

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.



European Union

Modernisation of Article 81

The Commission has published an invitation to comment on a draft Regulation and six draft notices which make up its modernisation package pursuant to the new Regulation 1/2003. This Regulation deals with on proceedings under Article 81 and 82 of the Treaty, which concern anti-competitive agreements, such as cartels and abuse by a company in a dominant position in its particular market.

The draft Commission notices, which are non-binding guidance documents, cover the following topics: cooperation within the Network of Competition Authorities; the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC; the handling of complaints by the Commission under Articles 81 and 82 of the EU Treaty; informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters); guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty and guidelines on the application of Article 81 (3) of the Treaty.

All interested parties are invited to submit comments. These will then be published and, having taken account of the views expressed, the Commission will issue final versions. All the legislation is intended to come into force on the date Regulation 1/2003 comes into force, that is 4 May 2004.

All the above documents are available on the Commission's website at: http://europa.eu.int/comm/competition/antitrust/legislation/procedural_rules.

EU welcomes WTO deal on generic medicines

All WTO Members have agreed to a compromise text brokered last December to allow those countries without the capacity to produce their own medicines to import generics. The compromise, known as the Perez Motta text, will allow countries to export generics to third countries with no manufacturing capacity in the pharmaceutical sector, by making effective use of compulsory licences. It includes safeguards against abuse and trade diversion and rules to ensure transparency. The decision also contains provisions on transfer of technology and regional cooperation. Legally, the decision takes the form of a

provisional waiver, but provides for its replacement by an amendment to the relevant TRIPs provision, on which work will have to be completed by mid 2004.

European Courts

Commission drops proceedings against IMS Health

The Commission has dropped its action for abuse of dominant position against IMS Health. In July 2001 the Commission issued an interim decision ordering IMS Health to license its 1860 brick structure, a method for gathering data on pharmaceutical sales, to its competitors, NDC and Azyx. The Commission based its action on the grounds that there was a prima facie case for abuse of dominance and that the refusal to license the brick structure created a risk of serious and irreparable harm to NDC. IMS appealed the decision and asked the Court for interim measures.

The decision was suspended by Order of the President of the CFI in October 2001, later confirmed by the President of the ECJ. IMS had also taken action against Pharma Intranet Information (PI) (now a subsidiary of NDC) for breach of the copyright held by IMS in its brick structure. The Frankfurt Regional Higher Court held in September 2002 that PI had breached the German unfair competition law by copying the 1860 structure and using it. However, in its judgment, the Court said that third parties could not be barred from developing another structure based on administrative and postal divisions "even if the resulting structure might have a similar number of brick segments to the 1860 structure and might be deemed to be derived from that structure."

The Commission, in its press release, states that the German judgment will allow NDC to "market a brick structure which meets customers' needs" and that there was therefore no longer any urgency requiring the Commission's intervention. A Commission spokesman stated that a decision to drop the case had been delayed by the necessity of seeking the views of the complainants.

There has, however, been a ruling on the substantive issue in the case. The Advocate General has given his opinion in a separate case brought by IMS against NDC, where the Landgericht Frankfurt am Main asked the ECJ for a preliminary ruling.

Advocate General Tizzano set down criteria in which

refusal to licence an intellectual property right may be abuse of dominance. These are that (i) there are no objective justifications for such refusal; (ii) the use of the product is essential in order to be able to operate in a secondary market, with the consequence that the refusal by the copyright holder allows it to eliminate all competition from the market; and (iii) such refusal prevents the development of a new product, and not simply prevents it from being reproduced.

See C-418/01, *IMS Health GmbH & Co. OHG contre NDC Health GmbH & Co. KG*, 2 October 2003.

ECJ Upholds CFI's annulment of Commission's decisions ordering withdrawal of marketing authorisations for anti-obesity drugs

By three decisions of 9 March 2000, the Commission ordered the withdrawal of marketing authorisations of medicinal products for human use which contain certain anorectics. The marketing authorisations of the drugs in question were accordingly suspended or withdrawn by the competent authorities of the Member States. The pharmaceutical companies concerned sought annulment of those Commission decisions. On 26 November 2002 the CFI annulled the decisions on the ground that the Commission lacked the competence to adopt them.

The Commission lodged an appeal which the Court has now rejected on the grounds that the Commission lacked the competence to adopt the decisions in question. The Court found that the amendment of certain terms of the national marketing authorisations by an earlier Commission decision was not equivalent to an authorisation granted under the procedure laid down in the 1975 directive on the mutual recognition procedure for national marketing authorisations. It follows that those authorisations could not be withdrawn by a decision taken under the procedure laid down in the directive for authorisations granted under that directive.

Case: C-39/03 P, *Commission of the European Communities vs. Artegodan GmbH, Bruno Farmaceutici SpA, Essential Nutrition Ltd*

United Kingdom

UK Secretary of State approves Carlton/Granada merger

On 7 October the Secretary of State for Trade and Industry accepted the recommendations of the Competition Commission ("CC") on the merger of the two largest commercial television operators in the UK, Carlton Communications Plc and Granada plc .

The main focus of the CC's investigation and the report was the impact of the merger on advertising sales. The CC found that the relevant market is television advertising as a whole, this market being national. In 2000 the CC identified advertising on ITV as a distinct market segment of the TV advertising market because it took the view that advertising on ITV had certain advantages. It now believes those advantages have substantially (but not wholly) diminished due to the decline of ITV and increasing competition from other commercial channels,

so that the correct definition of the market is television advertising as a whole.

The CC also considered the potential impact of the merger in respect of programme production, availability of studio facilities, future competition for ITV licences, the impact on ITV regional licensees that would remain outside the merged company and advertising sales. The CC relatively quickly ruled out issues in respect of programme production, studio facilities and future competition for ITV licences, but it looked in detail at the impact on remaining ITV licensees and on advertising sales.

The issues with respect to the remaining licensees were dealt with by way of proposed changes to the networking arrangements between the parties and a commitment to continue current arrangements for the sale of the airtime of the other licensees. With regard to advertising sales, despite the CC's conclusion on market definition in the advertising sector and the decline in the position of ITV, it nonetheless concluded that the loss of competition between Carlton and Granada in the sale of ITV airtime would have an adverse impact on competition and could be expected to operate against the public interest.

To address the concerns it had identified, the CC recommended that Carlton and Granada should agree to a package of safeguards which the ITC had put forward following consultation with the parties. It also recommended Carlton and Granada undertake to give the other licensees the option to carry forward, for the duration of their licences, the current terms under which Carlton and Granada sell advertising airtime on their behalf.

The CC considered a number of potential remedies but in the end decided on a behavioural remedy, based on a proposal put forward by the parties and known as "the contract rights renewal remedy" (CRR). It was designed to give all advertisers and media buyers who currently have a contract with Carlton or Granada the fallback option of renewing the terms of their 2003 contracts with Carlton and Granada without change. While the remedy aimed to establish the right to a fallback position, customers would not be precluded from negotiating different deals if they wished. The CC noted that new advertisers would be protected in that they could use an existing media buyer and benefit from its 2003 contract. The CRR remedy would be monitored and enforced by a wholly independent adjudicator selected by the ITC, but funded by Carlton and Granada. The remedy would stay in place for a minimum of 3 years.

The CC considered a number of arguments raised against the CRR remedy. A particular concern was that if customers wished to vary their current contracts, even to a minor extent, they would be unprotected from the increased market power of Carlton/Granada. Further, the remedy would tend to entrench the current contractual positions and may tend to preserve the price premium that ITV advertising currently obtains. The remedy was seen to involve considerable practical difficulties and a high level of regulation and monitoring.

The CC noted these concerns, but the majority of the

CC panel considered that the practical difficulties could be overcome. The CC noted that the usual disadvantages of behavioural remedies were less of an issue in this case, given that television was already a highly regulated sector with an existing industry regulator (the ITC, and, from December 2003, Ofcom). It noted that the ITC and Ofcom were in favour of the remedy and considered it workable. In the end, a majority of the CC concluded that the CRR was the most appropriate remedy, although a complex behavioural remedy of this nature is unusual.

This decision follows hard on the heels of the recent decision on Centrica's acquisition of the Rough off-shore gas storage field, which was also cleared subject to negotiation of complex behavioural remedies. As a result, it might reasonably be asked whether these decisions indicate a change in the CC's approach and a more favourable attitude to behavioural remedies in future cases. Notwithstanding these two decisions, it would seem likely that the CC will continue to be sceptical of behavioural remedies in most cases. Both the Centrica/Rough and Carlton/Granada decisions were unusual situations and both involved industries where there is an existing industry regulator actively engaged in monitoring and enforcement. Further, the television sector is currently in a state of transition. The remedy can be seen as a temporary measure until the market becomes more competitive.

However, in view of the clear risk that the chosen remedy will in fact entrench the current position of Carlton/Granada and help to preserve (or at least slow the reduction of) their current price premium, which might otherwise be eroded by the increasing level of competition, the decision is nevertheless striking.

Carlton and Granada's delight with the result was manifest. However, two aspects of the report suggest that the regulatory chapter of this story is not at an end. First, the parties have been given just one month (7 November) to negotiate the CRR remedy with the OFT (who will be working in concert with the ITC and Ofcom). Given the complexity of the remedy and the fact the OFT has already voiced concerns as to potential difficulties in transposing the remedy into undertakings, this is a challenging deadline. Further, the CC had concerns as to the operation of the advertising market independently of the merger and, in particular, the negotiation of discounts for share in the annual contract round. Consequently, the CC recommended the OFT and ITC look at these issues further to determine whether a wider review is necessary. A limited review by the ITC and Ofcom has already begun, with a consultation process on whether changes are necessary to the current ITC rules governing licensees' airtime sales arrangements. It is intended that any changes to the rules will come into force at the end of the year, in conjunction with the coming into force of a new regulatory regime for the sector under the Communications Act 2003.

UK Courts

Copyright and design right: mutually exclusive, but not necessarily one or the other

In the recent case of *Lambretta Clothing v Teddy Smith*, it was held that there is no protection under copyright or unregistered design right for those elements of clothing designs which fall within the description of "surface decoration." Lambretta sued two UK clothes retailers, Teddy Smith and Next Retail, for infringement of design right, or alternatively copyright, in one of its tracksuit tops. The Lambretta garment was based on a standard tracksuit top, but the colours gave it a "retro-vintage" style; it had a blue body, red sleeves, two white stripes on the sleeves, a white zip, and the 1960s Lambretta scooter logo on the front pocket and on the back. The Teddy Smith and Next tops were similar to the Lambretta top in colour and style. The judge found that, in fact, Teddy Smith had copied the Lambretta top, but Next had not. Lambretta's claim was based on two design documents: the first showed the colourways of the garment and included notes on the specific colours to be used; the second was an uncoloured representation of the garment with details of the fabric, colours and particular features of the garment.

The Copyright, Designs and Patents Act 1988 provides that it is not an infringement of the copyright in a design document to copy an article made to the design, with certain exceptions; the relevant one for this case being where the design is merely surface decoration. The Act also gives a shorter period of design right protection to original designs of any aspect of the shape or configuration (whether internal or external) of the whole or part of an article, again with certain exceptions, including surface decoration. The judge held that there was no design right in the shape of the Lambretta top because it was based on a standard shape and thus did not satisfy the "originality" requirement in the Act. Further, there was no design right in the Lambretta logos or the colourways (the arrangement of the blue body, red sleeves, white stripes and white zip), because "configuration" in this context referred to the relative arrangement of three-dimensional elements, and the colours were surface decoration. Lambretta also argued that the colours went all the way through the fabric and were therefore not merely on the surface. The judge rejected that argument.

Lambretta's alternative case was that Teddy Smith and Next had infringed the literary and artistic copyright in its design documents by copying the Lambretta top made to the design. In Lambretta's view, the scheme of the Act was to make copyright and design right mutually exclusive, so that a design (assuming it was original) must be protected by one or the other of those rights. The judge rejected that argument on the basis that:

- Parliament could not have intended to give just 15 years' protection to the "shape and configuration" parts of the design, but life plus 70 years to the surface decoration parts;

- Parliament could not have intended that the two parts should be considered separately, when it is well established in copyright law that you have to look at the work as a whole; and

- Parliament could not have intended that two parts of the same design should be subject to different infringement tests (for copyright, whether a substantial part of the work has been copied; for design right, whether the design has been copied so as to produce articles substantially to the design).

The judge acknowledged that the issues were not easy. Lambretta has filed an appeal, which is due to be heard in April 2004. Pending clarification of the law in this area, designers should consider applying for a UK or Community Registered Design for new designs, or rely on the Unregistered Community Design if the product was first made available to the public after 6 March 2002. Those regimes protect the colours and ornamentation of an article, without the exclusion for surface decoration.