

# 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.*



## New EC Merger Regulation

On 20 January 2004, the Council of Ministers adopted proposals making major changes to the EU's merger regime. There are to be changes to the substantive test for determining whether a merger should be allowed, the merger timetable, the triggering event, the rules on jurisdiction and the treatment of ancillary restraints.

*Substantive test:* The most dramatic and controversial change to the new EC Merger Regulation (ECMR) will be the new test for assessing mergers. Currently, mergers that are likely to "create or strengthen a dominant position as a result of which effective competition would be significantly impeded" are prohibited. The new test focuses on effects on competition rather than the structure of the market and will prohibit mergers that "significantly impede effective competition...in particular as a result of the creation or strengthening of a dominant position" (SIEC).

SIEC will move EC merger control clearly into the camp of jurisdictions with a consumer welfare standard. It is expected, certainly as far as horizontal mergers are concerned, that the Commission's enforcement policy will become aligned with those of the US Department of Justice and Federal Trade Commission, despite the differently worded tests. The Commission has strengthened its economic capabilities by appointing a Chief Economist as well as improving its internal review procedures (so-called "checks and balances"). Early indications are that the Commission's decision-making will, in future, meet higher analytical and evidential standards.

*Merger timetable:* For businesses, the new merger timetable will be significant. Phase I investigations will be lengthened from 1 month to 25 working days. This period will be extended to 35 working days if remedies are submitted (an extension from 6 to 7 weeks). For Phase II, the 4-month period will remain but is now expressed as 90 working days. A maximum 20-day extension will be available at the request of the parties, if made within 15 days after the opening of the Phase II inquiry. Thereafter, only the Commission may initiate such an extension of time, with the parties' consent. There will, in addition, be an automatic extension of 15 working days if remedies are offered 55 days or more after the start of the Phase II proceedings. Although the new timeframe will not necessarily prevent businesses being cornered as the deadlines

approach (the so-called "squeeze"), it allows more time and flexibility for analysis and remedy negotiations.

*Triggering event:* Currently, parties are required to notify their deals to the Commission within one week of signing or announcing a public bid. Rarely complied with in practice, this rule will be abandoned. Parties will also be able to notify deals before the conclusion of a legally-binding agreement (e.g., on signing a non-binding letter of intent). However, in such cases, parties will have to show a "good faith intention to conclude an agreement." Parties will be able to notify public bids before formal launch, provided they have announced an intention to make the bid.

*Jurisdiction:* The new ECMR will introduce two key changes to the jurisdictional rules:

- Referrals to the Commission of cases below the ECMR thresholds: The new ECMR will provide that a request by the parties can be made where the deal would otherwise fall within the remit of at least three Member States. If no Member State opposes the request then the Commission will take over the case and no national filings are required. However, a single Member State's opposition, within 15 working days of receiving the request, will be enough to frustrate the Commission's acquisition of jurisdiction. There is no material change to a Member State's ability to initiate a referral to the Commission, but the procedural rules will be streamlined.

- Referrals to Member States of cases above the ECMR thresholds: A new provision enables parties to request that a deal meeting the ECMR thresholds be notified to a Member State rather than to the Commission. Such a request will have to be based on the ground that the deal "may significantly affect competition" in a Member State's market that is no larger than national. Where the Member State does not object, the Commission must decide whether or not to comply with the request within 25 working days of receipt. Member States will continue to have the possibility to seek to take over a case that has already been notified to the Commission. Such a referral request will have to show that a deal "affects trade between Member States and threatens to significantly affect competition." The Commission will have to decide whether or not to refer within the extended (35 working day) Phase I proceedings or within 65 working days of the notification in Phase II. If referred, the case must be

decided by Member States “without undue delay.” This is a step down from the current situation in which Member States’ findings must be issued within 4 months.

*Ancillary restraints:* In 2001, the Commission abandoned its practice of assessing whether ancillary restrictions were “directly related and necessary” to the implementation of a notified merger. Even where notifying parties so requested, the Commission would no longer assess and clear ancillary restraints and it would be up to national competition authorities and national courts to assess them. The Commission’s policy was thrown into doubt by the European Court of First Instance last year and the Commission needed to secure its new policy in primary legislation. The new ECMR does indeed free the Commission from a general obligation to assess ancillary restraints. However, the Council has added a provision, in a Recital, requiring the Commission to assess restrictions “presenting novel or unresolved questions giving rise to genuine uncertainty” at the request of a party.

The Regulation will enter into force on 1 May 2004, together with the new EC competition rules under Regulation 1/2003 and the accession to the EU of ten new Member States.

### Technology Transfer Block Exemption

The Commission is in the final stages of formulating a new block exemption and guidelines on the transfer of technology. The review of the existing block exemption was begun in December 2001 with the adoption of a mid-term report. A new draft block exemption and guidelines were published for public consultation in October 2003 and, following comment from industry, national authorities, lawyers and trade associations, were revised and redrafted. These second drafts will be discussed with the Member State authorities in February this year with a view to the new rules being adopted and entering into force on 1 May 2004.

The Commission proposes a number of changes to the TTBE that will reduce the regulatory burden for companies, while ensuring an effective control of agreements between companies holding significant market power. The proposed new rules contain a more economic approach and leave companies more freedom to devise their licensing agreements according to their commercial needs. The new rules will have a clear and short hardcore list of restrictions that are normally prohibited and a safe harbour below certain market share thresholds: 20% for licensing agreements between competitors and 30% for agreements between non-competitors.

The draft block exemption and guidelines can be found at: [http://europa.eu.int/comm/competition/antitrust/legislation/entente3\\_en.html#technology](http://europa.eu.int/comm/competition/antitrust/legislation/entente3_en.html#technology).

### European Courts

#### European Court of Justice Upholds Court of First Instance’s Judgment in *Adalat*

On 6 January 2004, the ECJ upheld the CFI’s judgment in *Adalat* annulling a 1996 Commission decision on the grounds that the Commission did not prove the existence of an ‘agreement’ within the meaning of Article

81 of the EC Treaty. The ECJ recognised in this judgment that there are circumstances in which manufacturers may lawfully take unilateral action, such as introducing stock quota systems, which has the effect of constraining parallel trade.

*Adalat* is a drug manufactured by Bayer for the treatment of cardio-vascular disease. Between 1989 and 1993 the prices of *Adalat* fixed by the Spanish and French health authorities were on average 40% lower than in the UK, resulting in substantial parallel imports into the UK. In an effort to restrict these, Bayer adopted a “supply management” quota system for Spanish and French wholesalers that reduced their supplies of *Adalat* to a level that was deemed to reflect the traditional level of domestic demand. In 1996, the Commission found that this system infringed Article 81 EC and imposed a fine of m3 million on Bayer. On Bayer’s appeal, the CFI annulled this decision, finding that the Commission had failed to prove the existence of an agreement between Bayer and the wholesalers. The ECJ has now confirmed this ruling.

The ECJ’s ruling explicitly recognises that a non-dominant manufacturer may unilaterally restrict supplies to distributors without breaching EU competition law, even if this impedes parallel trade. It further clarifies the concept of an ‘agreement’ for the purpose of Article 81 EC: an agreement requires the existence of a true ‘concurrence of wills,’ or meeting of minds, between undertakings to collaborate, the manner in which such wills are expressed being unimportant. The ruling also rebuts the Commission’s view that an agreement arises merely from the distributors’ continuous commercial relations with a manufacturer (after implementation of the manufacturer’s unilateral policy) and reaffirms that the Commission has to prove to the ‘requisite legal standard’ the existence of an ‘agreement’ within the meaning of Article 81, in line with other recent European cases. This ruling implies that the Commission cannot intervene merely because the objective of a particular course of action contravenes fundamental Community policy on (for example) the creation of a single market. The ruling can also be applied to sectors other than pharmaceuticals and the principles established here may be relevant to restrictive measures other than export bans.

More generally, the *Adalat* ruling establishes that companies’ truly unilateral acts are unimpeachable under Community competition law, even where such acts have anticompetitive effects, as long as they do not result in the abuse of a dominant position under Article 82 EC.

The *Adalat* reasoning will primarily apply where the manufacturer relies on an external network of distributors; a restrictive policy adopted by a vertically integrated manufacturer is in any event outside the scope of Article 81 on the basis that there is no agreement between independent parties. However, if the manufacturer occupies a dominant position on the market, its behaviour will have to be examined under Article 82. In addition, businesses should only rely on *Adalat* where they are very confident that there are no facts to suggest a ‘meeting of minds’ as

to an anti-competitive motive between the manufacturer and distributor.

In spite of these limitations, *Adalat* has clearly created a useful precedent for manufacturers. Given EU enlargement, which is likely to exacerbate the issue of parallel trading, it is very helpful that the ECJ has confirmed that Bayer did act lawfully in implementing a quota system and hence that companies in similar positions may follow suit.

See Case C-2/01, *Bundesverband der Arzneimittel-Importeure v Bayer and Commission*, on the Curia web site at: <http://curia.eu.int/en/index.htm>.

### Ruling on Legal Professional Privilege

The European Court has granted interim relief in a case that may extend the scope of privilege to communications between companies and their in-house lawyers.

The ruling concerns legal professional privilege (LPP), the rule under which written communications between lawyers and their clients are confidential and may not be examined or used by third parties without the clients' consent. LPP is one aspect of a company's rights of defence. Under EC law, LPP does not apply to communications between companies and their in-house lawyers. This rule, established in the *AM&S v Commission* case in 1982, provides that only communications between companies and their external lawyers who are established in the European Economic Area benefit from protection.

On 30 October 2003, the President of the European Court of First Instance (CFI) granted interim relief in a case brought by Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd. If the companies' arguments in the case are accepted in the CFI's final judgment, the scope of LPP will be extended to communications between companies and their in-house lawyers. The facts of the case are that during a dawn raid at Akzo and Akcros' premises in February this year, the Commission seized and copied a number of documents. The applicants argued that two sets of these documents were privileged. The documents in the first set were drafted in preparation for seeking the companies' external lawyers' advice. The Commission examined the documents and put them into a sealed envelope. The documents in the second set comprised drafts of the documents in the first set and emails between the companies and their internal lawyers. The Commission examined the documents in the second set and put them on its files.

The interim order requires that both sets of documents be kept in a sealed envelope at the CFI's registry until its final judgment in the case. In the meantime, the CFI President accepted that:

- it may be timely to extend legal professional privilege to written communications between a company and its in-house lawyers;
- an internal document prepared by the company for the purposes of seeking external legal advice may be privileged even if the document does not make any reference to seeking such advice; and
- if a company makes a good argument showing that

a document is privileged, Commission officials may not examine the document, even cursorily, without the company's "unreserved consent." If the Commission disputes the claim of privilege, it may seize the document and place it into a sealed envelope until the dispute is resolved.

Akzo, Akcros, the Commission and three interest groups, which are supporting the companies, must now lodge their written pleadings. The CFI will then set a date for a hearing. It may be some months after the hearing until the CFI delivers its judgment, more than a year hence. If the CFI agrees to accelerate the proceedings, however, judgment may be delivered within months.

See, *Akzo Nobel Chemicals and Akcros Chemicals v Commission* Case T125/03, 30 October 2003.

### Volkswagen appeal against price-fixing finding

The Court of First Instance has annulled the Commission's decision declaring Volkswagen's commercial practices with regard to its German dealers unlawful. The Commission did not prove an agreement between the automobile manufacturer and its authorised dealers to fix a selling price by prohibiting discounts on a new model. The CFI recalled that the Commission may not decide that unilateral conduct by a manufacturer forms the basis of an anticompetitive agreement unless it establishes express or implied acquiescence by the retailers. Also, the Commission did not prove any actual acquiescence by the dealers in Volkswagen's calls when they became aware of them. The Commission decided that such proof was not necessary, since the dealers had, by signing a dealership agreement, tacitly acquiesced in such calls. The Court found that the Commission's position amounted to claiming that a dealer who has signed a dealership agreement which complies with competition law is deemed, upon and by such signature, to have accepted in advance a later unlawful variation of that contract, even though, by virtue precisely of its compliance with competition law, that contract could not enable the dealer to foresee such a variation. The Court rejects such position as contrary to the requirement to prove a concurrence of wills.

See case T-208/01, *Volkswagen AG v. Commission of the European Communities* on the Curia web site at: <http://curia.eu.int/en/index.htm>.

### Court confirms fine on British Airways' reward schemes for travel agents

In July 1999, the Commission ruled against the agreements and incentive schemes established by BA as constituting an abuse of its dominant position and fined BA 6.8 million euros. BA brought an action against that decision before the Court of First Instance. The Court of First Instance has dismissed BA's action, ruling that the performance reward schemes used by British Airways to calculate travel agents' commissions constitutes an abuse of the dominant position held by British Airways on the United Kingdom market for air travel agency services. The Court held that abuse of a dominant position might consist of applying dissimilar conditions to equivalent transactions with other trading parties. It considers that

this applies to BA's performance reward scheme because the latter could entail, in relation to United Kingdom air travel agencies, the application of different commission rates to an identical amount of revenue, by reason of a rate of increase in sales of BA tickets which would differ from one agency to another. In addition, the Court found that the performance reward scheme had the effect of restricting the freedom of UK agencies to supply their services to the airlines of their choice, and thus of limiting access by BA's competitor airlines to routes to and from UK airports, without that system being based on any economically justified consideration. Finally, the Court of First Instance confirmed the amount of the fine imposed on BA. See Case T-219/99, *British Airways plc v Commission of the European Communities* and European Court Press Release 116/03 on the Curia web site at: <http://curia.eu.int/en/index.htm>.

### Community Patent

In November last year, the competitiveness Council proved unable to reach a political agreement on the proposed Community Patent Regulation, despite agreement on a broad political approach at the March Council. However, the new Irish EU presidency, in a paper that sets its priorities for the EU's Competitiveness Council for the next six months, has stressed its commitment to ensuring the adoption of the Community patent. The paper states that a rapid adoption of a single patent across the EU, which would be available to European industry at a reasonable cost, will be conducive to research and innovation.

Meanwhile, in December last year, the Commission adopted two proposals concerning the Community patent jurisdiction. A proposed Council Decision establishing the Community Patent Court and concerning appeals before the Court of First Instance proposes a pool of 7 judges, with a normal bench consisting of three judges assisted by technical experts (assistant rapporteurs). Proceedings would be conducted in any official EU language with the *prima facie* principle that they be conducted in the language of the defendant's domicile. It proposes that the Community Patent Court be established by 2010 with national courts exercising jurisdiction until then. The second is a proposed Council Decision conferring jurisdiction on the Court of Justice in disputes relating to the Community patent. It proposes that the ECJ have exclusive jurisdiction in disputes relating to infringement and validity of the community patent. Both these proposals are now waiting on a decision by the European Council of Ministers.

The presidency's priority paper for the Competitiveness Council can be found at: [http://www.eu2004.ie/templates/document.asp?sNavlocator=4,355&content\\_id=2054&letter=C](http://www.eu2004.ie/templates/document.asp?sNavlocator=4,355&content_id=2054&letter=C).

The Commission's proposal for a Council decision on the Community patent court can be found at: [http://europa.eu.int/eur-lex/en/com/pdf/2003/com2003\\_0828en01.pdf](http://europa.eu.int/eur-lex/en/com/pdf/2003/com2003_0828en01.pdf)

### Commission Cartel Investigations Organic peroxides cartel

The Commission has imposed fines totalling nearly m70 million on Atofina, Peroxid Chemie, Laporte (now known as Degussa UK Holdings), Perorsa and AC Treuhand AG for operating a cartel in the market for organic peroxide products, a chemical used in the plastic and rubber industries. Between January 1971 and the end of 1999 the main producers of organic peroxides in Europe conspired to raise prices and share out markets for organic peroxides, or double oxygen bond organic chemical products for the production of plastic and rubber. With a total duration of 29 years, this is the longest-lasting cartel ever uncovered by the Commission. The Commission imposed the following fines: Atofina S.A. m43.47 million; Peroxid Chemie GmbH & Co KG. m8.83 million; Degussa UK Holdings Ltd and Peroxid Chemie GmbH & Co KG m16.73 million; Peroxidos Organicos S.A (Perorsa) m0.5 million and AC Treuhand AG m1,000. Akzo Nobel Polymer Chemicals B.V received full leniency for being the first to blow the whistle on the cartel.

See European Commission Press Release IP/03/1700, 10 December 2003.

### Industrial copper tubes cartel

The Commission has imposed a total of m79 million in fines on Outokumpu, KME-group and Wieland Werke, the main copper tube producers in Europe. The companies operated a cartel in the market for tubes used mainly in air-conditioning and refrigeration (ACR) between May 1988 and March 2001 in the industrial copper tubes sector. The cartel was organised within the framework of Cuproclima Quality Association for ACR Tubes established in 1985 in Switzerland, with the primary purpose of promoting a quality standard for these industrial tubes. The fines were: Outokumpu: m18.13 million ; Wieland Werke: m20.79 million ; KME-group: m39.81 million. The fine imposed on Outokumpu reflects a 50% reduction to reward it for its early and extensive co-operation in the investigation.

See European Commission Press Release IP/03/1746, 16 December 2003.

### Carbon and graphite products cartel

The Commission has imposed fines totalling m101.44 million on Carbone Lorraine, SGL, Schunk and two other companies for operating a cartel in the market for electrical and mechanical carbon and graphite products, principally used to transfer electricity to and within electrical motors. A sixth company, Morgan Crucible, also participated in the cartel, but received immunity from fines for being the first to denounce the illegal behaviour to the Commission. The firms found to have participated in the cartel are Morgan Crucible, Carbone Lorraine S.A. of France, German companies Schunk GmbH and Schunk Kohlenstofftechnik GmbH (which are treated as one company for the purpose of this decision), SGL Carbon A.G., C. Conradt Nürnberg GmbH, and Austrian company Hoffmann & Co. Elektrokohle AG (now part of the Schunk Group).

For details see European Commission Press Release IP/03/1651 3 December 2003.