses. Accordingly, the OFT notes that the market testing exercise should be used in conjunction with other evidence in order to come to any conclusions regarding the relevant market.

[11] See www.faqs.org/sec-filings/100219/IDEXX-LABORATORIES-INC-DE_10-K

3 THE ALLEGED INFRINGEMENT

The Chapter II prohibition and Article 102 of the Treaty on the Functioning of the European Union

3.1 Section 18(1) of the Act sets out the Chapter II prohibition, which provides that any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the UK or any part of it.[12]

3.2 Article 102 of the Treaty on the Functioning of the European Union (TFEU) states that 'any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States'.

3.3 To find an infringement of the Chapter II prohibition, the OFT must establish:

- that, at the time of the alleged infringement, IDEXX held a dominant position on a relevant market(s) within the UK or any part of it
- that IDEXX abused that dominant position on that market or a related market, and
- that such abuse may have affected trade within the UK or any part of it.

3.4 Separately, if raised by the party under investigation, the OFT may consider whether there is an objective justification for the exclusionary conduct

[12] The Chapter II prohibition does not apply in cases in which it is excluded pursuant to section 19 of the Act. None of the excluded cases are applicable in respect of the conduct which is the subject of this decision.

and/or efficiencies which would outweigh the negative effects of the exclusionary conduct.[13]

3.5 The OFT's determination of whether Article 102 of TFEU is applicable consists of assessing whether the conduct 'may affect trade between Member States'.

3.6 In practice, where the OFT considers that conduct under investigation may have an effect on trade between Member States, it will, in addition to applying the Chapter II prohibition, usually also apply Article 102 TFEU. According to settled case law the concept of 'trade' also encompasses cases where agreements or practices affect the competitive structure of the market. 'Agreements and practices that affect the competitive structure inside the Community by eliminating or threatening to eliminate a competitor operating within the Community may be subject to the Community competition rules'.[14] Further, in many cases involving a single Member State the nature of the alleged infringement, and in particular, its propensity to foreclose the national market, provides a good indication of the capacity of the agreement or practice to affect trade between Member States.[15]

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[13] *'Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings'* (*The Commission's Guidance*) (2009/C 45/02), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri =CELEX:52009XC0224(01):EN:NOT. Paragraph 28 also makes provision for an assessment as to whether there is an objective justification for the exclusionary conduct, further to claims put forward by a dominant undertaking that its conduct is justified. In this respect, it is incumbent upon the dominant undertaking to provide all the evidence necessary to demonstrate that the conduct concerned is objectively justified.

[14] Commission Notice *'Guideline on the effect on trade concept contained in Articles 81 and 82 of the Treaty'*, OJ [2004] C 101/81, at paragraph 20, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri =CELEX:52004XC0427(06):EN:NOT.

[15] *Ibid,* at paragraph 77. See as to this notion, in relation to possible abuses of dominance cases, Case C-179/90, *Merci convenzionali porto di Genoa* [1991] ECR I-5889, and Case C-242/95, *GT-Link*, [1997] ECR I-4449.

3.7 Accordingly, for the purposes of this decision references to the Chapter II prohibition and/or section 18 of the Act should be deemed to include an appropriate reference to Article 102 of the TFEU unless specifically excluded. However, it should be noted that given the specifics of this investigation, and in particular that the OFT considers that the other conditions of the Chapter II prohibition and/or Article 102 of TFEU are not all met, it has not been deemed necessary to carry out a detailed assessment of the effect of the alleged conduct on trade between Member States in this decision. Nothing turns on this consideration for the purposes of the analysis carried out in this decision.

4 MARKET DEFINITION

Introduction

4.1 Market definition is not an end in itself. Rather, it is a key process for identifying relevant competitive constraints acting on a supplier of a given product or service, thus facilitating the assessment of dominance. It provides a framework for competition analysis, and is usually the first step in an assessment of market power.[16] However, it should be noted that in the case of a 'no grounds for action' decision, such as this one, the detail of the OFT's analysis and the nature of its conclusions may be more circumscribed than in the case of an infringement decision.[17]

4.2 This section considers the relevant market definitions in the companion animal diagnostic testing sector having regard to the OFT's guideline on 'Market Definition' (the Guideline).[18] The Guideline sets out the framework and types of methodologies used by the OFT to define the relevant market(s) in an investigation under the Chapter II prohibition of the Act.

4.3 IDEXX made representations[19] to the OFT that the relevant product market is for the supply of companion animal diagnostic testing products and

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[16] OFT Guideline '*Assessment of market power'* (OFT415), www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft415.pdf.

[17] *Freeserve.com plc v Director General of Telecommunications*, [2003], CAT 5: '...it will often be appropriate for the Director, in rejecting a complaint on the grounds that there is no abuse, to indicate, at least briefly, which market or markets appear to him, at first sight, to be potentially relevant to his investigation, and whether or not he has made any assumption on the issue of dominance in those markets. We emphasise, however that the Director is not required to decide issues which it is unnecessary for him to decide in order to reach a concluded view on a complaint.' See also *'No Grounds for Action Decision - Alleged abuse of a dominant position by Flybe Limited'* (OFT1286), www.oft.gov.uk/shared_oft/ca98_public_register/decisions/OFT1286.pdf.

[18] OFT Guideline *Market definition* (OFT403), www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft403.pdf.

[19] IDEXX response dated 3 September 2010.

services which includes both in-clinic diagnostic services through the provision of different analysers, consumables and single use kits,[20] and external diagnostic testing at external labs.[21]

4.4 IDEXX stated[22] that almost all veterinary practices use a combination of in-clinic and external lab testing, and referred to the OFT's 2005 merger decision relating to the completed acquisition by IDEXX of the veterinary diagnostic testing services of VetLab Services Limited[23] in support of this view.

4.5 The OFT notes that in relation to the 2005 merger, given that in-clinic testing could not be substituted for all external lab tests, the OFT considered in its decision that it could be argued that the appropriate product scope might be as narrow as companion animal testing within external labs. Moreover, the OFT considered whether the external lab

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[20] In-clinic analysers (and their associated consumables), each performing a different type of test (for example, biochemistry, haematology etc), are situated within a veterinary practice and are relatively simple machines which are able to be operated by staff within the practice. Single-use kits are hand-held single-use disposable tests that can be used by veterinarians on-site to obtain visually read diagnostic results. The OFT has not considered single-use kits in this decision. IDEXX stated (in its submission of 3 September 2010) that its revenues from single-use kits was £[ ] and it estimated the market for such kits to be £[ ]. In view of these figures, the OFT notes that IDEXX's share of single-use kits is broadly similar to its market shares in the hypothetical markets for in-clinic analysers and their consumables (see paragraph 4.25 below). As such, the OFT considers that the inclusion or non-inclusion of single-use kits would be unlikely to make a significant difference to the assessment of IDEXX's market shares. The OFT notes, however, that if single-use kits particularly pertain to a specific diagnostic test (for example, biochemistry tests) then the inclusion of single-use kits may affect market shares more significantly. However, the OFT has not seen evidence to suggest that this is the case.

[21] Third party responses indicated that these external laboratories contain large complex testing analysers which require trained pathologists to analyse and interpret results.

[22] IDEXX response dated 3 September 2010, paragraph 4.15.

[23] *'Completed acquisition by IDEXX Laboratories Limited of Vetlab Services Limited',* the OFT's decision on reference under section 22 given on 24 November 2005. Full text of decision published 7 December 2005, www.oft.gov.uk/OFTwork/mergers/decisions/2005/idexx.

market might be narrower still, depending on the nature of testing services provided. Ultimately, in that case, while there was some indication that the relevant frame of reference could be external lab services, the OFT did not need to conclude on the matter because the transaction would not lead to a realistic prospect of a significant lessening of competition on either basis.

4.6 Given that almost six years had elapsed since the merger, in considering the relevant market(s) in this case the OFT used the framework of the hypothetical monopolist or SSNIP test[24] as part of a market testing exercise and examined the constraints from potentially competing products. The OFT examined two candidate markets: a market for the supply of analysers used for diagnostic test within clinics (the 'in-clinic' segment), and a market for diagnostic tests conducted by external laboratories (the 'external lab' segment).

4.7 The results of market testing exercise revealed that whilst there was some evidence for a wider market including both in-clinic and external lab tests, there was also some evidence for narrower markets. Given the findings of the investigation (see Section 6 below), it has not been necessary for the OFT to conclude definitively on the relevant market.[25] However for the purposes of this decision the OFT has proceeded on the basis of a narrower hypothetical market definition, and considered in-clinic and external lab tests to be separate markets. In addition, the evidence suggests that there

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[24] SSNIP stands for 'small but significant non-transitory increase in price'. This test supposes that a hypothetical monopolist of a 'focal' group of products/services exists. The test then asks whether it would be profitable for a hypothetical monopolist to increase the price of the focal product/service by a small but significant amount (five to 10 per cent) above competitive levels for a sustained period of time. If the answer is positive, then the test is complete and the product/service under the hypothetical monopolist's control is the relevant market. If the answer is negative (for example, because a sufficiently large number of customers would switch some of their purchases away), then the test continues with the hypothetical monopolist assumed to control a wider market containing both the focal product and its closest substitute, and the process is repeated. The competition law guideline *'Market Definition'* (OFT403) sets out in more detail how the OFT applies the test (see paragraphs 2.5 to 2.13).

[25] See Footnote 17, *Freeserve.com plc v Director General of Telecommunications*, [2003], CAT 5.

are likely to be separate relevant markets for each broad class of tests performed by different in-clinic analysers and their respective consumables,[26] and that there may be individual markets for certain specialist external lab tests, including two for which IDEXX has a monopoly, that are separate from the market for standard external lab tests.

An in-clinic 'system market' comprising analyser and consumables

4.8 In-clinic diagnostic tests are performed on analysers in situ (within the veterinary practice) with analysers and consumables[27] designed to operate as a single system.

4.9 The OFT considered whether the supply of in-clinic analysers and the supply of consumables for each analyser constitute separate markets or whether each analyser is a part of a 'system market' that includes its consumables (for example because customers engage in 'whole life costing').[28]

4.10 IDEXX argued that, given consumables from one competitor are not compatible with those of another, customers for in-clinic analysers compare the overall whole life cost of acquiring and running an analyser rather than simply the capital cost of the analyser alone.[29] IDEXX therefore considered the in-clinic market to be a systems market.

4.11 As part of the market testing exercise, 13 out of 15 veterinary practices that had recently purchased an in-clinic analyser stated that they had taken the likely future cost of consumables into account when deciding whether to purchase an analyser and which analyser to purchase. This was also

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[26] For example biochemistry analysers and its associated biochemistry consumables.

[27] A panel, slide or liquid that is used with the analyser to carry out a test.

[28] See OFT Guideline '*Market definition*' (OFT403), at paragraphs 6.5 and 6.6 for a description of whole life costing.

[29] IDEXX response dated 3 September 2010, paragraph 4.16.

corroborated by all of the in-clinic providers contacted by the OFT who confirmed that many veterinary practices tend to whole life cost. This suggests that there is a system market for each analyser and its respective consumables.

4.12 Nevertheless, all third party in-clinic competitors that were questioned also indicated that some veterinary practices may not whole life cost, which could suggest that the market may possibly be segmented by customer group.[30] However, given that on the basis of the evidence at its disposal the OFT considers it unlikely that IDEXX's conduct would lead to the foreclosure of actual or potential competitors such as to impair effective competition on the in-clinic or external lab markets (see Section 6 below), the OFT has not needed to conclude definitively on this point.[31]

Separate in-clinic markets for each type of analyser

4.13 There are a number of in-clinic analysers able to perform different types of test. The types of tests include biochemistry, haematology, electrolyte, endocrinology, blood gas, coagulation and urinalysis.

4.14 IDEXX stated that given veterinary practices typically conduct ranges of tests on a given sample, it was inappropriate to analyse the relevant market by type of test which, in their view, was not supported by medical practice.[32]

4.15 The OFT examined the demand-side and supply-side considerations to determine whether each type of analyser and its associated consumables constitute a separate product market, or whether there may be a wider

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[30] For example, with separate markets for veterinary practices that whole life cost and for those that do not.

[31] Paragraphs 6.47 to 6.53 below set out the OFT's assessment of alleged predatory pricing on the basis of in-clinic markets being system markets and on the basis that there might be a narrower market for veterinary practices that do not whole life cost.

[32] IDEXX submissions dated 27 September 2010, 18 May 2011 and 10 June 2011.

product market comprising all in-clinic analysers and their consumables. The results of its analysis suggest that given limited demand-side and supply-side substitution, there is likely to be a separate relevant market for each class of tests and its corresponding consumables.

Limited demand-side substitution

4.16 Overall, the market testing exercise undertaken by the OFT indicated that veterinary practices tend not to regard the different types of testing analysers as directly substitutable.[33]

4.17 Several in-clinic competitors contacted by the OFT stated that biochemistry and haematology analysers were the most important analysers for a veterinary practice. Furthermore, it is not possible to run a biochemistry test on a haematology analyser or vice-versa. This suggests that biochemistry and haematology analysers are not likely to be substitutable. With regard to electrolyte capabilities, however, the OFT is aware that many biochemistry analysers do have electrolyte capability, even though one can purchase a specific electrolyte analyser separately.[34]

4.18 With respect to endocrinology, IDEXX is currently the only provider of a dedicated endocrinology analyser. However, other in-clinic competitors stated that they are able to offer the most important endocrinology test (the

[33] As part of the market testing exercise, when asked what they would have done if the price of the in-clinic analyser and/or consumables that they last purchased had been five to 10 per cent higher at the time of purchase, none of the practices interviewed stated that they would have chosen to purchase a different type of analyser (for example, a haematology analyser instead of the biochemistry analyser).

[34] For example, IDEXX's Catalyst DX biochemistry analyser is able to undertake all the same tests as IDEXX's dedicated electrolyte analyser. Similarly, in-clinic competitors also supply biochemistry analysers that are able to undertake electrolyte tests.

T4 thyroid hormone test) as part of the offering within their biochemistry analysers.[35]

4.19 The OFT understands that there are no demand-side substitutes for coagulation and urinalysis analysers, although it would appear that demand for these analysers is relatively limited.[36] With respect to blood gas, the OFT's initial market research found that one company provides a dedicated blood gas analyser, although several other in-clinic competitors are able to offer some blood gas testing as part of their offering within their biochemistry analysers.

4.20 In terms of purchasing patterns, 15 out of 16 of veterinary groups and practices contacted by the OFT and which used an in-clinic analyser indicated that they use more than one type of in-clinic analyser, suggesting that one type of analyser does not fulfil all their needs.

Lack of supply-side substitution

4.21 In its submission dated 3 September 2010, IDEXX noted that the diversification of an external lab competitor (Nationwide Laboratories) into in-clinic products and services demonstrated how an external lab competitor was positioning itself to exert more powerful discipline on IDEXX in the in-clinic market. Further, in its economic submission dated 21 April 2011, IDEXX stated that barriers to entry were low and that rivals could easily supply most types of analyser from original equipment manufacturers (OEMs).

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[35] For example, QCR & Trio and Woodley both supply chemistry analysers which are capable of performing the T4 endocrinology test. IDEXX also stated, in their submission to the OFT of 18 May 2011, that Menarini supply a biochemistry analyser that is capable of testing bile acids, which while technically a test for liver dysfunction, is a test which is performed by IDEXX's endocrinology analyser.

[36] IDEXX has asserted that the fact that there is limited demand for these analysers demonstrates that veterinary practices are diagnosing conditions by other means, for example by using external lab tests. The OFT has not received any evidence of this from IDEXX or third parties and therefore cannot verify this.

4.22 The OFT's investigation revealed that analysers are typically manufactured by OEMs for the human market first, and are subsequently altered and recalibrated for use in the animal market. These are then sold by distributors such as IDEXX and other in-clinic competitors. In addition, an in-clinic competitor stated that each type of analyser requires a specific underlying technology, and not all OEMs have the requisite capability to manufacture the entire range of analysers.[37]

4.23 The following table sets out the range of analysers supplied by each in-clinic competitor. Whilst Woodley and QCR & Trio provide a substantial range of analysers, only IDEXX provides the entire suite of in-clinic analysers.

Table 4.1: Types of in-clinic analysers supplied by IDEXX and competitors

	Bio-chemistry	Electro-lytes*	Haema-tology	Coagu-lation	Blood Gas**	Urina-lysis	Endocrino-logy***
IDEXX	✓	✓✓	✓	✓	✓	✓	✓
Woodley	✓	✓	✓	✓	✓		✓
QCR & Trio	✓	✓	✓		✓✓		✓
Menarini	✓	✓	✓				
Vetlab Supplies	✓	✓	✓				
Nationwide	✓	✓					
Horiba	✓	✓	✓				
RxWorks			✓				

Key:
✓ - Supplies a dedicated analyser for this test discipline
✓ - Supplies a biochemistry analyser that can perform some or all tests relevant to this test discipline

[37] For example, a biochemistry analyser requires an OEM with expertise in chemicals, whereas a haematology analyser requires an OEM with expertise in laser technology. This was corroborated by another in-clinic competitor who had found it difficult to expand into endocrinology analysers due to there being few OEMs with the underlying technology in the human market.

* IDEXX supplies a dedicated electrolyte analyser. IDEXX, Woodley, QCR & Trio, Menarini, Vetlab Supplies, NationWide and Horiba each supply a biochemistry analyser that can also perform most or all electrolyte tests.

** QCR & Trio supplies a dedicated blood gas analyser. IDEXX, Woodley, and QCR & Trio each supply a biochemistry analyser that can also perform blood gas tests.

*** IDEXX supplies a dedicated endocrinology analyser. Woodley and QCR & Trio both supply a biochemistry analyser that can also perform the T4 endocrinology test.

Source: IDEXX response dated 27 September 2010, information obtained by the OFT from other firms operating in the sector and desk research.

4.24 Furthermore, responses from in-clinic competitors indicate that the majority of OEMs that manufacture in-clinic analysers currently supplied to veterinary practices in the UK have exclusive distribution agreements with their existing distributors. The OFT notes that IDEXX has long-term exclusive contracts with its OEMs.[38] This makes it difficult for an in-clinic competitor to sell a different type of analyser if the OEM which it sources from is not already manufacturing it. Accordingly, several in-clinic competitors stated that a key constraint to expansion of their range of analysers is the development and/or sourcing of suitable analysers from OEMs.[39]

Provisional assessment of the in-clinic market: Conclusion

4.25 Although it has not been necessary for the OFT to conclude definitively on the relevant market, for the purposes of this decision, the OFT has proceeded on the basis of a narrower hypothetical market and considers that there is likely to be a separate relevant market for each class of tests performed by different in-clinic analysers and its associated consumables.

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[38] Analysis of copies of IDEXX's exclusive contracts with OEMs, submitted by IDEXX on 24 November 2010.

[39] IDEXX stated that they have developed a number of its analysers in-house, and therefore competitors could do the same. However, this would require significant research, development and investment and therefore is not appropriate to consider within supply-side substitution.

This is based on the results of the market testing exercise as well as evidence from in-clinic competitors, which has indicated limited evidence of demand-side and supply-side substitution.

4.26 The OFT has been unable to conclude definitively whether the distribution of in-clinic endocrinology analysers and their associated consumables represent a distinct market. However, for the purposes of this decision it has proceeded on the basis of a narrower hypothetical market and conducted its analysis based on the distribution of in-clinic endocrinology analysers and its associated consumables within the UK being a distinct market. In addition, the OFT considers that it may be possible to segment the in-clinic markets further by customer group. However, given that on the basis of the evidence at its disposal the OFT considers it unlikely that IDEXX's conduct would lead to the foreclosure of actual or potential competitors such as to impair effective competition on the in-clinic or external lab markets (see Section 6 below), it has not needed to conclude definitively on this point.

Separate in-clinic and external lab markets

4.27 The OFT has also considered whether in-clinic and external lab tests form a single relevant market. As part of its investigation, the OFT identified three main factors taken into account by veterinarians prior to deciding whether to undertake a test in-clinic or at an external lab:

- **Accuracy**: External lab testing is undertaken on more complex machines which are able to undertake a greater and more accurate range of tests, with a trained pathologist analysing the results. Accordingly, external lab testing is generally regarded as being more accurate than in-clinic tests. Indeed tests are routinely performed at an external lab to check the result of a test already undertaken in-clinic.

- **Urgency**: Despite courier services becoming increasingly prevalent for external lab testing, the key advantage of an in-clinic test is the availability of results within the hour (as opposed to same day or next day).

- **Cost**: A number of veterinary practices indicated that when considered in the round, it can be cheaper to send some tests to an external lab. This is due to the additional costs of using the in-clinic analysers, such as staff training, machine calibration and service and maintenance costs.

4.28 The OFT contacted a number of veterinary practices and groups of practices as part of a market testing exercise (see paragraph 2.11 above).

4.29 The results revealed that that, if the price of analysers, consumables or both had been five to 10 per cent higher at the time of their last analyser purchase, the majority of veterinary practices would have continued to purchase the analyser and perform tests in-clinic.

4.30 When asked to what extent external lab tests were a substitute for in-clinic testing and by what percentage the price of an in-clinic test would have to rise for the veterinary practice to consider using external lab tests instead: three of the 15 practices that answered the question stated that they did not consider external lab tests to be a substitute for in-clinic; a further five practices stated that the price of in-clinic testing would have to rise by a significant amount with three of these practices referring to increases ranging from a 20 per cent to a tenfold increase; and a further four practices gave answers suggesting that external lab testing would not be a substitute for in-clinic in at least some circumstances (for example, for emergency, pre-operative or out-of-hours testing). Only one practice answered the question by stating that it considered external lab tests could be a substitute for in-clinic testing, and the OFT notes that this practice does not have in-clinic analysers at all of its branches, which means they are already required to send all samples externally to their main branch in order to have in-clinic tests carried out.

4.31 Additionally, when asked what they would have done if the price of the in-clinic analyser that they last purchased *and* its consumables had been five to 10 per cent higher at the time that they purchased the analyser, five out of 12 practices that answered this question stated that they would have continued to purchase the analyser anyway. Two would have purchased the same type of analyser from a different supplier. One practice was undecided, stating that it would either purchase the same type of analyser

from another supplier or switch to using an external lab rather than purchase the analyser. Only one practice stated that it would have considered switching to using external lab services rather than purchase the analyser. [40]

4.32 Further, one of the veterinary groups that was interviewed operates a number of emergency services clinics. Emergency services clinics have a higher requirement for urgent results than normal clinics. This group stated that they would never substitute use of an in-clinic analyser with the use of an external lab as test results were required immediately and were often conducted out-of-hours.

4.33 Another of the practices interviewed, which was accredited as a Veterinary Hospital under the Practice Standards Scheme administered by the Royal College of Veterinary Surgeons (RCVS),[41] stated that it would never be possible for it to switch to using external lab rather than purchase a biochemistry analyser, as having a biochemistry analyser was a condition of its RCVS accreditation.

4.34 Accordingly, due to the limited nature of the market testing exercise, whilst the OFT has not reached a definitive conclusion on this point and indeed does not reach a definitive conclusion, based on the analysis above, the OFT has proceeded on the basis of a narrower hypothetical market definition and has considered the conduct on the basis of there being separate markets for in-clinic and external lab tests.

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[40] The remaining three respondents stated that they do not currently use in-clinic analysers.

[41] The Practice Standards Scheme (PSS) is a voluntary initiative to accredit veterinary practices in the UK. Through setting standards and carrying out regular inspections, the RCVS aims to promote and maintain the highest standards of veterinary care. The PSS identifies three main types of standards: Core Standards (for all practices), General Practice (for small animal, equine, farm animal and small animal emergency service), and Veterinary Hospitals (small animal and equine). See www.rcvs.org.uk/practice-standards-scheme/about-the-practice-standards-scheme.

Separate markets for standard external lab tests and two specialist external lab tests

Some demand-side substitution

4.35 Similarly to in-clinic, there appears little demand-side substitutability between different types of external lab tests. For example, a biochemistry test is not a good substitute for a haematology test.

4.36 IDEXX submitted[42] that as veterinary practices typically request a range of tests to be performed on a single sample (for example in a screen or profile[43]), it would be incorrect to argue that the external lab market should be sub-divided by test. While the OFT notes that this may be true of standard external lab tests, this does not mean that customers can readily switch between standard external lab tests and certain specialist tests for which vets are likely in some cases to have a specific requirement. Indeed, external lab competitors indicated that there were no UK alternatives to IDEXX's Spec fPL test in order to diagnose pancreatitis in cats. In addition, the OFT understands that the Spec cPL and Spec fPL tests can be, and often are, purchased individually, rather than as a part of a screen or profile. For example, in 2010, approximately [55-65] per cent of Spec fPL tests and [65-75] per cent of Spec cPL tests[44] carried out by IDEXX were purchased as stand-alone tests, rather than as an add-on to, or part of, a screen or profile.[45]

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[42] IDEXX response 27 September 2010, question 2.

[43] Screens and profiles comprise a predetermined selection of external lab tests to be performed on a sample supplied by a vet. Veterinary practices can also request that one or more additional tests be added on to a standard screen or profile.

[44] See footnote 46 for further details regarding IDEXX's Spec fPl and Spec cPL tests.

[45] OFT analysis of IDEXX data submitted on 14 March 2011.

Supply-side substitution

4.37 The OFT notes that, unlike the in-clinic market, there are no exclusivity agreements between external lab OEMs and external labs, so that the full range of external lab analysers are available to the external lab market. The OFT therefore considers that, from a supply-side, this suggests that there is a single market for standard external lab tests.

4.38 However, the OFT notes that IDEXX holds patents and/or exclusive licences for patents for two external lab tests in the UK: feline pancreatic lipase ('Spec fPL') and canine pancreatic lipase ('Spec cPL').[46] Accordingly, as no other external lab is able to provide these specialist tests in the UK, and given that these two tests are not substitutable on the supply-side for the standard external lab tests, this suggests that these may constitute separate supply-side markets.[47]

Provisional assessment of the external lab market: Conclusion

4.39 In light of the evidence above, it would appear that external labs provide more accurate results, are able to undertake a wider range of tests, and require a specialist veterinary pathologist to undertake the analysis (and for this reason, similar results cannot be achieved in-clinic). Furthermore, tests are often performed at an external lab to check the result of a test already

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[46] IDEXX response dated 14 March 2011. Spec cPL and Spec fPL tests are proprietary IDEXX tests which test for pancreatitis in dogs and cats respectively. IDEXX introduced Spec cPL in 2006 and it is available from IDEXX external labs. IDEXX also supply a single-use, in-clinic 'SNAP cPL' test which can be used by veterinary practices to diagnose or rule out pancreatitis in dogs. IDEXX introduced Spec fPL in 2008 and it is only available from IDEXX external labs.

[47] IDEXX stated that other competitors could develop tests that do not infringe IDEXX's patent right. However, the OFT considers that this would require significant research, development and investment and therefore is not appropriate to consider within supply-wide substitution. Further, IDEXX stated that there may be different ways of diagnosing these conditions. However, the OFT has not received any evidence that this would be a good substitute. Finally, it should be noted that whilst there may be other specialised tests held by other companies, for the purposes of this investigation, the OFT has only considered the specialised tests held by IDEXX.

undertaken in-clinic. This suggests that at least for a certain group of customers, external lab tests are not part of the same market as those undertaken in-clinic. However, given the findings of the investigation (see Section 6 below), it has not been necessary for the OFT to conclude definitively on the relevant market.[48] However, based on the reasoning above, for the purposes of this decision the OFT has proceeded on the basis of a narrower hypothetical market definition, and considered in-clinic and external lab tests to be separate markets.

4.40 Within the external lab market, based on the available evidence it would appear that standard external lab tests constitute part of the same relevant market, and that certain specialist tests in relation to which IDEXX has exclusive rights to supply in the UK, such as Spec fPL and Spec cPL, constitute separate individual markets. Nevertheless, given that the OFT considers that on the basis of the evidence at its disposal, it is 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 (see Section 6 below), it has not needed to conclude definitively on either of these points.

The geographic market

In-clinic

4.41 IDEXX argued[49] that, given it supplies in-clinic analysers on a nationwide basis, the relevant geographic market is UK wide.

4.42 The OFT's enquiries revealed that in-clinic providers tend to operate nationally, with no indication that the market should be sub-national. The OFT notes that the requirement for on-going in-clinic analyser maintenance would make it difficult for a company not based in the UK to supply this

[48] See Footnote 17 above.

[49] IDEXX response dated 3 September 2010, paragraph 4.17.

service. This appears to be confirmed by the fact that there are currently no non-UK in-clinic suppliers.

External lab

4.43 In relation to external lab, IDEXX submitted[50] that the rapid delivery of samples to the laboratory by courier and express mail, and rapid electronic communication of results to veterinary practices permit external labs to service customers all over the UK. On this basis, IDEXX considers that the relevant geographic market is UK wide.

4.44 The OFT notes that in relation to the 2005 merger, the parties submitted that the relevant geographic frame of reference would be the UK.[51] While there was some evidence at that time that veterinarians used external labs outside the UK to a limited degree, this tended to be for specialised services. Nevertheless, as no competition concerns arose on a UK basis, the OFT did not conclude whether overseas suppliers provided a constraint.

4.45 The results of the OFT's market testing exercise as part of this investigation suggests that external labs are increasingly using courier services to collect samples from veterinary practices, allowing the results either to be returned later the same day, or the following day. Although traditionally external labs used the Royal Mail to collect samples (tending towards a national market), not all courier services are operated on a national basis. Accordingly, there may be sub-national markets, although on the basis of the evidence at its disposal, due to the fact that the OFT considers that it is 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 (see Section 6 below), it has not needed to conclude definitively on this point.

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[50] IDEXX response dated 3 September 2010.

[51] *Completed acquisition by IDEXX Laboratories Limited of Vetlab Services*. See footnote 23 above.

Provisional conclusion on market definition

4.46 In light of the above, and given the findings of the investigation in Section 6 below, it has not been necessary for the OFT to conclude definitively on the relevant market.[52] However for the purposes of this decision the OFT has proceeded on the basis of a narrower hypothetical market definitions comprising of:

- the UK distribution of in-clinic analysers and consumables by individual type of test[53]
- the provision of standard external lab tests in the UK, and
- the provision of each of certain specialist external lab tests, such as Spec fPL and Spec cPL, in the UK.

[52] See footnote 17.

[53] For example, biochemistry, haematology, etc.

5 DOMINANCE

Introduction

5.1 An undertaking will not be dominant unless it has substantial market power.[54] In assessing whether an undertaking has substantial market power, it is helpful to consider market shares and the extent to which the undertaking faces competitive constraints, such as actual competitors, barriers to entry and buyer power. Normally, available evidence from all indicators will be considered in the round before coming to an assessment of market power.

5.2 As set out in Section 4 above, whilst it has not been necessary for the OFT to conclude definitively on the relevant market, for the purposes of this decision the OFT has proceeded on the basis of narrower hypothetical market definitions. On this basis, the OFT's investigation revealed that IDEXX is likely to have a dominant position in each of the in-clinic markets and is unlikely to have a dominant position for the provision of standard external lab tests. However, as the monopoly supplier of two specialist tests (Spec cPL and Spec fPL), IDEXX is likely to have a dominant position for these two specialist tests. Nevertheless, given that the OFT considers that on the basis of the evidence at its disposal, it is unlikely that IDEXX's conduct would lead to the foreclosure of actual or potential competitors such as to impair effective competition on the in-clinic or external lab markets (see Section 6 below), the OFT has not needed to conclude definitively on dominance.

Legal assessment

5.3 The Court of Justice has defined a dominant position as:

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[54] See OFT Guideline *'Abuse of a Dominant Position'* (OFT402), paragraph 4.11, www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft402.pdf. Also *'Assessment of Market Power'* (OFT415) paragraph 2.12, www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft415.pdf.

> '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 behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers'.[55]

5.4 However, it is not necessary for a finding of dominance that an undertaking has eliminated all opportunity for competition in the market. For example, the Court of Justice has held that:

> '…such a position does not preclude some competition…but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which competition will develop, and in any case to act largely in disregard of it as long as such conduct does not act to its detriment.'[56]

5.5 Accordingly, market power is not an absolute term but a matter of degree, and the degree of market power that an undertaking possesses will depend on the circumstances of each case.

5.6 In general, the higher the market share and the longer the period of time over which it is held, the more likely it is that it constitutes an important preliminary indication of the existence of a dominant position. However, the OFT will always interpret market shares in the light of the relevant market conditions.

Assessment of IDEXX's market power in the in-clinic markets

5.7 As stated above, whilst an undertaking's market share can be an important factor in assessing whether it has market power it does not, in itself,

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[55] Case 27/76 *United Brands v Commission* [1978] 1CMLR 429, paragraph 65. Also Case 85/76 *Hoffman-La-Roche v Commission* [1979] ECR 461, paragraph 38.

[56] Case 85/76 *Hoffman-La-Roche v Commission* [1979] ECR 461, paragraph 39.

determine whether an undertaking holds a dominant position.[57] Accordingly, the OFT has also considered other factors such as constraints placed on the firm by existing competitors, barriers to entry and/or expansion, and buyer power. It should be noted that the analysis below applies to each of the in-clinic markets identified previously unless otherwise stated.

Market share

5.8 On the basis that IDEXX considered the relevant market to be the supply in the UK of companion animal diagnostic testing products and services (in-clinic and external lab), IDEXX estimated that its market share would have been approximately [30-40] per cent.[58]

5.9 IDEXX also provided an approximate breakdown of its overall in-clinic share and at the individual test level (represented in the following table).

Table 5.1: IDEXX's estimates of its market share in-clinic and at individual test level

Company	All in-clinic %	Biochemistry %	Haematology %	Endocrinology %	Urinalysis, Electrolytes, Coagulation and Blood Gas %
IDEXX	[55-65]	[55-65]	[60-70]	[90-100]	[55-65]

Source: IDEXX responses dated 3 September 2010 and 12 October 2010

5.10 Given the lack of information in the public domain concerning the size of the in-clinic markets, the OFT contacted the main in-clinic competitors in order to ascertain the size of the market. The responses reveal that IDEXX is likely to have high in-clinic market shares.

[57] For example, market shares may overestimate market power in situations where there are weaker constraints from outside of the market (that is, the binary fallacy).

[58] IDEXX response dated 3 September 2010.

Table 5.2: Market shares in-clinic and by test discipline (2009 revenue for analysers and consumables)

Company	All in-clinic %	Bio-chemistry* %	Haem-atology %	Endocrin-ology %	Coag-ulation %	Urinalysis %
IDEXX	[60-70]	[60-70]	[70-80]	[90-100]	[90-100]	[90-100]
QCR& Trio	[15-25]	[20-30]	[10-20]	[<10]		
Woodley	[<10]	[<10]	[<10]	[<10]	[<10]	
Menarini	[<10]	[<10]	[<10]			
Vetlab**	[<10]					
Horiba	0***					

Note: columns may not sum to 100 per cent due to rounding.

* Including analysers which are able to carry out electrolyte and blood gas analysis.

** A breakdown of Vetlab's revenue by test discipline was not requested due to the relatively small size of the business.

*** Horiba entered the in-clinic market in 2010. In 2010, its market share based on revenue was approximately [<10] per cent.

Source: Figures derived from 2009 revenue data obtained by the OFT from companies operating in the sector.

Constraints from existing competitors

5.11 IDEXX stated that their strength in the in-clinic segment had been built up over time and could be attributed to a history of innovation, customer focus, and having gained first-mover advantage in a number of tests/products.[59] In addition, IDEXX stated that some of its customers dual source their in-clinic analysers (that is, they purchase analysers from more than one supplier).[60]

[59] OFT meeting with IDEXX on 13 September 2010.

[60] IDEXX response 27 September 2010. For example, IDEXX estimated that of its [ ] biochemistry analyser customers, approximately [ ] use a haematology analyser supplied by a competitor.

5.12 The OFT notes that given the high fixed cost of analysers, veterinary practices are unlikely to switch to a competitor during the core lifetime of an analyser (or indeed purchase two of the same analysers, for example two biochemistry analysers).

5.13 There are broadly two types of business model in the market for the supply of analysers and consumables. The first is where the analyser is supplied 'free' or very inexpensively but with a commitment on the part of the veterinary practice to purchase a set amount of consumables each month or quarter for a defined term (for example, for three years). The second is where the veterinary practice purchases or leases the analyser at full cost with no fixed consumable commitment. In either case, should a veterinary practice switch to a competitor analyser before the end of the consumable commitment or before the end of the lifetime of the analyser, the average cost of an in-clinic test (which comprises the fixed cost of the analyser and the marginal cost of the consumable) would be likely to increase. Accordingly, there is unlikely to be a strong incentive for veterinary practices to switch from an IDEXX analyser within the period of the fixed consumable commitment or the lifetime of the analyser.

5.14 IDEXX stated that, among customers that lease in-clinic analysers (which they estimated to be approximately [45-55] per cent of in-clinic customers), the typical length of such a lease agreement is five years.[61] IDEXX have also stated that their customers typically retain an analyser for a period in excess of five years.[62] IDEXX has also stated that the average contract length for consumables is approximately three years. This indicates that the expected lifetime of an in-clinic analyser may be five years, whereas those of consumable contracts may be three years.[63]

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[61] OFT meeting with IDEXX on 13 September 2010.

[62] IDEXX submission dated 4 January 2011.

[63] See also paragraph 6.32 for further commentary in relation to the expected lifetime of an in-clinic analyser.

5.15 These factors suggest that it would be difficult, in most circumstances, for rivals to win business from existing IDEXX customers with analysers that are less than five years old.[64] On the basis that analysers are replaced on average every five years, rivals would only be able to compete, on average, for one fifth of IDEXX's existing business in any one year. With only one fifth of its existing customers contestable per year, this may imply that IDEXX's current strong position within the analyser markets is unlikely to be quickly eroded.

5.16 Furthermore, even when those customers are looking to replace their IDEXX analysers (or looking to purchase additional new analysers within the range) it is likely that many would not switch away from IDEXX. The OFT's market testing suggests that many veterinary practices have a preference to purchase the different in-clinic analysers that they need from one supplier. Thus, existing IDEXX customers, that wish to replace one or more of their analysers, but that do not wish to replace all of their analysers at that particular time, may be inclined to purchase another IDEXX analyser. Finally, IDEXX is the only in-clinic provider to offer the entire range of analysers (see Table 4.1 in paragraph 4.23 above). This evidence suggests that IDEXX's currently strong market position is unlikely to be quickly eroded by competitors.

5.17 The OFT notes that with regard to new sales the installed base may not play as significant a role. However, several in-clinic competitors stated that, as the first company to offer in-clinic analysers to veterinary practices, IDEXX gained a first mover advantage and new in-clinic entrants had difficulties in displacing IDEXX analysers given the fact that veterinarians had been trained using IDEXX equipment and were already familiar with IDEXX analysers. This was confirmed by the OFT's market enquiries which revealed that even where veterinary practices had been offered cheaper in-clinic deals by competitors, some still had not switched due to staff

[64] Whilst the average consumable contract lasts for three years, given that the analyser is expected to last for at least five years and competing consumables cannot be used with an IDEXX analyser, the OFT considers that five years is the appropriate duration in considering the proportion of the market that can be competed for by rivals.

familiarity with the analysers, being content with the service provided and insufficient benefits to justify switching provider.

5.18 Furthermore, one in-clinic competitor stated that approximately four to five years ago independent veterinary practices were targeted for particular sales efforts but it became was very labour intensive to identify those practices that did not already have in-clinic analysers (that is to say, new sales). This suggests it may be difficult for competitors to target and compete specifically for veterinary practices that have not purchased any analysers in the past.

5.19 The OFT's market testing broadly revealed that veterinary practices value interoperability between analysers, there are efficiency savings to single sourcing,[65] there are relatively low rates of multi-sourcing,[66] and that customers tend to purchase from the same company for many years.[67]

5.20 In light of the above, the evidence suggests that IDEXX's current market share may not be eroded quickly given the reluctance for veterinary practices to switch away from IDEXX or choose competing suppliers.

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[65] Mainly due to staff familiarity with a particular supplier's analysers, interoperability between different analysers, and the potential to negotiate a better deal with the relevant supplier if multiple analysers are purchased.

[66] Only six out of 16 of the veterinary groups and practices contacted by the OFT which used an in-clinic analyser stated that they purchase different in-clinic analysers from different suppliers. Further, an in-clinic competitor stated that it estimated that 70 per cent of veterinary practices preferred to purchase biochemistry, haematology and electrolyte analysers from a single supplier. Another in-clinic competitor stated that, in its experience, less than 10 per cent of veterinary practices sourced their in-clinic analysers from multiple suppliers.

[67] [ ] out of [ ] current IDEXX in-clinic customers that responded to this question stated that they had been a customer of IDEXX for more than [ ] years. In addition, IDEXX's submission to the OFT dated 4 January 2011, states that their in-clinic customers have been with them an average of [> five] years.

High barriers to entry

5.21 In a presentation to the OFT,[68] IDEXX argued that there were no substantial technological, research and development or intellectual property rights entry barriers into the in-clinic market. Further they identified that human in-clinic instruments were available on OEM basis for distribution into veterinary market, and pointed to the recent entry of NationWide Laboratories into the in-clinic market.

5.22 IDEXX identified certain specific in-clinic analysers that were available outside the UK, but not currently supplied in the UK.[69] IDEXX stated that it considered that those analysers could be sold in the UK.

5.23 However, the OFT considers, as discussed in paragraph 4.24 above, that the main barrier to entry for an in-clinic provider is gaining access to a suitable OEM. A new entrant seeking to supply in-clinic analysers can either try to establish a relationship with an existing OEM of veterinary diagnostic equipment, or partner with an OEM that is not currently active in the sector.

5.24 All things being equal, a new entrant would have more chance of a successful entry if it partnered with an OEM currently active in the sector, as it would be able to compete for sales to customers currently purchasing that OEM's analysers, which will already have market recognition. However, all of the in-clinic competitors stated that they had exclusive agreements with existing OEMs. Accordingly, it is likely to be difficult for a new entrant to partner with an OEM of equipment currently available to veterinary practices in the UK, unless they purchased an existing in-clinic competitor or the exclusive agreement was terminated.[70]

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[68] In the OFT meeting with IDEXX on 13 September 2010.

[69] IDEXX submission dated 27 September 2010, Annexe 11.

[70] For example, Horiba entered the in-clinic market in 2010 by taking over the distribution for analysers produced by an OEM for which another in-clinic competitor (Woodley) had previously distributed.

5.25 A new entrant could still enter by partnering with an OEM not currently active in the veterinary diagnostics sector in the UK. This could, for example, include partnering with an OEM of analysers for diagnostic testing in humans in order to develop a product for the veterinary market. However, partnering with an OEM not active in the sector is likely to lead to higher costs of entry, as it would require more promotional activities to raise brand awareness of the analyser. In addition, where this included developing a human diagnostic analyser to be suitable for veterinary use, this would also be likely to require significant investment and therefore lead to higher costs of entry. Accordingly, entry by this route may be too slow to provide an effective constraint, and indeed may not also provide the new entrant with access to a full range of analysers. For example, [ ]. The OFT considers that it is likely that a new entrant that did not itself already benefit from a degree of brand recognition among veterinarians (such as that enjoyed by [ ] due it already being an established provider of external lab services) would find it more difficult still to enter the in-clinic market successfully.

5.26 Finally, the establishment of suitable repair, servicing and maintenance provision, along with a sales team, although unlikely to be a significant barrier to entry, will add to the cost of entry for distributors – in particular, as the majority of these represent sunk costs.

5.27 Given that OEMs currently supplying veterinary practices with diagnostic equipment in the UK have long-term exclusivity arrangements with existing in-clinic suppliers, and that partnering with a new OEM appears to take a number of years, the OFT considers that new entry from distributors that are not currently active in the market is unlikely to be timely or likely. As such, the OFT considers that there are significant barriers to entry in the distribution of analysers.

5.28 The OFT considers that barriers to expansion are also likely to be high. IDEXX has an installed base of customers who typically have leases of up to five years in duration for each of their in-clinic analysers. On this basis, setting aside new customers, no more than a fifth of the market is likely to be open to competition in any one year, thus creating a barrier to expansion for competitor firms.

5.29 Further, where veterinary practices stagger their purchase of in-clinic analysers, the contracts for each of the practice's analysers will expire at different times. As many veterinary practices prefer to source all of their analysers from the same supplier (see paragraph 5.19), such practices are likely to prefer to replace an analyser for which the contract has expired with a new analyser from the same supplier (in order to maintain the efficiency advantages of having all of their analysers from a single supplier). As such, this is likely to represent a further barrier to expansion for competitors.

Lack of buyer power

5.30 In recent years there has been increased consolidation of veterinary practices into larger groups, which tend to adopt common purchasing policies. However, the OFT notes that even the largest consolidated practice represents less than five per cent of the overall number of veterinary practices in the UK, and thus its purchasing power should not be overstated.

5.31 In addition, the OFT understands that in-clinic suppliers are able to price discriminate between different customers. As such, even if some customers or groups of customers do have limited buyer power, this is unlikely to constrain IDEXX's and other suppliers' ability to price independently to the large number of smaller buyers. Accordingly, the OFT considers that there is only a limited potential for buyer power by veterinary practices.

Provisional conclusion on market power for in-clinic

5.32 For the purposes of its substantive assessment under Section 6 and in order to provide the benefit of wider guidance on the OFT's analytical approach to the relevant theories of harm, the OFT has proceeded on the basis of narrower hypothetical market definitions and on that basis considers that IDEXX is likely to have a dominant position in each of the in-clinic markets. This provisional assumption is based on IDEXX's high market shares combined with the significant barriers to entry and/or expansion, barriers to customer switching and relatively low levels of buyer power.

5.33 However, given that the OFT considers that, on the basis of the evidence at its disposal, it is unlikely that IDEXX's conduct would lead to the foreclosure of actual or potential competitors such as to impair effective competition in the in-clinic or external lab markets (see Section 6 below), the OFT has not needed to conclude definitively on dominance.

Assessment of market power in the market for standard external lab tests

5.34 The OFT has analysed market share data and considered other factors such as barriers to entry and/or expansion, buyer power, brand reputation and customer switching, the results of which suggest that IDEXX is unlikely to have market power in relation to standard external lab tests.

Market share

5.35 On the basis that IDEXX considered that the relevant market is the overall supply in the UK of companion animal diagnostic testing products and services, they estimated their market share was approximately [30-40] per cent.[71] IDEXX also provided a breakdown by segment, estimating that their external lab market share would be [15-25] per cent (share of sales).[72]

5.36 Given the lack of information in the public domain concerning the size of the market, the OFT contacted the external lab competitors in order to ascertain the size by revenue of the market. The responses reveal that IDEXX's market share is likely to be higher than they estimated at approximately [30-40] per cent by revenue (see table 5.3 below).

[71] IDEXX response dated 3 September 2010.

[72] *Ibid*.

Table 5.3: Market shares for external lab (2009 revenue, excluding Spec fPL and Spec cPL tests)

Company	Share of revenue - %
IDEXX	[30-40]
CVS Group plc	[15-25]
NationWide Laboratories	[5-15]
TDDS Limited	[<10]
CTDS Limited	[<10]
Abbey Veterinary Services	[<10]
Animal Health Trust	[<10]
Lab Services Limited	[<10]
Batt Laboratories Limited	[<10]
Avacta Group plc	[<10]
[ ]	[<10]
Biobest Laboratories Limited	[<10]
CAPL Limited	[<10]
Langford Veterinary Services	[<10]
University of Glasgow Vet School	[<10]
PTDS Limited	[<10]
The Royal Veterinary College	[<10]
Labokin	[<10]
Pinmoore Animal Laboratory Services Limited	[<10]

Source: Figures have been rounded and are derived from 2009 revenue data obtained by the OFT from companies operating in the sector.

5.37 The OFT considers that it is unlikely that an undertaking will be individually dominant if its share in the relevant market is less than 40 per cent.[73] However, dominance could be established below that level if other relevant factors provided strong evidence of dominance.

[73] OFT Guideline '*Abuse of a dominant position'* (OFT402), at paragraph 4.18.

Customer switching is straightforward

5.38 In relation to customer switching, IDEXX stated[74] that the OFT reported in its decision in 2005 relating to the acquisition by IDEXX Laboratories Limited of Vetlab Services Limited that customers had confirmed that they were able to switch between providers where necessary. In the same submission, IDEXX also referred to the fact that they had lost the external lab custom of several veterinary practices that had been purchased by [ ].

5.39 The results of the OFT's market testing exercise revealed that switching from one external lab supplier to another appears relatively straightforward.

5.40 Some veterinary practices mentioned certain factors encouraging them not to switch to another provider, such as the provision of retroactive sliding volume rebates commonly offered by IDEXX and some other external labs. Whilst such volume rebates may disincentivise multi-sourcing or partial switching, veterinary practices indicated that multi-sourcing of external lab services is quite common, in particular where a smaller niche external lab is used alongside a main external lab provider.

5.41 Overall, the veterinary practices contacted as part of the market testing exercise suggested that they consider the market for external lab tests to be competitive.

Barriers to entry and expansion

5.42 In relation to barriers to entry in the external lab segment, IDEXX stated that such barriers were not particularly high, and estimated that a new entrant into the external lab market would need to invest approximately £100,000 to £200,000 in equipment.[75] IDEXX also stated that external lab analysers can be leased rather than purchased, thus mitigating some set up

[74] IDEXX submission of 3 September 2010.

[75] OFT meeting with IDEXX on 13 September 2010.

costs.[76] IDEXX also stated that revenues of around half a million pounds a year would be required to achieve a critical mass for a going concern across the full range of external lab tests, but that this sum would be lower if the external lab was a specialist lab.[77]

5.43 In addition to equipment, third party external lab competitors stated that external labs require at least one trained pathologist in order to interpret the test results.[78] In contrast to the in-clinic market, OEMs do not have exclusivity agreements with external labs, allowing a potential entrant access to a broad range of OEM external lab analysers.

5.44 Responses to the OFT's enquiries identified four new entrants to the external lab market since 2005. Estimates provided to the OFT by these new entrants for the costs they incurred in entering the external lab market ranged from [ ] to [ ]. One of the recent new entrants stated that it and had taken them around six months to prepare to enter the market.

5.45 Accordingly, the main barrier to entry would appear to be the cost of the analysers, hiring trained staff such as a pathologist, and attracting a sufficiently large customer base to achieve the critical mass required to reach the scale necessary to run the external lab profitably.

5.46 In relation to barriers to expansion, responses to OFT enquiries of a selection of businesses operating in the external lab market suggest that the main barrier to expansion is the difficulty of winning new custom from competitor businesses. However, we note that one of the recent new entrants to the external lab market has grown its market share considerably in recent years and is now one of the larger competitors in the market. Another of the recent new entrants stated that it had taken them around four years from entering the market to build an acceptable client base.

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[76] IDEXX slide-pack dated 13 September 2010.

[77] OFT meeting with IDEXX on 13 September 2010.

[78] See footnote 21.

5.47 In light of the above, the OFT considers that barriers to expansion in the external lab market do not appear to be insurmountable or particularly high.

No buyer power

5.48 For the reasons set out in paragraph 5.30 to 5.31 above, the OFT considers that it is unlikely that consolidated veterinary practices would be able to exert a significant constraint on the external lab market.

Provisional conclusion of market power in the market for standard external lab tests

5.49 The OFT notes that there are some barriers to entry and expansion in the market. However, in light of the provisional assessment of IDEXX's market share being [30-40] per cent in the standard external lab market and the willingness of customers to switch provider or multi-source, the OFT considers that the balance of evidence suggests that IDEXX is unlikely to have a dominant position for the provision of standard external lab tests.

Assessment of market power in the market for two specialist external lab tests

5.50 While in relation to standard external lab tests, IDEXX is likely to be constrained by other competitors, this is not the case for Spec cPL and Spec fPL. IDEXX is the monopoly supplier of these specialist external lab tests due to being the holder of European patents and/or having been granted exclusive licences in relation to European patents for these tests. [79]

5.51 In its submission dated 3 September 2010, IDEXX stated that it had elected not to supply the Spec fPL test as kits directly to competitors in order to

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[79] In relation to Spec fPL, IDEXX holds an exclusive licence to a patent owned by The Texas A&M University System. The exclusive licence was issued in July 2008 and expires in May 2023. IDEXX also holds a patent application relating to Spec fPL which discloses and claims the two monoclonal antibodies used in the IDEXX Spec fPL test. In relation to Spec cPL, IDEXX holds a patent which was issued in April 2009 and which expires in April 2025.

highlight to customers IDEXX's efforts to invest in the development of new products.

Provisional conclusion of market power for two specialist external lab tests

5.52 Given that IDEXX is the monopoly supplier of the Spec cPL and Spec fPL tests, and that for the purposes of this decision the OFT has proceeded on the basis of individual hypothetical markets for Spec cPL and Spec fPL (see paragraph 4.40 above), the OFT considers that IDEXX is likely to have a dominant position for these two specialist tests.

6 LEGAL AND ECONOMIC ASSESSMENT OF THE CONDUCT

Introduction

6.1 The assessment of whether the conduct of a dominant undertaking amounts to an abuse requires a consideration of a number of factors, including whether in fact the relevant conduct constitutes normal competition and whether it has the potential to adversely affect competition.

Normal competition

6.2 A dominant undertaking must not resort to methods other than 'normal competition', and must not adopt a strategy of using its economic strength and/or market position to impair undistorted competition, including competition remaining in the market and the growth of future competition.[80] This involves an assessment of whether the behaviour in question deviates from 'normal' or 'fair' competition on the merits. Behaviour which amounts to 'normal competition' will not infringe the Chapter II prohibition or Article 102 TFEU.

6.3 However, due to the 'special responsibility'[81] on dominant firms not to allow their behaviour to impair competition on the market, conduct which is permissible by non-dominant firms may nevertheless amount to an abuse if carried out by a dominant firm.

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[80] See, for example, Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 (paragraph 90), which defined abuse as being 'an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance or the degree of competition still existing in the market, or the growth of that competition'.

[81] Case 322/81 *Michelin v Commission* [1983] ECR 3461, [1985] CMLR 282 at paragraph 57, and Case T-203/01 *Michelin v Commission* [2003] ECR II-4071 (Michelin II) at paragraph 97.

Effect on competition

6.4 According to the case law of the Court of Justice, abuse in terms of Article 102 TFEU is an 'objective concept' which refers to the conduct of a dominant company which through recourse to different methods from the ones governing normal competition 'has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.'[82]

6.5 The Court in Michelin II established that the effect referred to in the case-law cited in the preceding paragraph 'does not necessarily relate to the actual effect of the abusive conduct complained of', but instead for the purposes of establishing an infringement of 102 TFEU 'it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect.'[83]

6.6 The Commission's Guidance[84] explains that anti-competitive foreclosure relates to both actual or potential competitors:

> 'In this document the term 'anti-competitive foreclosure' is used to describe a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers.'

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[82] Case 322/81 *Nederlandsche Banden Industrie Michelin (Michelin I)* [1983] ECR-3461 at paragraph 73 and *Michelin II* at paragraph 40.

[83] *Michelin II*, paragraph 239 and Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, paragraph 250 [293] (*British Airways*), Case 280/08 P Judgment of the Court (Second Chamber) of 14 October 2010 *Deutsche Telekom AG v European Commission (Deutsche Telekom)* at paragraph 117 and Case T-155/06: Judgment of the General Court of 9 September 2010 *Tomra Systems and Others v Commission (Tomra)*, at paragraph 289.

[84] Paragraph 19 of the Commission's Guidance.

6.7 Evidence of actual or observed effects is not necessary to establish an infringement of the Chapter II prohibition and/or Article 102 TFEU. In *Tomra*, the General Court endorsed previous case law and stated that it is not necessary for the European Commission to demonstrate the actual effects of the agreements on the market:

> '... for the purposes of establishing an infringement of Article 82 EC [now Article 102 TFEU], it is not necessary to show that the abuse under consideration had an actual impact on the relevant markets. It is sufficient in that respect to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect (*Michelin II*, paragraph 239, and *British Airways*, paragraph 293)'.

6.8 In *Deutsche Telekom*,[85] the Court of Justice also ruled that a practice whose aim is to remove a competitor can be characterised as an abuse even if the desired result is not ultimately achieved. However, it also established that where there is no effect, the pricing practice cannot be categorised as exclusionary if it does not render market penetration more difficult:

> 'Admittedly, where a dominant undertaking actually implements a pricing practice resulting in a margin squeeze of its equally efficient competitors, with the purpose of driving them from the relevant market, the fact that the desired result is not ultimately achieved does not alter its categorisation as abuse within the meaning of Article 82 EC [now Article 102 TFEU]. However, in the absence of any effect on the competitive situation of competitors, a pricing practice such as that at issue cannot be classified as exclusionary if it does not make their market penetration any more difficult'.

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[85] Case 280/08 P Judgment of the Court (Second Chamber) of 14 October 2010 *Deutsche Telekom AG v European Commission*, at paragraph 254.

6.9 According to the case law cited above, the conduct of a dominant firm infringes Article 102 TFEU if the conduct is capable of restricting competition and of making market entry more difficult or impossible for equally efficient actual or potential competitors. However, in its analysis of the facts of this case, the OFT has not only considered whether the conduct of IDEXX is capable of or tends to restrict competition by foreclosing actual or potential competitors, but also, in line with the Commission's Guidance, whether the conduct of IDEXX is also *likely* to foreclose competition in the relevant markets. [86]

6.10 In light of the above, the OFT analysed three theories of harm and sets out the methodology it has adopted when considering whether each of these three theories of harm are likely to foreclose competition.[87] Overall, having conducted its analysis, the OFT considers that on the basis of the evidence at its disposal, it is unlikely that IDEXX's conduct would lead to the foreclosure of actual or potential competitors such as to impair effective competition in the market(s) in question at this point in time.

Discounts on in-clinic equipment to foreclose the market for standard external laboratory tests (multi-product rebate)

6.11 The Complainant has alleged that IDEXX is providing discounts on in-clinic analysers conditional on using its external lab services. The Complainant

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[86] This is consistent with the Commission's Decision in Case COMP/E-1/38.113 – *Prokent-Tomra* (29.3.2006) at paragraph 285, where the Commission did not need to show the likely restrictive effect of the practices, but did so anyway. The General Court supported the Commission's analysis, which went beyond showing that effects were likely to occur and showed that they had in fact materialised. There are elements of the judgment that both support earlier case law (taking a view that certain types of conduct are in general illegal) but also demonstrate that the General Court is perhaps looking increasingly also to an effects-based approach, where appropriate.

[87] Although the complainant did not specifically complain about the issue, in order to ensure that potential anti-competitive conduct was not overlooked, the OFT also considered whether IDEXX may have provided discounted bundles of in-clinic analysers in order to foreclose competitors in the supply of certain types of in-clinic analyser. However, the OFT did not find evidence to support this theory of harm.

has argued that competitors cannot provide the same discounts as IDEXX on in-clinic purchases and are unable to match IDEXX's combined discounts to customers that use both in-clinic and external lab services.

The theory of harm

6.12 In assessing a dominant undertaking's pricing conduct, it is important to bear in mind that if an undertaking is dominant in one market, it may have the ability to adversely affect competition in a closely related market.[88] This can be done through tying, pure bundling or multi-product rebates (also known as mixed bundling).[89] All of these practices (sometimes collectively referred to as tying and bundling practices) can be used to 'leverage' a strong market position from one market, or segment, to another.[90] For example, according to case law, the bundling together by a dominant undertaking in one inclusive price of separate, but ancillary, products or services may constitute an abuse where the effect is to eliminate or substantially weaken competition.[91]

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[88] Case C-333/94P, *Tetra Pak v Commission* [1996] 1 ECR 595 (*Tetra Pak II*).

[89] This may also be achieved in the same market through the use of conditional rebates. Conditional rebates are rebates granted to customers to reward them for a particular form of purchasing behaviour. See paragraph 37 of the Commission's Guidance.

[90] The term 'leveraging' refers to the ability to increase sales in one market (the tied market), by virtue of the strong market position of the product to which it is tied or bundled. 'Tying' occurs when customers that purchase one good (the tying good) are required also to purchase another good from the producer (the tied good). 'Pure Bundling' refers to the practice of only selling the products jointly in fixed proportions. In the case of 'Mixed Bundling', also termed as 'Multi-Product Rebates', the products are also made available separately; however the sum of the prices when sold separately is higher than the bundled price.

[91] In *De Poste- La Poste* (OJ [2002] L61/32) the Commission imposed a fine on the Belgian Post Office for, in effect, offering lower prices to customers in the market for the delivery of letters if they also made use of a separate 'B2B' service that it provided. In *BSkyB* (OFT Decision, 17 December 2002, [2003] UKCLR 240), the OFT was not satisfied that BSkyB's bundling of sports and film premium channels had produced an anti-competitive effect as competitors had not been foreclosed.

6.13 The potential competition concern regarding all of these practices is that a firm that has a strong position which can not be easily replicated in one market/segment may provide discounts or rebates on that market/segment on condition that its customers buy its product in the competitive market/segment.[92] In tying, pure bundling and multi-product rebate cases the leveraging takes place from a dominant 'tying' market, into a competitive 'tied' market.[93]

6.14 Within these categories of abuse, a key aspect of the analysis is to what extent the bundle can be replicated by competitors. As such the OFT would typically consider how easy it is to replicate the bundle, tied product or multi-product rebate, that the dominant firm is offering.[94,95]

6.15 In the current case, the OFT has proceeded on the basis of the narrower hypothetical market definition comprising separate relevant markets for

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[92] It is important to note that the discount structure must be this way round – that is, offering discounts on the assured base (in this case, in-clinic) in order that the discount in the assured base forecloses the contestable base (in this case, standard external lab tests). A discount on the contestable base conditional on taking the assured base should be considered as a standard predation test within the contestable base.

[93] Paragraph 48 of the Commission's Guidance.

[94] Paragraph 61 of the Commission's Guidance.

[95] A similar question is asked within conditional rebate cases. In conditional rebate cases the OFT would typically consider what proportion of the market is 'assured'. The European Commission defines the non-contestable (assured) base as: 'the amount that would be purchased by the customer from the dominant undertaking in any event.' See The Commission's Guidance, at paragraph 39. See also *Michelin II*, paragraphs 162 and 163, *British Airways*, paragraphs 277 and 278, and *Intel*, Case COMP/37.990, at paragraph 1005. Paragraph 1005 of Intel also uses the term 'inelastic share of demand' as being synonymous with the 'non-contestable' share of demand of each customer. At paragraph 36 of the Commission's Guidance, the Commission refers to the fact that competitors may not be able to compete for an individual customer's entire demand because the dominant undertaking is an unavoidable trading partner at least for part of the demand on the market, for instance because its brand is a 'must stock item' preferred by many final consumers or because the capacity constraints on the other suppliers are such that a part of demand can only be provided for by the dominant supplier.

each in-clinic analyser and its respective consumables, and a separate market for standard external lab tests. Therefore, the OFT considers that leveraging from one market to the other should be analysed within the framework of a multi-product rebate.

6.16 In determining whether competitors can effectively replicate IDEXX's bundle of in-clinic analysers and external lab tests, the OFT notes that there is only one other company which is active in both the external lab market and the in-clinic market. Furthermore IDEXX has high market shares for each of the in-clinic analysers. In addition, there is evidence that IDEXX benefits from a first mover advantage within in-clinic analysers and that there is a tendency for many veterinary practices to prefer to purchase all of their in-clinic analysers from a single supplier.[96] Evidence also indicates that IDEXX has strong brand reputation and that many veterinarians are familiar with IDEXX's equipment, thus making switching away from an IDEXX in-clinic analysers less attractive to many veterinary practices.

6.17 These factors suggest that it is likely to be difficult for competitors to replicate IDEXX's bundle over at least IDEXX's existing customers across each of the in-clinic markets. However, given that the OFT considers that on the basis of the evidence at its disposal, it is unlikely that IDEXX's conduct would lead to the foreclosure of actual or potential competitors such as to impair effective competition in the external market (see below), the OFT has not needed to conclude definitively on whether IDEXX competitors can effectively replicate IDEXX's bundle of in-clinic analysers and external lab tests.

Methodology applied by the OFT

6.18 In determining whether an abuse is established, the OFT will consider whether the allegedly abusive conduct is likely to lead to anti-competitive

[96] See paragraph 5.19 above.

foreclosure. For multi-product rebates,[97] the following cumulative factors will need to be demonstrated:

a) The firm has a dominant position within the tying markets (the in-clinic markets) and competitors in the tied market (the external lab market) are unable to replicate effectively the firm's bundle.

b) An equally effective competitor in the tied market alone is unable to match the effective incremental price in that market without making losses. This would be the case if the incremental price is below the dominant firm's own average avoidable costs (AAC) of supplying that market.[98,99] It could also occur where incremental price is above the dominant firm's AAC but below its long run average incremental costs (LRAIC) if other factors point to the conclusion that an equally efficient competitor could not compete.[100]

c) The extent of the allegedly abusive conduct needs to be sufficient to restrict competition in the market.[101]

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[97] See footnote 90 above.

[98] It should be noted that the Commission's Guidance at paragraph 60 refers to LRAIC as being the appropriate cost benchmark for multi-product rebates. However, the OFT considers that there may be valid reasons why firms choose to price above AAC but below LRAIC in those instances, such as those set out in paragraph 44 of the Commission's Guidance for conditional rebates. In particular, the AAC test may also be more relevant when the rebates relate only to a subset of customers in the market, rather than for all customers supplied with the products.

[99] In the case of multiple products the correct test is of incremental revenue rather than incremental price. However incremental price may be a helpful proxy for incremental revenue.

[100] Paragraph 60 of the Commission's Guidance.

[101] As explained at paragraph 20 of the Commission's Guidance, in general, the higher the percentage of sales in the relevant market affected by the conduct, the longer its duration, and the more regularly it has been applied, the greater is the likely foreclosure effect of the relevant pricing practice.

6.19 Even if the above factors were demonstrated, the OFT is unlikely to intervene if the parties can objectively justify the conduct. Given that IDEXX has not made any representations on objective justification and as the OFT does not consider that the extent of the conduct in question would be sufficient to lead the foreclosure of actual or potential competitors such as to impair effective competition (see paragraphs 6.35 to 6.37 below), the OFT has not considered this aspect any further.

Analysis: the conduct is unlikely to result in foreclosure

a) Dominance and ease of replicating the bundle?

6.20 As set out in paragraphs 5.32 to 5.33 above, although the OFT has not needed to conclude definitively on this point, for the purposes of this section the OFT has assumed that IDEXX has a dominant position in the in-clinic market. In addition, as set out in paragraphs 6.16 to 6.17, although the OFT has not needed to conclude definitively on this point, the OFT has assumed for the purposes of this section that competitors are not able to replicate effectively the in-clinic element of IDEXX's bundle.

b) Could an equally efficient competitor replicate the discount?

6.21 Although the provision of in-clinic and external lab services are likely to be distinct and in separate markets,[102] the OFT considers in this case that these two markets are sufficiently proximate for it to be feasible for an action in the former to have an anti-competitive effect in the latter.

6.22 As part of its investigation, the OFT requested that IDEXX provide all conditional contracts (that is, contracts where IDEXX provided discounts on the in-clinic analyser and/or consumables on condition that the client used its external lab services) spanning the period of the complaint (2009 and 2010).

[102] See paragraphs 4.27 to 4.34 above.

6.23 IDEXX made enquiries with its relevant employees and carried out a physical onsite review of all relevant contractual documentation for the period 1 January 2009 to 31 December 2010 that was held at its [ ] offices. Only [ ] contracts were clearly identified to contain conditional clauses.[103]

6.24 However, there did appear to be some ambiguity regarding the phrasing of other IDEXX contracts and whether discounts were offered on in-clinic analysers on condition of taking both IDEXX's in-clinic and external lab services, in particular relating to IDEXX's Complete Suite Plus (CSP) marketing programme.

6.25 The CSP programme offers customers a standard 15 to 30 per cent discount on in-clinic analysers and separately an additional six per cent rebate on their IDEXX external lab expenditure, with the six per cent rebate provided on condition that the customer meets a specified monthly expenditure on external lab. The CSP agreement provides that the rebate is offered in exchange for the customer's commitment to use IDEXX's external lab as its primary external lab and that the discount is intended to offset the cost of the customer's new in-clinic equipment.

6.26 IDEXX stated that it does not consider the terms of the CSP programme to be ambiguous.[104] However, the concerns surrounding ambiguity were supported by comments from in-clinic and external lab competitors who reported that some of their current and/or former customers had indicated that IDEXX had offered discounts on in-clinic analysers on condition of using IDEXX's external lab services. When a sample of these customers were contacted some stated that they believed their discounts may have been conditional on external lab services, although subsequent analysis of their contracts revealed they in fact were not. Nevertheless, the OFT considers that, to the extent that the CSP agreement may have the potential to give veterinary practices the perception that discounts on in-

[103] Namely, [ ].

[104] IDEXX submission dated 25 May 2011.

clinic analysers were conditional on the use of external lab services (even if that is not the case), the agreements may have had the potential to foreclose competitors.

6.27 In relation to determining whether IDEXX's conduct is able to foreclose rivals in the external lab market, IDEXX submitted financial analysis provided by its economic advisers comparing average prices paid by customers purchasing both in-clinic analysers and consumables and external lab services from IDEXX, and average prices paid by customers only purchasing in-clinic analysers and consumables from IDEXX. The analysis indicates that customers that purchase external lab services do not tend to pay a lower price for in-clinic analysers and consumables than non-external lab customers. IDEXX submits that the findings of its analysis suggests that the difference in price between the analyser and consumables when bundled with external lab services and the price of unbundled analysers and consumables is not capable of creating foreclosure effects.[105]

6.28 The OFT considers this analysis provides evidence which indicates that CSP customers do not benefit from conditional discounts in practice. However, the OFT notes that some CSP customers may still have perceived that additional in-clinic discounts were being provided on condition that they use IDEXX's external lab services, even if they were not.[106] In these situations the OFT may still have concerns if such ambiguity were to cause customers to switch from using a competitor's external lab to using IDEXX's external lab service.

6.29 Between 2009 and 2010, there were [ ] CSP contracts concluded ([ ] in 2009 and [ ] in 2010). As the OFT considers that it is possible that some veterinary practices interpreted the CSP contracts as providing discounts on in-clinic analysers on condition of using IDEXX's external lab service (see

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[105] IDEXX's economic submission dated 21 April 2011.

[106] Should veterinary practices believe that they will only get the discounts on in-clinic analysers on the condition that they also purchase IDEXX's external lab services, then competitors may find it difficult to compete – even if the actual prices are identical.

paragraphs 6.24 to 6.26). Accordingly, for the purposes of this decision, the OFT has included these contracts as part of the potential foreclosure analysis below.

6.30 The OFT undertook a financial analysis of the [ ] conditional contracts to see whether the effective price was set below AAC. These contracts were a small proportion of IDEXX's total business. As only a small number of contracts are being considered, the OFT considers that AAC is a more appropriate measure in this investigation than LRAIC from an economic perspective, as we are considering whether the revenue from these contracts is sufficient to cover the costs incurred by the supply of these contracts alone.[107]

6.31 The OFT then considered whether an equally efficient competitor in the external lab market could replicate IDEXX's offering such that veterinary practices would be indifferent between buying from them or IDEXX. In order to replicate IDEXX's offering, an equally efficient competitor would need to both match the price of IDEXX's external lab tests and also compensate the customer for any conditional discount that the customer had to forgo on its in-clinic purchases from IDEXX. If this discounted price is above IDEXX's AAC of providing the external lab tests, an equally efficient competitor should be able to replicate IDEXX's offer and hence would not be foreclosed from competing.

6.32 In terms of the relevant time frame over which to calculate revenue and costs, IDEXX argued that this should be the life of the analyser, as a supplier can expect to receive consumable revenues for this period. While IDEXX acknowledged that some of their marketing programmes require

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[107] LRAIC may be more appropriate when considering rebates which cover a whole line of business, since it would then be appropriate to consider whether the revenue is sufficient to cover the attributable fixed costs associated with that line of business, and potentially some costs shared with other products, as well as the avoidable costs. In this case, even over a period of three years or more, it is unlikely that a significant proportion of fixed or common costs would be avoided in the absence of these few contracts, and so LRAIC for these contracts would not be expected to differ significantly from AAC.

customers to commit to a minimum consumable purchase over a minimum term (ranging from two to five years), they argued that this would only represent a minimum period for which revenue from consumables can be expected. IDEXX argued that the vast majority of their customers continue to purchase consumables long after the expiry of their contract. Citing a survey conducted by IDEXX in the United States, they asserted that the average IDEXX US customer continues to purchase consumables for on average [> five] years, and at least [>five] years. Accordingly, IDEXX argued that on a conservative basis and in the circumstances of this investigation, they consider five years, if not longer, to be an appropriate minimum time frame.

6.33 Nevertheless, given that this survey related to the US and not the UK market, the OFT considers that it may be more appropriate to use a three year duration on the basis that IDEXX has stated that the average length of commitments to purchase consumables, among customers that entered into a contract with such a commitment, was approximately three years.[108]

6.34 In light of the above, the OFT analysed the [ ] contracts containing conditional rebates and found that they were all above AAC.[109] Given that the OFT does not consider that the extent of the conduct in question would be sufficient to lead the foreclosure of actual or potential competitors such as to impair effective competition (see paragraphs 6.35 to 6.37 below), the OFT has not carried out a detailed assessment of whether the incremental price is below LRAIC.

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[108] IDEXX submission dated 4 January 2011 stated that the average length of commitments entered into by customers under those marketing programmes which included a consumables commitment between January 2005 and December 2009 was [ ] months.

[109] For example, [ ], over a two year period (2009 and 2010): analysers were sold at a [ ] per cent discount equalling £[A] and in-clinic consumables were provided at a discount of [ ] per cent equalling £[B]. External lab revenue amounted to £[C] and avoidable costs amounted to £[D]. Accordingly, an equally efficient external lab competitor would have needed to meet both the discounts and cover the avoidable costs from its revenue for external lab services, that is: C – A – B – D >0. Since the cost test is passed on a [ ] year basis, it would certainly be passed on a three year basis (see paragraph 6.33) given the positive margin on consumables.

c) Is the extent of the conduct sufficient to restrict competition in the external lab (tied) market?

6.35 In determining whether the [ ] conditional contracts would lead to the foreclosure of actual or potential competitors such as to impair effective competition on the market, the OFT notes that the total value of the external lab part of the [ ] conditional contracts amounted to around £[ ] in 2010. This represents around [<five] per cent of the external lab market.

6.36 Accordingly, the OFT considers that even if an equally efficient competitor was foreclosed from this [<five] per cent of the external lab market, it is highly unlikely that these [ ] contracts on their own would lead to foreclosure of actual or potential competitors such as to impair effective competition in the external lab market. Even if the CSP contracts were included, this would not change the OFT's analysis given that the combined value of the contracts represents only a small proportion of the external lab market.[110]

6.37 Accordingly, on the basis of the current value of contracts in which there were (or may be perceived to be) discounts on in-clinic equipment on condition of using IDEXX's external lab, the OFT is of the opinion that it is unlikely to lead the foreclosure of actual or potential competitors such as to impair effective competition.

Conclusion

6.38 In light of the above, the OFT considers that on the basis of the evidence at its disposal, it is 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.

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[110] In its submission dated 18 May 2011, IDEXX provided data showing that the revenue from CSP contracts concluded in 2010 amounted to only £[ ], or [<five] per cent of total IDEXX external lab sales in 2010, and a significantly smaller proportion of the total market. Sales in 2009 were much lower at £[ ].

Predatory pricing to foreclose in-clinic markets

6.39 The Complainant has also alleged that IDEXX was offering in-clinic analysers at no cost, or considerably reduced cost, in return for a minimum monthly guaranteed spend by the customer on 'consumables' for the analyser.

The theory of harm

6.40 Predatory pricing is a strategic behaviour whereby an undertaking deliberately incurs losses in the short term in order to eliminate a competitor so as to be able to charge excessive prices in the future.[111]

6.41 This conduct could constitute an abuse of a dominant position if IDEXX was attempting to predate competitors in the in-clinic markets by offering packages of analysers and/or consumables that are below cost.

6.42 All of IDEXX's contracts are individually negotiated. Given these individual negotiations it is appropriate to look at whether competitors are foreclosed from each individual contract rather than aggregating across contracts in order to look at an 'average' contract.

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[111] It should be noted that this could include actual as well as potential competitors (see paragraph 63 of the Commission's Guidance). A summary of the law on predation is set out in the OFT's recent *Flybe* case, at paragraphs 6.17 to 6.28, www.oft.gov.uk/shared_oft/ca98_public_register/decisions/OFT1286.pdf. The ECJ in the leading EU case on predatory pricing, *AKZO v Commission,* (C-62/86 [1993] 5 CMLR 215) stated that where prices are below average variable costs there is a presumption of an abuse of Article 102. Similarly in *Tetra Pak II* (Case C-333/94P, [1996] ECR 1-5951) the ECJ indicated that 'prices below average variable costs must always be considered abusive as there is no conceivable purpose other than the elimination of a competitor'. In contrast to the apparent approach taken by the ECJ in relation to below variable cost pricing, the OFT has taken the approach that the presumption of abuse in such cases is rebuttable in exceptional circumstances (cf. *Aberdeen Journals v Director General of Fair Trading (II)* [2003] CAT 11). The Commission's Guidance sets out a methodology based on a (i) costs ('sacrifice') and (ii) anti-competitive foreclosure.

Methodology applied by the OFT

6.43 In determining whether an abuse is established, the OFT will consider whether the allegedly abusive conduct is likely to lead to anti-competitive foreclosure. For predation, the following cumulative factors will need to be demonstrated:

a) The firm has a dominant position within the in-clinic markets.

b) Given the lack of any documentary evidence of intent in this case, the relevant test for predation in these circumstances is whether the firm is providing the goods/services below AAC (profit sacrifice) so as to foreclose or be likely to foreclose as efficient competitors.

c) The extent of the allegedly abusive conduct needs to be sufficient to restrict competition in the market.[112]

6.44 Even if the above factors were demonstrated, the OFT is unlikely to intervene if the parties can objectively justify the conduct. Given that IDEXX has not made any representations on objective justification and as the conduct in question would be unlikely to lead to the foreclosure of actual or potential competitors such as to impair effective competition in the in-clinic market (see below), the OFT has not considered this aspect any further.

Analysis: the conduct is unlikely to result in foreclosure

a) Dominance?

6.45 As set out in paragraphs 5.32 to 5.33 above, although the OFT has not needed to conclude definitively on this point, for the purposes of this

[112] As explained at paragraph 20 of the Commission's Guidance, in general, the higher the percentage of sales in the relevant market affected by the conduct, the longer its duration, and the more regularly it has been applied, the greater is the likely foreclosure effect of the relevant pricing practice.

section, the OFT has assumed that IDEXX has a dominant position in the hypothetical in-clinic market(s).

b) Prices below AAC within in-clinic analyser markets?

6.46 As set out in paragraphs 4.8 to 4.12 above, the OFT considers that there is likely to be a systems market for each analyser and its respective consumables, although it has not concluded on whether there may also be a narrower market for the supply of analysers alone to certain veterinary practices that may not whole life cost.

6.47 To the extent that veterinary practices whole life cost, and the in-clinic markets are therefore system markets, the relevant predation test should take into account the future profits from consumables associated with the sale of analysers.

6.48 Accordingly, the OFT conducted an analysis using IDEXX's 2009 cost data to determine whether IDEXX was pricing below AAC for a sample of sales of individual analysers and consumables and a sample of bundled packages of analysers and consumables. [113,114,115]

6.49 The results revealed that, when taking the sale of the analysers and consumables into account, IDEXX had not priced below AAC. This result includes the cases where IDEXX gave away some of its analysers for 'free' as, given the profit margins on the consumables, the cost of the analyser

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[113] Revenues and avoidable costs for consumables were based on average figures for the relevant types of consumables.

[114] Consumables sales were calculated over a three year period – see paragraph 6.33.

[115] The OFT considered whether IDEXX may have priced below AAC for individual deals completed in 2009 which comprised either (i) the sale of an individual biochemistry or haematology analyser and its consumables, or (ii) a bundled package of analysers which included a biochemistry and/or haematology analyser and their consumables.

was recouped in [ ] years and therefore was profitable over a three year period.[116]

6.50 However, in light of the fact that there may also be separate markets for the supply of analysers alone to veterinary practices that do not whole life cost (see paragraph 4.12 above), and for which the relevant predation test would not take into account any future profits from consumables associated with the sale of the analysers, the OFT also considered whether IDEXX's business model[117] could be replicated by other in-clinic competitors. Such practices will not typically restrict competition, even if customers do not whole life cost, so long as other competitors in the market are able to replicate the business model, and provided the overall system price is not predatory.

6.51 Responses from the larger in-clinic competitors regarding the replicability of IDEXX's business model revealed that, whilst due to current financial constraints, there may be some difficulties involved in matching IDEXX's business model,[118] most competitors had circumvented these constraints by providing veterinary practices with an option to lease analysers. Such a pricing model acts to reduce the upfront cost of purchasing the analyser in

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[116] For example, IDEXX provided certain veterinary practices with a VetTest chemistry analyser free of charge [F], but according to IDEXX sales of consumables for this type of analyser would typically provide revenue of £[G] in the first year. An equally efficient competitor would have needed to cover the avoidable cost of both the analyser and the consumables from the consumables revenue. According to IDEXX, the avoidable costs amounted to £[H] for the VetTest analyser and approximately £[J] for the first year of consumables. Accordingly the avoidable costs of this particular deal would have been covered by the consumables revenue within the first year – that is: F (zero) + G > H + J.

[117] That is, of offering 'free' or heavily discounted analysers and recouping the costs of doing so through the subsequent sale of consumables for the analyser. The OFT notes that IDEXX discontinued the specific marketing programmes which included these types of deal on 1 April 2010 (IDEXX's submission dated 3 September 2010).

[118] Such as, their inability to subsidise the short-to-medium terms losses incurred through providing analysers at below cost prices, or concerns that some veterinary practices may default on the consumables commitment.

a similar way to IDEXX's business model. Indeed, such leasing arrangements appear to be prevalent among IDEXX's competitors. For example, one in-clinic competitor stated that approximately 95 per cent of its customers obtained their analysers via leasing arrangements. It is also noteworthy that IDEXX also offers its customers the option to lease analysers and that around [45-55] per cent of its customers lease their analysers.[119] This suggests that the leasing arrangements should enable equally efficient competitors to offer a competitive alternative to IDEXX's business model.

c) Is the extent of the conduct sufficient to restrict competition in the in-clinic market?

6.52 Given that a number of customers engage in whole life costing, and that competitors are in any case able to offer a competitive alternative to IDEXX's business model, the OFT has not considered it necessary to assess the extent of the conduct.

Conclusion

6.53 In light of the fact that IDEXX's overall system price (the price of the analyser and its associated consumables) is not predatory, and that in-clinic competitors appear to be able to replicate the provision of analysers without the need for veterinary practices to make a significant upfront commitment, the OFT considers that IDEXX's conduct is unlikely to have an adverse impact on effective competition.

Bundling of specialist external laboratory tests to foreclose the market for standard external laboratory tests

6.54 [ ].

[119] OFT meeting with IDEXX on 13 September 2010.

The theory of harm

6.55 Bundling occurs when products are either sold jointly in fixed proportions (pure bundling) or where the dominant company also makes them available separately, but at a higher aggregate price than the bundle (mixed bundling or multi-product rebates).[120]

6.56 The concern in this case is that IDEXX, as the monopoly supplier of the Spec fPL and Spec cPL tests, may be foreclosing external lab providers by offering bundled discounts on these two tests (the tying markets) when they are purchased with other, contestable, standard external lab tests (the tied market).

Methodology applied by the OFT

6.57 In determining whether an abuse is established, the OFT will consider whether the allegedly abusive conduct is likely to lead to anti-competitive foreclosure. For anti-competitive bundling, the following cumulative factors will need to be demonstrated:

a) The firm has a dominant position within the tying market(s) (in this case, the markets for specialist Spec fPL and Spec cPL tests) and competitors in the tied market (in this case, the market for standard external lab tests) are unable to replicate effectively the firm's bundle.

b) An equally effective competitor in the tied market alone is unable to match the effective incremental price in that market without making losses (that is, without pricing those conditional sales below AAC).

d) The extent of the allegedly abusive conduct needs to be sufficient to restrict competition in the market.[121]

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[120] See paragraph 6.12 and 6.13 above.

[121] As explained at paragraph 20 of the Commission's Guidance, in general, the higher the percentage of sales in the relevant market affected by the conduct, the longer its duration, and the

6.58 Even if the above factors were demonstrated, the OFT is unlikely to intervene if the parties can objectively justify the conduct. Given that IDEXX has not made any representations on objective justification and as the conduct in question would be unlikely to lead to the foreclosure of actual or potential competitors such as to impair effective competition in the external lab market, the OFT has not considered this aspect any further.

Analysis: conduct unlikely to result in foreclosure

a) Dominance and ease of replicating bundle?

6.59 Although the OFT has not needed to conclude on this point, for the purposes of this section the OFT has assumed that IDEXX has a monopoly position (see paragraph 5.52 above) and correspondingly an equally efficient competitor could not replicate the bundle with respect to the two specialist external lab tests (Spec fPL and Spec cPL).

6.60 Spec fPL and Spec cPL tests are proprietary IDEXX tests which test for and monitor pancreatitis in cats and dogs respectively. Spec fPL and Spec cPL are both only available from IDEXX external labs.[122]

b) Could an equally efficient competitor replicate the discount?

6.61 IDEXX offers veterinary practices different purchasing options for the Spec fPL test including:

- A standalone Spec fPL test (£35 plus VAT).

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more regularly it has been applied, the greater is the likely foreclosure effect of the relevant pricing practice.

[122] IDEXX also supply a single-use, in-clinic 'SNAP cPL' test which can be used by vets to give a simple diagnosis of pancreatitis, or to rule pancreatitis out, in dogs. However, the SNAP cPL test does not produce the quantitative results that are provided by the Spec cPL test and which enable veterinarians to gauge and monitor pancreatitis in dogs.

- A number of screens or profiles which include the Spec fPL test, such as the 'Under The Weather' Profile (£33.50 plus VAT) which comprises a Basic Profile plus the Spec fPL test.

- An option to add on a Spec fPL test (£15 plus VAT) to a number of screens or profiles, such as, the Extended Basic Profile (£37.80 plus VAT).[123]

6.62 The cost of the Spec fPL standalone purchase is £35 plus VAT. IDEXX's 'Under The Weather' bundle (the Basic Profile plus Spec fPL test) is charged at £33.50 plus VAT. This means that an equally efficient competitor would have to offer its own equivalent to the Basic Profile at minus £1.50 in order to compete with IDEXX's 'Under The Weather' bundle.[124] Accordingly, the price at which a competitor would have to offer its own alternative to the Basic Profile in order to compete with the 'Under The Weather' bundle is clearly below AAC. Therefore, we conclude that an equally efficient competitor will be unable to compete on the bundle without incurring a loss.

6.63 In relation to Spec cPL, IDEXX offers veterinary practices different purchasing options including:

- A standalone Spec cPL test (£35 plus VAT).

- A number of screens or profiles which include the Spec cPL test, such as the 'Vomiting Dog/Pancreatitis' profile (£47.30 plus VAT).

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[123] Test and pricing information from *'IDEXX Reference Laboratories Directory of Services 2009'*, IDEXX submission dated 24 November 2010.

[124] In theory a competitor could buy the IDEXX bundle for £33.50 plus VAT and discard everything but the Spec cPL portion. This would imply the equally efficient competitor would have to offer an equivalent to IDEXX's Basic Profile at zero.

- An option to add on a Spec cPL test (£15 plus VAT) to a number of screens or profiles, such as a Basic Profile (£24.70 plus VAT).[125]

6.64 Given that the price of the Spec cPL standalone test is £35 plus VAT and that veterinary practices have the option to add on a Spec cPL test to the Basic Profile for a bundled price of £39.70 plus VAT means an equally efficient competitor would need to offer an equivalent to IDEXX's Basic Profile for £4.70 in order to compete with IDEXX's bundle of the Basic Profile plus cPL.

6.65 The OFT does not have data on the average avoidable cost of providing the Spec cPL plus the Basic Profile test. However given the minimum bundled price is £39.70, at £4.70, it could be below cost. However, as explained below, given the current demand for the Spec cPL test, the OFT considers that on the basis of the evidence at its disposal that it is unlikely that IDEXX's conduct would lead to the foreclosure of actual or potential competitors such as to impair effective competition.[126] Accordingly, the OFT has not needed to consider definitively whether the price of IDEXX's bundles containing Spec cPL would allow an equally efficient competitor to compete without pricing below cost.

c) Is the extent of the conduct sufficient to restrict competition in the external lab (tied) market?

6.66 In order for the bundling of the Spec fPL and Spec cPL specialist tests (assured base) with screens or profiles (contestable base) to give rise to a likely foreclosure effect on the relevant market, there must be a significant number of veterinary practices that both require the specialist test and may

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[125] Test and pricing information from *'IDEXX Reference Laboratories Directory of Services 2009'*, IDEXX submission dated 24 November 2010.

[126] As explained at paragraph 20 of the Commission's Guidance, in general, the higher the percentage of sales in the relevant market affected by the conduct, the longer its duration, and the more regularly it has been applied, the greater is the likely foreclosure effect of the relevant pricing practice. In this case, and in particular given the limited extent of the conduct, these factors point in the other direction.

also want to purchase a screen or profile test. That is, the proportion of the assured base relative to the contestable base must be significant. For example, if very few veterinary practices requiring a screen or profile need to purchase the specialist test, then even if a competitor was to be foreclosed from all the screens and profiles being sold with the specialist test, it may not be foreclosed from a significant proportion of the screens and profile within the relevant external lab market.

6.67 First, it is worth noting that in 2010 approximately [55-65] per cent of the customers that purchased the Spec fPL, purchased it as a standalone test rather than in a bundle.[127] Similarly, in 2010 approximately [65-75] per cent of the customers that purchased the Spec cPL, purchased it as a standalone test rather than in a bundle.[128] This is consistent with there being a distinct and separate demand for the standalone tests, even if they are bundled below cost.

6.68 Second, in 2009[129] even if every Spec fPL and Spec cPL test that IDEXX sold had been bundled with a Basic Profile, this would have foreclosed only [<one] and [<one] per cent of the external lab market respectively, resulting in a potential combined foreclosure of only [<two] per cent of the relevant external lab market.[130]

6.69 Finally, even on the worse case assumption that all screens and profiles that could be bundled with a Spec fPL or Spec cPL test were indeed bundled, the OFT estimates that, at 2009 demand levels, this would have

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[127] In total there were [ ] fPL tests sold in 2010. Of these, [ ] were sold in a bundle (IDEXX submission of 14 March 2011).

[128] In total there were [ ] cPL tests sold in 2010. Of these, [ ] were sold in a bundle (IDEXX submission of 14 March 2011).

[129] The OFT did not have the equivalent data for 2010.

[130] In 2009, the total number of all Spec fPL and Spec cPL sold was [ ] and [ ] respectively. In 2009, IDEXX sold [ ] external lab tests. We estimate that IDEXX's external lab market share was [30-40] per cent in 2009, thus implying a total of [ ] tests sold in the relevant external lab market.

amounted to approximately [<15] per cent of the relevant external lab market.[131]

6.70 Therefore, having conducted its analysis, the OFT considers that, on the basis of the evidence at its disposal, it is unlikely that, at these levels, IDEXX's conduct would lead to the foreclosure of actual or potential competitors such as to impair effective competition in the external lab market.

6.71 The OFT notes that this assessment is based on current levels of sales. The OFT notes that, a future investigation may reach a different finding, however, if in the future, the Spec fPL and Spec cPL markets were to grow significantly in proportion to the relevant external lab market.

Conclusion

6.72 In light of the above, the OFT considers that, at current levels, the bundling of specialist external lab tests with standard external lab tests is unlikely to lead to the foreclosure of actual or potential competitors such as to impair effective competition in the external lab market.

The OFT's conclusions on IDEXX's conduct

6.73 Having conducted an analysis of the theories of harm set out above, the OFT does not consider that the conditions of the Chapter II prohibition of the Act are all met. In particular, the OFT considers that, on the basis of the evidence at its disposal, it is unlikely that IDEXX's conduct in the supply of in-clinic companion animal diagnostic testing equipment would lead to the foreclosure of actual or potential competitors such as to impair effective competition on either of the hypothetical markets (that is, in-clinic or external lab) and thus have an adverse impact on consumer welfare.

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[131] In 2009, IDEXX carried out [ ] screens and profile to which a Spec fPL or Spec cPL test could have been bundled with. Assuming a [30-40] per cent external lab market share, this implies [ ] tests which could potentially be sold with one of the Spec tests. This represents [<15] per cent of the total tests sold in the relevant external lab market.

7 OTHER ISSUES IDENTIFIED

7.1 Although not expressly raised by the Complainant, in the course of its investigation the OFT identified one aspect relating to IDEXX's contractual arrangements which merit further comment.

Removal of the claw-back provisions from the CSP agreements

7.2 The OFT notes that the Complete Suite Plus (CSP) contracts contain a claw-back provision for all previous rebates where the customer has failed to meet the Qualifying Monthly Purchase Level in any month during their agreement period.

7.3 IDEXX confirmed that it had never enforced the contractual claw-back provision and stated that from 1 October 2010 it would remove the contractual claw-back provision from all future CSP contracts.