

Commentary On New EU Competition Rules

A recurring feature

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A review and commentary on recent decisions relating to licensing in the European Union.



When the history of competition policy is written, the closing months of 2002 will stand out as a remarkable period of activity:

- On the judicial front, the Court of First Instance (CFI) overruled two Commission decisions prohibiting mergers, namely *Schneider/Legrand* and *Tetra Laval/Sidel*, these bombshells multiplying the impact of June's *Airtours* judgment. And to add insult to injury, in *Lagardère* the CFI also overturned the Commission's 2001 Notice on ancillary restraints, while in *European Broadcasting Union (EBU)* the CFI struck down an Article 81(3) exemption. In all, a striking total of five judicial reversals for Directorate-General of Competition (DG Comp) in the space of six months. (See Judicial Front below);

- On the legislative front, the Council of Ministers adopted the "modernisation" regulation to replace the venerable Regulation 17, so ushering in a brave new world for Article 81 practice, as of May 1, 2004. (See New Legislation below);

- Also at the legislative level, the Commission formally submitted its proposal to overhaul the Merger Regulation, following a year-long consultation process. The proposal extends the concept of dominance, revisits the allocation of cases between Commission and Member States, and flexes the timetable and procedure in the light of experience, to suit both the convenience of the business community and equally the interests of enforcement. (See Proposal for a New Merger Resolution below);

- Arising from the merger review process and court reversals, the Commission committed itself to making radical improvements to its working methods. It will engage a new Chief Economist to help upgrade the pedigree of its economic analysis, while creating a new internal Scrutiny Unit, and system of peer or "devil's advocacy" panels, to inject a measure of independent review into decision-making. And while these changes were born out of the controversy surrounding mergers, they will be applied to all of DG Comp's work. (See Proposal for a New Merger Resolution below);

- Internationally the International Competition Network (ICN) held its first full meeting, bringing together the anti-trust authorities of the world, while the EU and US agreed a set of "best practice guidelines" for their co-

operation in merger cases.

- A flurry of cartel decisions brought both the individual and the annual total level of fines to new heights, while signalling the efficacy of the new policy on leniency for whistleblowers.

- The Copenhagen summit agreed on the accession of 10 new Member States, promising interesting times ahead, but not least in the field of state aid.

- The UK Enterprise Act was passed into law, introducing criminal liability for cartelists from its entry into force in the course of 2003.

Judicial Front

The Commission has lost cases in Luxembourg before, and losing five in six months could be seen as no more than a coincidence of timing, without necessarily forming a pattern. But *Airtours*, *Schneider* and *Tetra* stand out for the intensity of the CFI's examination of the facts, and the tone adopted in the judgments. Judicial criticism can be phrased in many ways, neutrally sometimes, or in sorrow rather than anger, or directly and harshly. These judgments are certainly direct, to the point even of brutality. Is there in fact a pattern here?

The court does not exist in a vacuum, and its members are hardly unaware of the criticism that has swirled in recent years around the Merger Task Force (MTF). That DG Comp is judge, jury and prosecutor is hardly a new complaint, but the complaint has built to a crescendo in the field of mergers, given the business interests at stake, the high finance and the personalities, and often the politics, all crammed into a fixed timetable and played out in a goldfish bowl under a media spotlight. So the CFI has reminded us that there is an external judge overseeing DG Comp, and a vigorous and responsive one at that. Whereas *Airtours* took nearly three years to come to judgment, in the traditional way, the latter two cases followed the court's new accelerated procedure. The court clearly laboured hard to show that it could provide timely justice, bringing both cases in after some 10 months, with press releases ready to satisfy the media hunger for the latest twist in the saga.

This media interest, and a round of conference speeches from members of the CFI, have yielded some additional context to the judgments themselves. Cer-

tainly CFI members have gone on record to say that they have simply been doing their job, dealing with whatever cases were lodged with the court, and not looking to send any more general message. But there has been no denying the keen interest in showing the availability of prompt review, in debating the limits that exist to further acceleration and in discussing the possibility of greater reform, e.g. of new resource via creation of a judicial panel under the Nice Treaty which will soon enter into force.

And beyond that, judicial comment outside the courtroom has shown acute awareness both of the jurisprudential significance of the case law, and its implications for administrative reform. President Vesterdorf, speaking to the International Bar Association (IBA)-MTF conference in early November, reflected that "...some commentaries in the future might argue that" the judgments set a new and higher standard of proof to be met by the Commission in merger cases. And asked, in an interview published in *Libération* on November 7, 2002, whether the Commission had the necessary resources to meet the CFI's standards, he said that it did not—but that this could not deflect the court from striking down defective decisions. The Commission should, he said, take its case for additional resources to those that hold the purse-strings.

What then is this new higher standard? One searches the judgments in vain for a specific formulation. We know that, formally speaking, the Treaty mandates a test of "manifest error," a test that traditionally leads to the court allowing a margin of discretion, in other words showing some deference to the Commission's assessment. But only rarely do the rulings speak in terms of manifest error, preferring instead a variety of formulations: "...the Court cannot accept...it has not been shown that...the Commission could not legally base itself...the Commission was wrong to refer..." all leading to the conclusion that the Commission "failed to meet the requisite legal standard." Cumulatively, one supposes, such failings amount to a manifest error, but the reference to a "requisite legal standard" is elliptical.

Knitting together the threads, what emerges is a test which is specific to mergers. It starts with the recognition that mergers are presumptively good, unlike cartels, abuse of dominance or state aid. From there it moves to the reflection that it is inherently more difficult to predict the future, and to anticipate the impact of a merger, than to assess past facts and misdemeanours. So, the CFI reasons, the Commission must demonstrate a high level of certainty, a "*preuve solide*," before acting against a merger. Since the only basis for predicting the future is an assessment of the present, the CFI requires the Commission to make a searching assessment of the existing facts, in which the CFI accords no margin of discretion—the Commission is either right or it is wrong. Only from such a solidly constructed platform of present market realities may the Commission make its forecast of future impact, at which stage it can be allowed a measure of latitude. But even then it is not unfettered: a specula-

tive concern, for example, is not enough, nor one based on home-made economics, nor one which blithely presumes that business will be willing to act in breach of other obligations, e.g. in disregard of Article 82.

Measured against this test, the three Commission decisions failed repeatedly and comprehensively. Evidence was lacking, or misconstrued; relevant issues were not pursued; theories of economic harm were unorthodox; relevance was not demonstrated; unwarranted extrapolations were made; and future adverse impact was speculative. And even where there was indisputably a problem—the French markets in *Schneider*—the Commission failed to sustain its case, through a procedural failing that deprived the parties of the opportunity to comment fully.

These judgments provoke mixed emotions. There was an obvious sense of justice being done, and the temptation to cheer was irresistible for those who have felt, under previous Commission scrutiny, that they were powerless to resist tenuous arguments or high-handed treatment. But the successive humiliations heaped on the Commission invite also a certain sadness, that a system which has mostly served business well should be so criticised. There is also a sense of unfairness towards individual officials who have given of their best, but within a structure that failed either to give them the necessary manpower, or to channel their energies within a process that would objectively test their findings. Perhaps with hindsight it will be thought that the pendulum has now twice swung too far: first in the degree of power exercised by the MTF, but then possibly a second time, in an over-correction by the CFI. But correction was sorely needed, and has already had a salutary effect. One senses already a greater determination on the part of the MTF to have clear evidence for its conclusions, and the reforms to the DG Comp's internal processes promise to raise the quality of its decision-making. That will certainly be a blessing in hard cases, although a mixed one in run-of-the-mill cases, where the burden on companies to deliver information and analysis can only grow, so that the Commission in turn is able to discharge its burden.

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New Legislation

Modernisation Has Arrived

On November 26, 2002 the EU Council of Ministers unanimously agreed to a Regulation that will revolutionise EU competition law, formally adopting it on December 16. Fittingly, for the start of a new era, it has been published as Regulation 1 of 2003. The new Regulation is concerned with restrictive practices and abuse of dominance (but not with merger control, which is under separate review—see below). The fundamental change introduced by the Regulation is not to the substance of the law, but to the procedure and responsibilities for applying it. The entry into force of the new rules is scheduled for May 1, 2004 to coincide with the accession to the European Union of 10 new Member States.

Self-assessment

The first new feature is the abolition of the system of notification in favour of self-assessment. Currently, national competition authorities (NCAs) and national courts have the power to find that certain agreements or practices fall foul of the laws on restrictive practices (Article 81(1)) and abuse of dominance (Article 82), but only the Commission can apply Article 81(3), which allows certain restrictive agreements exemption from the operation of EU antitrust rules. The European Commission is therefore currently obliged to dedicate much of its manpower to reviewing notifications that businesses submit seeking exemption under Article 81(3).

The new Regulation in abandoning prior notification introduces a system whereby businesses and their advisers will have to make and rely on their own evaluation of the criteria for exemption. A ruling on the legality of agreements will only be required if a complaint or dispute arises. At that stage, NCAs and national courts will have concurrent jurisdiction with the European Commission, including the right to rule on legality under Article 81(3). In other words, the Commission loses its exclusive jurisdiction to apply Article 81(3) and businesses will no longer have the benefit of the notification system to seek and obtain an exemption. The Commission will retain the power to decide that Article 81 or Article 82 is not applicable to an agreement or practice, but only on the basis of "Community public interest" and not in individual cases or at the request of businesses.

In addition, the European Commission will continue to have jurisdiction to grant "block" exemptions that declare Article 81(1) inapplicable to certain categories of agreements or practices, subject to the Council delegating the power to do so.

Decentralisation

Under the new regime, the European Commission, NCAs and national courts will have jurisdiction to apply all the EU competition rules. The element of decentralisation thus introduced inevitably involves the risk that EU competition law might be applied inconsistently in Member States' different jurisdictions. In order to prevent this, the Commission will set up a network comprising NCAs and the Commission (the European Competition Network or ECN), which will determine how cases are allocated between particular NCAs and between NCAs and the Commission. The general aim is co-operation: NCAs will notify the Commission when they take antitrust proceedings on the basis of EU competition rules; they may consult the Commission on individual cases; they may exchange information and national courts can also ask the Commission for documentation or for advice. However, if the Commission has already started proceedings, the national authorities will have no jurisdiction and national courts may not determine issues that are being or have been decided by the Commission.

Case Allocation

NCAs will continue to decide for themselves whether

they have jurisdiction in a particular case (in contrast with the rules applicable to merger cases). There will be no strict criteria for allocating cases between NCAs or between the Commission and NCAs. However, a proposed joint declaration by the Council and the Commission will set down guidelines for the operation of the ECN, including case allocation. This provides that the Commission should exercise its discretion to initiate competition proceedings where more than three Member States are substantially affected; the agreement or practice is closely linked to other EU rules, which may be more effectively applied by the Commission; a Commission decision is needed to develop EU competition policy, or where the need for effective enforcement requires the Commission to act.

Simultaneous application of national and EU law. Article 3 of the new Regulation will allow NCAs and national courts to apply EU and national law in tandem. This means that whenever a NCA or national court applies national competition law in cases where trade between Member States is affected, they have the obligation also to apply EU competition rules. National competition law may neither prohibit agreements that are authorised under EU competition law nor authorise agreements that are prohibited under EU competition law. However, NCAs may apply national competition law more strictly than EU competition law with respect to the prohibition or sanctioning of unilateral conduct (Article 82). Also they can apply their own law exclusively, where the predominant objective pursued by the national law is different from that pursued by Articles 81 and 82, for example, where national law regulates unfair trading practices such as unjustified or disproportionate contract terms.

Article 3 thus raises the concern that the enforcement of unilateral conduct which Member States may regulate more strictly than under EU law, will be "renationalised" in that the boundaries of the "objectives pursued" by EU competition laws, beyond which national law may be applied exclusively, is as yet untested. It may also be that NCAs and national courts will have a natural preference for their own legal systems and may be disinclined to apply EU law while authorities in the 10 candidate countries may not have sufficient training in EU competition law to make the judgment.

Enhanced Powers of Investigation

One of its stated motives for reform has been the Commission's wish to dedicate more of its resources to the investigation of cartels and abuses. In pursuit of that goal, the opportunity has also been taken to strengthen the Commission's powers of investigation. The Commission believes that company employees have hampered investigations in the past by storing relevant documents other than in their business premises. The new Regulation therefore confers on the Commission power to search the homes of senior company employees. Unsurprisingly, this move has proven highly controversial. However, the Commission insists that employees' rights of privacy will be adequately pro-

tected because the Commission will be required to show “a reasonable suspicion” that relevant business records are held in employees’ personal premises and to obtain prior authorisation from a national court, which will control the authenticity of the Commission decision and ensure that the measures envisaged are neither arbitrary nor excessive. Further additions to the Commission’s powers of investigation include the power to take statements and to ask members of staff to explain relevant facts or documents.

Commission Decisions

The new Regulation will confer on the Commission new explicit powers to impose structural remedies where there is no equally effective behavioural remedy and subject to proportionality (defined in the Recitals as a substantial risk of a lasting or repeated infringement that derives from the structure of the undertaking). The Commission will also be able to take interim measures and to impose binding commitments, without the requirement to make a finding on the compliance of the legality of the agreement or practice under Article 81 or 82.

The ability to impose structural remedies is by far the most radical of the Commission’s new decision-making powers and has been the subject of much criticism in the business community since it was first proposed in the Commission’s 1999 White Paper.

Conclusion

There are a number of things, however, that the new Regulation does not resolve. It does not address businesses’ rights regarding access to documents in national proceedings. Nor does it clarify case allocation, Commission interventions in national litigation, the exchange of documents between the Commission and national competition authorities or the interplay between the cartel leniency policies of Member States and the Commission. The decentralisation of EU competition law enforcement without the harmonisation of businesses’ procedural rights will inevitably lead to legal uncertainty as well as encourage businesses to “forum shop” for the most beneficial jurisdiction in their particular case. Concerns about the new system focus on the abolition of the notification system which it is feared could lead to an inconsistent application of competition law enforcement across the EU with an increase in national litigation as Article 81(3) is tested in new jurisdictions. There is likely to be an increase in references for preliminary rulings from national courts to the European Courts, particularly with the probable extension of the CFI’s jurisdiction to determine preliminary rulings in competition cases. As an additional burden on the courts, there could also be an increase in infringement cases as the limits of national powers are established.

Proposal for a New Merger Regulation

On December 11 the European Commission adopted a proposal to amend the EC Merger Regulation (ECMR) and a draft notice on the appraisal of horizontal mergers. Draft notices on vertical and conglomerate mergers

will be published during 2003. The Commission has also made a commitment to changes to the personnel structure of DG Competition to introduce further checks and balances in its decision-making procedure.

The Commission proposes new ECMR extending the substantive test for assessing mergers, changing the rules on time limits and substantially altering the provisions for case allocation between national competition authorities (NCAs) and the Commission. It also makes various procedural changes. The notice gives guidance on horizontal mergers and the concept of efficiencies.

The Substantive Test

The Commission is not changing the EU test it uses to assess mergers: the “dominance” test will stay, but it will be redefined so as to bring it close enough in reality to be tantamount to the US substantial lessening of competition (SLC) test. The new definition does this by expressly encompassing consideration of so-called unilateral effects in oligopolistic markets which the Commission has presented as a clarification rather than a change of substance. In its draft notice on horizontal mergers, the Commission sets out in more detail the application of the dominance test to mergers between competitors or potential competitors, stressing how the test will function in oligopolistic markets.

Horizontal Mergers and Efficiencies

In its guidelines on horizontal mergers, the Commission discusses its view on collective dominance and, for the first time acknowledges the role of efficiencies. Although, in reality, providing nothing new (any efficiency claims will be just another consideration in the overall assessment of the merger), the Notice explicitly accepts the parties’ right to raise efficiencies to counteract any finding of dominance. But such arguments will only be of importance in borderline cases and the burden will be on the parties to satisfy the Commission that any efficiencies are directly beneficial to consumers, generated by the merger under assessment, substantial, timely and verifiable. Other mitigating factors at the disposal of merging parties set out in the notice are countervailing buyer power, ease of market entry and the failing firm defence.

Jurisdiction

The proposal on jurisdiction which has emerged is far less definite than the “3+ rule” (allowing the Commission automatic jurisdiction over cases that fall within the jurisdiction of at least three Member States) mooted in the Green Paper. The Commission is to have exclusive jurisdiction where at least three Member States agree to a case being referred to the Commission. For referrals from the Commission to Member States, the requirement for a Member State to carry out a preliminary assessment as to dominance is to be dropped and referral is to be allowed simply on the basis that a concentration “significantly affects competition.” The new rules expressly allow requests for referral to be made by the parties (in practice this had always been the case) but there is some-

thing new: requests can be made at the pre-notification stage. The Commission proposes that referrals between the Commission and Member States (Articles 9 and 22 ECMR) should be aligned and subject to a strict timetable.

Time Limits

The “stop-the-clock” idea, much discussed as a mechanism for alleviating the “squeeze” on time allowed for negotiating remedies, is not in fact to be specific to the submission of remedies as had been suggested. What the proposal in fact does is simply allow for an extension of the overall timeframe for the merger procedure. Phase I inquiries will be lengthened from one month to 25 working days. This period can be further extended to 35 working days to allow for Phase I remedies leading to clearance. In the case of Phase II proceedings, a general extension from four months to 90 working days is to be made, with further automatic extension of 15 working days if remedies are offered. Another maximum 20 day extension will be available but with the major caveat that the parties can only request this within 15 days of the opening of the Phase II inquiry: thereafter it is only the Commission which can initiate an extension of time, although only with the parties’ consent.

Checks and Balances

This thorough overhaul of the structure and internal workings of DG Competition is the Commission’s answer to overwhelming criticism by respondents to the Green Paper and the sharp words of the CFI. A Chief Competition Economist is to be appointed to work with a team which will give guidance on methodological issues and on individual cases. In complex cases, a member of the team is likely to be seconded to the case team examining the merger. In all Phase II cases, new peer panels, composed of experienced officials from DG Competition and on occasion from other Directorates-General, will be given a mandate to scrutinise the case team’s provisional findings with a “fresh pair of eyes.” The involvement of a peer panel in complex cases should mean that sound arguments made by the parties but dismissed by the case team will be given a second hearing. To facilitate the operation of the peer panels, a scrutiny office will be established in DG Competition to follow all cases throughout their development and, at key moments in the procedure—for example before the Commission issues its Statement of Objections or before the final decision in a Phase II case—to convene the peer panel. It had been suggested in speeches by Commission officials that the role of the Member States would be reinforced and that a “rapporteur” representing the Member States would be actively involved from the beginning of the Phase II process, with the remit of passing on an informed and independent view to the Member States. This proposal, however, is not contained in the documentation published on December 11, 2002.

Best Practice Guidelines: These guidelines will replace the 1999 version which was intended to deal primarily with the problem of incomplete notifications by way of

pre-notification contact between the parties and the Merger Task Force. The new guidelines reinforce and extend this idea, widening its scope, to promote more contact between the parties, the regulators and third parties throughout the procedure. The guidelines form part of the overall reform package, and are intended in particular to address concerns that were voiced in the consultation on the earlier Green Paper as to the fairness of MTF procedures.

Pre-notification contacts should as a general rule take place in all cases and the parties are encouraged to submit a “short memorandum” about the transaction at a very early stage, to be then followed by a “substantive briefing memorandum” or draft form CO which will be discussed in detail at a first meeting. The Commission is encouraging the submission of as much internal documentation as possible at this stage together with any arguments and evidence pertaining to efficiencies.

There are then to be “state-of-play meetings” at key stages throughout the Phase I and any Phase II investigation, involving third parties and, if appropriate, US authorities. These meetings could be bilateral or “triangular.”

Importantly, the Commission is also proposing to be somewhat more open with the information it gives to the merging parties. Access will be given to submissions made by third parties from the start of Phase I, together with, on an ad hoc basis, certain “key documents” – particularly those relating to market definition. Access to the non-confidential version of the Commission’s file will be allowed at the beginning of Phase II. Public consultation has been invited on the draft guidelines up to a deadline of 28 February.

Procedural Rights

Several procedural changes are being introduced in response to criticisms that the merging parties have limited access to the case against their merger and access to the file will be improved in a number of respects. First, in all cases the Commission will allow the merging parties ad hoc access to third-party submissions that contest the merging parties’ views. Secondly, at the beginning of all Phase II inquiries, the merging parties will be entitled to review the Commission’s file (subject to confidentiality claims). In this way, the parties will be able to respond to criticisms earlier and before the Statement of Objections. Meetings at which the merging parties can confront their critics may also be organised before the Statement of Objections is released. The Commission will also offer the parties the opportunity to attend state-of-play meetings with officials at decisive points in the procedure, to ensure that the parties are updated on progress in the investigation.

Other Significant Changes

The new regime will allow for notification prior to the conclusion of a binding agreement. Ostensibly to allow companies to better organise the timetable to closing on transactions, these proposed changes will, if adopted,

entitle the parties to notify their transaction even before the conclusion of a binding agreement. This change, which is intended to synchronise the EU review timeline with US investigations, may accelerate closing in transactions where the negotiation of the deal is a matter of public record or where no confidentiality issues arise. Time limits will be defined in working days rather than in calendar days—further extending the time limits. The Commission is also inclining towards imposing a filing fee although this may be further debated. To date, businesses have expressed no strong objection so long as the filing fees are not excessive and are used to supplement the resources and enhance the efficiency of the MTF. The role of Hearing Officers is to be further strengthened and they are to be given more staff.

Changes to the judicial system are outside the scope of this reform package but Messrs. Monti and Lowe, in their speeches, have made plain that they will pursue a dialogue with the Member States and the courts themselves over possible improvements. This might entail the creation of a specialised judicial panel, under the powers created in the Treaty of Nice, from which appeals would lie to the CFI. Or, such a panel could relieve the CFI of, for example, staff cases, leaving that court more time for competition cases.

Adoption

Although subject to agreement by Member States, the Commission's proposed deadline for the adoption of the amendments to the ECMR is May 1, 2004, coinciding with the entry into force of the new competition enforcement regime and the accession of 10 new Member States. Changes to procedure that do not require amendment of the Regulation, such as the new rules on access to file, are expected to come into effect early next year. The changes in personnel and structure of DG Competition are likely to be in place within two to three months. The Commission intends to adopt its notice on the assessment of horizontal mergers by the end of 2003, but in reality, is likely to have regard to the draft notice as guidance for its current cases.

Recent European Court of Justice Cases

Agreement to Share Out TV Sports Rights Unlawful

Since 1993 the Commission, in an effort to pave the way for a single market for broadcasting throughout Europe, has been trying to exempt the rules of the European Broadcasting Union (EBU) from prohibition under Article 81 of the Treaty. But with the judgment of the Court of First Instance of October 8, 2002 it failed for a second time. The first Commission exemption decision was annulled for an error of law, the second for a "manifest error of assessment." What are the prospects for a third?

The EBU was set up as a not-for-profit professional association in 1950 to co-ordinate the joint acquisition and sharing of radio and television rights. Its full membership is restricted to broadcasting bodies with a public remit providing services on a nationwide scale. In

particular, it set up a system of exchange of rights to international sporting and cultural events known as "Eurovision." Initially, the benefit of this system was restricted to the Union's 68 full "active" members from 49 European broadcasting area countries but in 1988 the rules were altered to allow associate members, of which there are 30, and non-members to be granted sub-licences to use the rights.

Following complaints from several private television channels, including French Métropole Télévision (M6) and Spanish companies Antena 3 and Gestevisión Telecinco, the Commission concluded that the agreement constituting the EBU's rules was indeed restrictive of competition contrary to Article 81. However, the Commission granted an exemption on the grounds that the restrictions were "indispensable"—a ground for exemption explicitly allowed for under the Article. The three companies, two of which had applied for and been refused membership of the EBU, took the case to appeal. The CFI's judgment of July 1996 went straight into the competition law textbooks, since in overruling the Commission decision the court established a rule. It had already been held in previous case law (*Metro v. Commission*) that for restrictions to competition to be regarded as "indispensable" (under Article 81(3)(a)) they must be objective and sufficiently determinate so as to enable them to be applied in a non-discriminatory manner. In this judgment, the CFI went further and held that to establish this, the Commission was under a duty to carry out a full investigation. The absence of such investigation rendered the granting of the exemption an "error of law."

Following the appeal decision the Commission and the EBU went back to the drawing board and in May 2000 the Commission announced that the EBU's new Eurovision scheme was being granted an exemption up until 2005. On the strength of this, the EBU members bid for and acquired the rights to the Olympics of the summer 2004 and those of winter 2006. This time, the Commission's exemption decision was based on the second ground for exemption specified in Article 81(3), namely that the restrictions did not eliminate competition. On an examination of the facts, however, in an appeal brought by the same parties, M6, Gestevisión and others, the court found this not to be the case.

The court held that although the EBU's new rules did allow non-members to obtain sub-licences, rights to live broadcast rights, even when not taken up by members, were not available to non-members and the possibility of providing deferred coverage was substantially restricted. In these circumstances, the characterisation of the sub-licensing system as one which did not eliminate competition was a "manifest error of assessment." The extent of the court's power of judicial review does not generally allow for the court to replace the Commission's analysis of the facts by its own. However, case *SCK and FNK v. Commission* in 1997 established that the court can overturn an exemption if the Commission has made a

“manifest error of assessment” regarding the facts.

However, the court did not find an agreement to jointly purchase television rights to be a restriction of competition per se, stating that “the joint purchase of televised transmission rights for an event is not in itself a restriction on competition in breach of the provisions of the Treaty and may be justified by particular characteristics of the product and the market in question...” What is most likely to happen now, therefore, is that the EBU will come up with yet another system for including non-members which the Commission will then exempt. Whether we then get another court ruling will depend on the appetite Métropole TV and its co-appellants still have for litigation.

EU Trade Marks Directive: *Davidoff v. Gofkid*

The European Court's decision in *Davidoff v. Gofkid*, given on 9 January 2002, greatly extended the anti-dilution provisions of the EU Trade Marks Directive. To the surprise of many lawyers, the European Court of Justice (ECJ) did not adopt the literal interpretation favoured by Advocate-General Francis Jacobs, but held that Article 5(2) of the Directive can be applied where a well-known trade mark is used in relation either to similar or non-similar goods or services.

Article 5 of the Directive provides as follows:

1. *The registered trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:*

(a) *any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered;*

(b) *any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of the goods or services covered by the trade mark and the sign, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association between the sign and the trade mark.*

2. *Any Member State may also provide that the proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade any sign which is identical with, or similar to, the trade mark in relation to goods or services which are not similar to those for which the trade mark is registered, where the latter has a reputation in the Member State and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.*

Davidoff sued Gofkid in Germany for infringing its trade mark registration for the stylised script form of the mark Davidoff by setting out its mark Durrfee in a similar stylised script form. Gofkid used its mark on goods which were identical or similar to those for which Davidoff's well-known mark was registered. Since Gofkid's stylised mark was only similar to Davidoff's mark, rather than identical to it, Davidoff could not rely on Article 5(1)(a). It would have to show a likelihood of confusion if it relied on Article 5(1)(b). That would re-

quire the production of evidence and findings of fact about the way the public responded to Gofkid's mark. Under pre-Directive German law, such evidence would not be required in those circumstances.

The Bundesgerichtshof (German Federal Supreme Court) asked the ECJ for a ruling on whether the provisions of Articles 4(4)(a) and 5(2) could be applied to cases where a well-known mark was used for goods or services which were identical with or similar to those for which it was registered, as well as to cases where the goods or services were not similar. It also asked whether, even if those Articles did not apply in such cases, member states could supplement them by national rules which give broader protection to well-known marks.

The Advocate-General advised that the wording of Article 5(2) limited it to cases where the defendant uses a mark in relation to non-similar goods. He noted that some commentators, including the European Commission, thought there would be a gap in the legal protection for well-known marks if the literal interpretation was correct; but he could not see a way around the plain meaning of the words. He suggested that the “gap” might be filled by the ECJ's approach in *Sabel v. Puma* and *Canon v. MGM*, holding that the likelihood of confusion is increased where a mark has a particularly distinctive character.

The ECJ avoided the literal interpretation by referring to the the “overall scheme and objectives” of the Trade Marks Directive. Instead, the Court observed that Article 5(2) of the Directive must not be interpreted solely on the basis of its wording, but also in the light of the overall scheme and objectives of the system of which it is a part. The Court then stated, “Having regard to the latter aspects, that article cannot be given an interpretation which would lead to well-known marks having less protection where a sign is used for identical or similar goods or services than where a sign is used for non-similar goods or services.”

The Court considered whether equivalent protection is available under article 5(1)(b) but concluded that it is not because a likelihood of confusion would still be required. There could be circumstances in which the distinctive character or repute of a well-known mark is impaired without giving rise to confusion. Thus it is necessary to interpret Article 5(2) more broadly in order to give a consistent level of protection to well-known marks. The Court concluded that Article 5(2) can apply where an identical or similar sign is used for goods or services which are identical with or similar to those covered by the registration, as well as for non-similar goods or services. In view of that conclusion, it did not have to consider whether national laws could give protection beyond the scope of Article 5(2).

The ECJ's decision in this case is also interesting in the wider European law context for the way in which it avoided a literal interpretation of Community legislation by referring to “the overall scheme and objectives of the system of which it is a part.” The Court could not

point to a specific Recital in the Directive which supported its interpretation, but made its decision on the basis of its view of what the legislature must have intended. The decision will certainly be welcomed by the owners of well-known marks.

Parallel Imports - The Burden of Proof

On 18 June, Advocate General Stix-Hackl gave her opinion on a question referred to the European Court of Justice by the German Bundesgerichtshof concerning the burden of proof under national law in a parallel imports case. Under the Trade Marks Directive a trade mark owner's rights will be exhausted if goods bearing the trade mark have been marketed by or with his consent within the European Economic Area (EEA). This is determined by the principle of free movement of goods but, as pointed out by the Bundesgerichtshof, in the circumstances below it may be contrary to Articles 28 and 30 of the EC Treaty.

Stussy Inc. owns the trade mark "STUSSY," registered for clothes. Van Doren has exclusive rights to market Stussy products in Germany and has acquired the right to defend Stussy's trade marks. Stussy products have one exclusive distributor in each EEA country which is contractually bound not to sell the products to intermediaries for resale outside its exclusive area. Lifestyle Sports sells STUSSY products in Germany which it has not acquired from Van Doren. Van Doren started legal proceedings alleging that these products had been initially marketed in the US and that the trade mark owner had not consented to them being marketed in any EEA Member State. Lifestyle Sports argued that the trade mark rights were exhausted as the products had been acquired within the EEA, where they had been marketed with the consent of the trade mark owner. Lifestyle Sports appealed against the first instance decision granting most of Van Doren's requests. The Appeal Court dismissed the first instance judgment saying that Van Doren should have established that the products had been imported into the EEA without the trade mark owner's consent. The issue was which party had to prove exhaustion.

Van Doren appealed to the Bundesgerichtshof which asked the ECJ whether Articles 28 and 30 of the EC Treaty allowed the application of national rules under which a defendant who pleads exhaustion of trade mark rights within the meaning of Article 7 of the Directive must prove that the products had been marketed in the EEA with the consent of the trade mark proprietor.

Under German law, a defendant who pleads exhaustion must prove the facts establishing it. The Bundesgerichtshof pointed out that this could result in market partitioning and allow price differences between Member States. A distributor will generally have no difficulty in proving from whom he has acquired his products but may not be able to force his suppliers to disclose their own suppliers. And if he is able to prove that the products have been put on the EEA market with the consent of the trade mark owner, his supplier may stop supplying him. Such a national

rule therefore places a potential offender in a situation where he has a choice of either supplying the requested proof, and possibly giving up his current supply source, or losing the case, even if the products have been marketed within the EEA with the consent of the trade mark owner. To remedy the situation, the Advocate General suggested that the imposition of the burden of proof on the defendant be modified on the condition that the manufacturer/trade mark owner must first check himself (insofar as it is reasonable) whether he can distinguish products put on the market with his consent within the EEA from products put on the market outside the EEA. She said that such co-operation from the trade mark owner need not go beyond what is necessary to eliminate the difficulties of proof or avoid the risk of market partitioning.

The Advocate General said that Article 7 does not deal with the burden of proof of exhaustion and that Member States should deal with that question themselves.

Community Patent Update

On 30 August, the European Commission published a "Working Document on the Planned Community Patent Jurisdiction." The document sets out the Commission's latest proposals. The key proposals include:

- the creation of a single first instance Community Patent Court. Initially, this will be in only one location (not specified). As the number of cases increases, regional chambers (no more than one per country) may be created, but they must work as part of a centralised, harmonised court system;
- three judges will hear each case: two legally qualified and one technically qualified. The aim of having the latter is to reduce the use of parties' expert witnesses;
- the language of the proceedings will, theoretically, be the language of the defendant. However, the court is to be given wide discretion to designate another language. On appeal, the language will be the same as that used at first instance;
- appeals will be possible before a specialised chamber of the Court of First Instance, composed of members with a high level of experience in patent law. Appeals will normally have suspensory effect, but in exceptional cases remedies may take effect immediately, subject to appropriate security being given by the claimant;
- parties must be represented by a lawyer who may be assisted by a "technical advisor," who must be a professional representative whose name appears on the list maintained by the European Patent Office. The technical advisor will be allowed to speak at hearings under certain conditions;
- procedural rules will be based closely on those which currently apply to cases heard by the Court of First Instance/European Court of Justice, with appropriate modifications to take account of the nature of patent litigation; and
- jurisdictional rules will closely mirror those in the Brussels Convention/Regulation.

Cartel News

As was the case last year, the end of 2002 has seen a spate of cartel decisions to round off the enforcement year. The first that should be mentioned is the massive €149 million fine on Nintendo for sewing up the market for computerised video games and game consuls, a decision which is unusual in that it involved a vertical agreement—the illegal cartel agreement was with the distributors of the games. The distributors, based in the UK, Portugal, Italy, Sweden, Greece and Belgium had colluded with Nintendo to maintain artificially high prices and unwarranted price differentials by preventing parallel imports from 1991 to 1998. The distributor participants were fined, collectively, €18.8 million, with John Menzies incurring the highest fine of €8.64 million.

Then the end of November saw two further cases, one in a very tiny market, the other involving two recidivist cartel participants. The first was in the market for methylglucamine, a chemical substance used in the analysis of X-rays, and the cartel involved the three companies which control the entire world production. Merck KgaA blew the whistle on the price-fixing and market share agreement and benefited from full immunity. Aventis Pharma and Rhone-Poulenc Biochemie (which as part of the Aventis Group were treated as one company) were together fined €2.85 million. The second involved a much more prosaic and much larger market, that of plasterboard and involved four companies with business throughout the EU. The cartel had been set up specifically to put an end to fierce competition and involved detailed exchanges of sales information over a six year period. Two of the companies, French Lafarge and BPB of the UK were particularly penalised with fines of €249.6 and €138.6 respectively because of their participation in cartel activity in the past. The other two companies were Knauf, fined €85.80 million and Gyproc Benelux which was fined €4.32 million.

In a third set of cartel decisions on December 17, the Commission imposed a total of a further €166 million in fines. In the food flavourings market, the Commission fined Japanese company Ajinomoto €15.5 million and the South Korean companies Cheil Jedang Corp and Daesang Corp, €2.74 and €2.28 million respectively. A fourth company, Takeda Chemical Industries, was granted full immunity. The level of the fines reflected the fact that the companies, although huge in their market worldwide, had only a small share of the EEA market.

In Italy, eight firms were found to have participated in a price fixing agreement in the market for concrete reinforcing bars, a product covered by the ECSC, hence within the jurisdiction of the Commission. A total of €85 million in fines was imposed on the companies: Riva Acciaio, Lucchini SpA, Feralpi Siderurgica, Valsabbia Investimenti, Alfa Acciai, Leali SpA, IRO Industrie and Ferriere Nord SpA. The trade association Federacciai was also found to have been involved but was not fined.

Lastly, seven companies involved in two cartels in the speciality graphites sector were penalised to the tune of €60.6 million. The investigation was a spin-off from that which led to fines in the graphite electrode sector, when one of the parties, Graftech, came forward with evidence. The main cartel involved price-fixing, exchange of business information and market sharing; the smaller cartel, involving only two of the parties, SGL Carbon and Graftech, was a parallel price-fixing cartel for extruded graphite products. While Graftech was granted full immunity, SGL was given the highest fine at €27.75. The other companies involved were Toyo Tansa, Cabone-Lorraine, Tokai Carbon, Ividen, Nippon Steel Chemical and Intech.

International Competition Network Conference

The ICN Conference which took place in Naples on 28th and 29th September saw the attendance of officials from 59 of the world's 92 existing competition authorities at a forum set up to facilitate cooperation and convergence in competition law and policy at an international level. In the area of merger notification and procedures, ICN members adopted Guiding Principles for Merger Notification and Review in which they recognize overarching principles of sovereignty, transparency, non-discrimination, procedural fairness, timeliness, coordination, convergence and confidentiality. The Recommended Practices for Merger Notification Procedures were endorsed in principle, realizing a common desire to recognize the concepts of jurisdictional nexus, the development of objective and understandable merger notification thresholds, and appropriate flexibility in the timing of merger notifications. The competition advocacy discussions focused on an Advocacy Study which, among other things addressed the role of advocacy, its political influences and approaches in developing countries.

A further development which emerged from the Conference was that the European Union and the United States reached an informal agreement on examining big transactions simultaneously either side of the Atlantic. The purpose of the agreement is to encourage companies that need to get clearance in both jurisdictions to notify in both at the same time, rather than filing in one first and then the other. One of the key purposes of the ICN conference was to bring regulatory authorities together from developing countries, as well as from the larger jurisdictions such as the United States and the EU. However, competition agencies from developing countries complained that their governments often hamper their work and don't always understand that it can improve the economy in the long run. There were a number of reports at the conference of competition authorities raising concerns about a proposed deal, only to have such advice overturned by the government, which then recommended that the deal should go ahead. This highlights the need for assistance to authorities in developing countries to formulate an effective advocacy programme.