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Recent Developments in EC Competition Law 2001 to April, 2002

RECENT DEVELOPMENTS IN EC COMPETITION LAW

I. INTRODUCTION

As the European Community braces itself for major legislative upheavals that will transform the nature of antitrust practice and procedure, the European Commission and the European courts forge ahead with their mission to establish a wide body of case law to guide the commercial behavior of firms doing business in Europe. The present paper reviews some of the more important developments in that case law transpiring within the last sixteen months. The cases discussed have been organized according to four general themes: cases involving restrictive agreements between non-competitors; cases involving restrictive agreements between competitors; mergers and joint ventures; and cases involving the abuse of a dominant market position.

Restrictive agreements between non-competitors. In relation to vertical agreements, *i.e.*, agreements between entities at different levels of the supply chain, the Commission continues to implement important reforms in 1999 and 2000 that ushered in a new "more economic" approach. The Commission routinely analyzes agreements in light of the market power of the parties, their competitive relationship, market structure and dynamism, foreclosure of third parties, entry barriers, buyer power, *etc.* On the other hand, the primary element which sets EC competition law apart from US antitrust, *i.e.*, the goal of market integration, has not changed. Indeed, as the Community grows from 15 to 28 Member States or more, that objective could well take on new momentum.

The goal of integration plays a particularly important role in cases where the holders of intellectual property rights wish to use their rights to prevent parallel imports. Two cases from 2001, *Davidoff & Levi Strauss*, decided by the European Court of Justice, and *Glaxo Wellcome*, decided by the European Commission, are reviewed in the discussion below. These cases illustrate the important differences between an IP right holder's prerogatives depending on whether the subject of the IP is first marketed within the European Economic Area (the "EEA," *i.e.*, the 15 EU Member States plus Iceland, Liechtenstein, and Norway) or whether the first authorized sale occurs outside the EEA. The two cases are discussed in section II.

Restrictive agreements between competitors. The European Commission has intensified its enforcement efforts *vis-à-vis* cartels, and in 2001 alone imposed significant fines on 43 companies for impermissible coordinated market behavior. The fines imposed on one cartel consisting of eight vitamin producers was the largest ever – Euro 855 million ($770 million). Clearly, cartel-busting has become a major priority for the Commission. In fact, approximately 40 different cartel investigations are currently under way. This activity is likely to be boosted further by the Commission's new policy of offering immunity and fine reductions for whistle blowing cartel members.

Recent cartel cases have followed a similar pattern: the Commission is tipped off by one or more members of the cartel; the Commission responds by conducting a "dawn raid" at the premises of the companies concerned; evidence is found of secret meetings and sophisticated monitoring and enforcement schemes; and heavy fines are imposed, with adjustments made based on a variety of factors such as cooperation in the investigation and the leadership role, if any, on the part of the particular company. Three representative Commission decision which reflect that pattern are discussed below in section III, namely, *Zinc phosphate cartel*, *Citric acid cartel*, and *Graphite electrode cartel.*

Mergers and joint ventures. The number of merger filings continues to grow each year. In 2001, 335 concentrations were notified to the Commission, and about 90% of these were approved in "Phase I," *i.e.*, without the need for an in-depth investigation. The more celebrated cases tend to be Phase II cases, where the Commission often requires the merging parties to offer remedies including, above all, divestitures, to ensure adequate post-merger competition on the relevant markets. In 2001, the Commission approved ten Phase II mergers after the parties offered such remedies, and approved another five Phase II mergers without the need for any such commitments. Five mergers out of the 335 notified were blocked, but twelve other mergers were voluntarily withdrawn, including some in which the parties anticipated that the Commission would prohibit their proposed concentration.

The big news in the mergers field last Summer was the decision of the European Commission to prohibit GE's $42 billion acquisition of Honeywell, a deal that had been approved by the US Department of Justice subject to certain divestitures. Although the inconsistent conclusions of the two regulatory authorities have the potential to overshadow many other cases in which similar views were taken, the case does reflect differences on issues such as "range" effects, foreclosure, and the ability of markets to correct themselves. Another interesting prohibition decision was *Schneider/Legrand*, where the Commission focused on national markets and, in what some have seen as evidence refuting claims that merger review by the Commission is biased toward Europe, rejected the creation of a French national champion in low-voltage electrical equipment. Other cases discussed below in section IV include *Tetra Laval/Sidel*, a prohibited merger involving packaging products; *Compaq/HP*, a cleared merger between the two American IT companies, and *K&S/Solvay*, an approved salt production joint venture.

Abuse of a dominant market position. In *IMS Health*, a case capturing the attention of antitrust lawyers in all quarters, the Commission is once again testing its ability to compel a dominant firm to license its copyright on the theory that the copyrighted material is an "essential facility" that is indispensable to third parties. The case is thus somewhat reminiscent of the controversial *Magill* case, in which compulsory licensing under the particular facts of the case was upheld by the Court of Justice. As will be seen, however, *IMS Health* takes *Magill* one step further, as the Commission's remedy (now suspended pending substantive review) would require the licensing of a direct competitor, as opposed to a non-competitor operating on a downstream market. In *DSD* (*"Green Dot"*) another compulsory licensing case, the remedy chosen bears another

novel feature in that the IP holder has been required to license its "Green Dot" trademark free of charge. The final "abuse" case that will discussed is the Commission's decision in *Michelin,* currently on appeal. There the Commission condemned certain discounts and rebates offered by Michelin, despite the absence of any predatory practices on the part of the tire company. *IMS Health*, *DSD*, and *Michelin* are discussed below in section V.

II. RESTRICTIVE AGREEMENTS BETWEEN NON-COMPETITORS

A. International exhaustion: silence of mark holder does not imply consent

Davidoff & Levi Strauss, Judgment of the European Court of Justice

The Court of Justice has added some clarification to the concept of consent in cases where trademarked goods are placed on a market outside the European Economic Area (EEA) and where a parallel trader seeks to show that the mark holder's rights have been exhausted, thus paving the way for grey imports. In the recent case of *Davidoff & Levi Strauss,* the Court held that consent must be expressed in such a way that an intention to renounce those rights is *unequivocally* demonstrated. According to the Court, this intention will normally be gathered from an express statement of consent, but could also be inferred from the operative facts and circumstances.

The Court's judgment applied to two cases involving parallel issues. The first case concerned Zino Davidoff, the proprietor of two trade marks ("Cool Water" and "Davidoff Cool Water") registered in the United Kingdom and used for toiletries and cosmetic products. The goods in question carry batch code numbers and are sold by Davidoff or on its behalf both within and outside the EEA. A & G Imports acquired stocks of products which had originally been placed on the market in Singapore by Davidoff or with its consent. A & G imported those products into the United Kingdom and began selling them. Only the removal or obliteration of the batch code numbers distinguishes those products from other goods bearing the Davidoff trade mark.

The second case involved Levi Strauss, the proprietor of the trade marks 'LEVI'S' and '501', registered in the UK and used for jeans and other products.
Tesco and Costco obtained genuine Levi's 501 jeans from suppliers importing them into the Community from countries outside the EEA and sold them in the UK. Levi Strauss had always refused to sell jeans to Tesco and Costco.

In Community law, the principle of exhaustion prevents the mark holder from relying on the exclusive rights conferred by the trade mark where goods bearing that mark have been placed on the market within the EEA by the proprietor or with his consent. However, the mark holder may market its products outside the EEA without exhausting its rights within the EEA, and thus is entitled to control the initial marketing in the EEA of goods bearing the mark.

In reference to the importers' argument that the mark holders implicitly consented to the marketing of the trademarked goods within the EEA, the Court first explained that

consent constitutes the decisive factor in the extinction of that right. In that regard, and in view of the serious effects of extinguishing the exclusive rights of the mark holder, consent must be expressed in such a way that an intention to renounce those rights must be "unequivocal," whether the intention be expressed in an explicit or implicit fashion.

The Court further held that consent must be expressed *positively*. It follows that it is not for the trade mark proprietor to demonstrate absence of consent, but rather for the trader alleging consent to prove it. Implied consent to the marketing within the EEA of goods put on the market outside that area thus cannot be inferred from the mere silence of the trade mark proprietor. Furthermore, implied consent cannot be inferred from the fact that contractual reservations were not imposed at the time of the transfer of ownership of the goods bearing the mark, or from the fact that the trade mark proprietor has not communicated its opposition to marketing within the EEA. Similarly, consent may not be inferred from the fact that the goods carry no warning of a prohibition on their being placed on the market within the EEA.

B. "Dual pricing" not justified by lack of uniformity in national regulation

Glaxo Wellcome, Decision of the European Commission

The European Commission last year decided to prohibit the dual pricing system which Glaxo Wellcome had introduced for all its pharmaceutical products in Spain. GW had notified this system to the Commission for clearance in 1998. Under the dual pricing system, GW required its Spanish wholesalers to pay a higher price for products which they export to other Member States than the price which they pay when reselling the same products for consumption on the domestic market. The Commission found that the system was anti-competitive insofar as it obstructed parallel trade within the Single Market and thus frustrated the Community's objective of market integration. In the Commission's view, the system also restricted price competition for GW products.

In 1998, Glaxo Wellcome (now merged with SmithKlineBeecham into GlaxoSmithKline) notified to the Commission new conditions for the sale of all its products to wholesalers in Spain. Under the notified agreements, these wholesalers would have had to pay higher prices for products destined for export than for products to be resold on the domestic market.

Glaxo Wellcome (GW) acknowledged that the dual pricing system aimed at impeding parallel trade. However, the company maintained that its system did not restrict competition because the price differences between Member States resulted from the differences between national governments' regulatory environments. Such differences included the setting of sales prices as well as the reimbursement of pharmaceutical products. As GW pointed out, prices varied considerably between Member States. In particular, in Spain, regulatory maximum prices are the norm, while in the UK, companies' *profits* are capped, but companies can, in principle, set their prices freely.

The Commission rejected this argument on both legal and factual grounds. First, the Commission explained that the Court of Justice had already ruled that divergent national price regulations in the pharmaceutical sector do not exclude the principle of the free movement of goods (*Merck Primecrown judgment, 1996*) and that a similar principle should apply in regard to the Community's competition rules.

Moreover, the Commission noted that GW was not simply constrained to accept prices set by the Spanish authority. According to the Commission, there was always room for negotiation and GW had even negotiated price increases with the Spanish authorities. Furthermore, the level of parallel trade in pharmaceuticals was affected by other non-regulatory factors such as currency fluctuations.

In regard to the argument that dual pricing was justified in order to prevent the losses GW would otherwise incur due to parallel trade, which losses seriously affect its R&D budget, the Commission found no causal link between GW's economic losses due to parallel trade and the amounts of GW's R&D investments. Furthermore, the Commission added, the R&D budget of pharmaceutical companies generally only represents around 15% of their total budget. Losses stemming from parallel trade could therefore just as easily be deducted from the companies' other budget items such as marketing costs.

III. RESTRICTIVE AGREEMENTS BETWEEN COMPETITORS

A. *Zinc phosphate cartel*, Decision of the European Commission

On 11 December 2001, the European Commission fined Britannia Alloys & Chemicals Ltd, Heubach GmbH & Co. KG, James Brown Ltd, Société Nouvelle des Couleurs Zinciques S.A., Trident Alloys Ltd, and Waardals Kjemiske Fabrikker A/S a total of Euro 12 million for allegedly participating in a price-fixing and market-sharing cartel in the market for zinc phosphate. Zinc phosphate is widely used as an anti-corrosion mineral pigment in protective coating systems, and paint manufacturers use it for the production of anti-corrosive industrial paints for the automotive, aeronautic and marine sectors. Although the companies concerned are of a modest size, The Commission noted that they supplied more than 90% of the EEA-wide zinc phosphate market.

According to the Commission, the cartel began on 24 March 1994 in London, at the Holiday Inn Heathrow Airport Hotel. There, and following on previous informal contacts, Britannia Alloys, James Brown, Heubach, SNCZ and Waardals decided to maintain the "status quo" on quantities of zinc phosphate supplied in Europe. It was decided to attribute to each member of "the Club" (as they called themselves) a reference market share to be complied with. Those market shares were defined in reference to sales figures for the years 1991 to 1993 in France, Germany, UK and Scandinavia. During subsequent cartel meetings, the cartel participants allegedly circulated lists of "recommended" minimum prices and shared out specific customers. In order to ensure that market shares were adhered to, a monitoring system was also established.

The companies were fined as follows: Britannia Alloys & Chemicals Limited (Euro 3.37 million); Dr. Hans Heubach GmbH & Co. KG (Euro 3.78 million); James M. Brown Limited (Euro 940,000); Société Nouvelle des Couleurs Zinciques S.A. (Euro1.53 million); Trident Alloys Limited (Euro 1.98 million); and Waardals Kjemiske Fabrikker A/S (Euro 350,000).

To calculate the fines in cartel cases, the Commission takes account of the gravity of the infringement, its duration, and the existence of any aggravating or mitigating circumstances. It also takes account of a company's share of the market concerned and of its overall size. These factors are intended to ensure that the penalty is proportional and constitutes a sufficient deterrent. In any event, however, the fine can never go beyond 10 percent of a company's total annual turnover.

B. *Citric acid cartel,* Decision of the European Commission

On 5 December 2001, the European Commission fined Hoffmann-La Roche AG, Archer Daniels Midland Co (ADM), Jungbunzlauer AG, Haarmann & Reimer Corp, and Cerestar Bioproducts B.V. a total of Euro 135 million for participating in a price-fixing and market-sharing cartel in citric acid. Citric acid is one of the most widely used additives in the food and beverage industry, both as an acidulent and as a preservative. It is found in non-alcoholic beverages as well as in jams, gelatin-based deserts and tinned vegetables and fruit. Citric acid is also used in household detergent products, especially as a substitute for phosphates considered harmful for the environment. Citric acid also enters in the composition of dissolving tablets in the pharmaceuticals industry and is used in the cosmetics industry.

According to the Commission, the cartel was formed on 6 March 1991 at the Hotel Plaza in Basle, Switzerland. There, the founding members ADM, H&R, Roche and JBL agreed on the main features of their plan “to eliminate competition between them.” Cerestar joined the group in May 1992, shortly after it entered the citric acid market. The cartel allegedly continued until May 1995 and pursued four main objectives:

- Allocation of specific sales quotas for each member and adherence to these quotas;
- Fixing 'target' and 'floor prices' for citric acid;
- Exchanging specific customer information; and
- Eliminating price discounts.

According to the Commission, the companies established a sophisticated monitoring system whereby each company reported its monthly sales figures to a previously agreed member, who would then ensure the distribution of the confidential information to all the others. In order to ensure that each player would stick to the quotas assigned, a compensation scheme was created, obliging any member that over-sold its quota to provide compensation to the others.

The Commission explained that the companies had also coordinated action against Chinese manufacturers that had increased their exports to the European market as a result of the significant rise in prices for citric acid during the time the cartel operated. The cartel participants tried to regain some of the customers lost to the Chinese suppliers through a concerted and carefully targeted price war. The list of the clients lost and targeted by the cartel for "recovery" came to be known as the "Serbia List" and was regularly monitored.

The Commission imposed fines against the following companies: F. Hoffmann-La Roche AG (Euro 63.5 million); Archer Daniels Midland Company Inc (Euro 39.69 million); Jungbunzlauer AG (Euro 17.64 million); Haarmann & Reimer Corp. (Euro 14.22 million); and Cerestar Bioproducts B.V. (Euro 170,000).

The Commission explained that, because ADM and Roche acted as co-leaders of the cartel, the basic fines on ADM and Roche were increased by 35 percent. This figure is below the level applied for a leadership role in previous cartel cases, which is usually 50%, but takes account of the fact that although these two companies clearly had an outstanding role in the infringement, other members of the cartel also carried out activities usually associated with a leadership role (like chairing meetings or centralizing data distribution).

C. *Graphite electrode cartel,* Decision of the European Commission

On 18 July 2001, the Commission imposed fines amounting to Euro 219 million on Germany's SGL Carbon AG, the US' UCAR, and six other companies. According to the Commission, the fines were imposed as a result of price-fixing and market-sharing by those companies with respect to graphite electrodes. Graphite electrodes are ceramic-molded columns of graphite used primarily in the recycling of scrap steel into new steel in electric arc furnaces, also called "mini-mills." The electric arc process accounts for some 35% of steel production in the EU.

The cartel allegedly began in 1992 at the instigation of SGL and UCAR, which together supply more than two thirds of European demand. The cartel continued until 1998, despite the fact that competition authorities in the U.S., Canada and the EU had begun investigations. The companies apparently held regular meetings including at chief executive level or "Top guy" meetings to agree on concerted price increases usually triggered by the "home producer" or market leader and then followed in other parts of the world.

The Commission stated that the companies were "well aware that they were infringing antitrust law" and that they took great pains to conceal their secret meetings. For example, hotel and travel expenses were paid in cash, with no explicit reference to those meetings in expense claims. In cases where a paper trail was left behind, the companies had used code names to refer to the cartel participants, such as "BMW" for SGL, "Pinot" for UCAR, *etc.*

Throughout the period during which the cartel operated, prices of graphite electrodes increased by 50%. Then, however, the Commission stated that the concerted price increases became less regular as the companies became aware of the antitrust investigations.

The breakdown of the fines imposed (in millions of Euros) is as follows: SGL Carbon: 80.2; UCAR International: 50.4; Tokai Carbon: 24.5; Showa Denko: 17.4; VAW Aluminium: 11.6; SEC: 12.2; Nippon Carbon: 12.2, and Carbide Graphite: 10.3.

The Commission substantially reduced the fine imposed on Showa Denko and granted significant reductions to several other companies, in light of those companies' co-operation in uncovering the cartel. By contrast, the Commission stated, SGL and UCAR were the driving forces behind the cartel, and the highest fines were thus imposed on those two companies. Most of the cartel members committed an infringement of long duration (more than five years). Aggravating circumstances were taken into account for several of them (role of ringleader, continuation of the infringement after the Commission started its investigation, and attempts to obstruct the Commission's investigation).

This case marked the first time the Commission granted a substantial reduction of a fine (70%) under the terms of a new Leniency Notice. Showa Denko benefited from the reduction because it was the first company to co-operate and provide "decisive evidence" of the cartel to the Commission. UCAR also co-operated with the Commission at an early stage of the investigation. The Commission therefore granted a reduction of 40% on the fine imposed on that company. In the U.S., the major parties to the cartel pled guilty and paid substantial fines, including U.S. $110 million for UCAR and U.S. $135 million for SGL. Two former executives of the largest U.S. producer, UCAR, were jailed for several months.

IV. MERGERS AND JOINT VENTURES

A. GE/Honeywell, Prohibition Decision of the European Commission

In a well-publicized case, the European Commission decided last year to block the proposed acquisition by General Electric Co. of Honeywell, Inc. The prohibition followed an in-depth investigation in the markets for aero-engines, avionics and other aircraft components and systems. The Commission's decision was based on its finding that the merger would create or strengthen dominant positions on several markets and that the remedies proposed by GE were insufficient to resolve the competition concerns resulting from the proposed acquisition of Honeywell. According to the Commission, the merger between GE and Honeywell would have severely reduced competition in the aerospace industry and resulted ultimately in higher prices for customers, especially the airlines. Although the European Commission and the U.S. Department of Justice worked in close co-operation during this investigation, the authorities reached different conclusions.

GE and Honeywell notified their merger agreement for regulatory clearance in Europe on 5 February of last year. On March 1, the Commission started an in-depth investigation and found that GE alone already had a dominant position in the markets for jet engines for large commercial and large regional aircraft. Based on GE's strong market position, combined with its financial strength and vertical integration into aircraft leasing activities, The Commission concluded that the company was dominant on those markets. The Commission further found that Honeywell was the leading supplier of avionics and non-avionics products as well as engines for corporate jets and engine starters – a key input in the manufacturing of engines.

According to the Commission, the combination of the two companies' activities would have resulted in the creation of dominant positions in the markets for the supply of avionics, non-avionics, and corporate jet engines, and would have strengthened GE's dominant positions in jet engines for large commercial and large regional jets. These dominant positions would have been created or strengthened as a result of horizontal overlaps in some markets as well as through the extension of GE's financial power and vertical integration to Honeywell activities and of the combination of their respective complementary products. Such integration would enable the merged entity to leverage the respective market power of the two companies into each other's products. The Commission explained that this would have had the effect of foreclosing competitors, eliminating competition in these markets, undermining product quality and service, and inflating consumer prices.

On 14 June 2001, GE proposed a number of undertakings intended to address these concerns, but the Commission considered these undertakings to be insufficient to remove the various competition problems raised by the concentration. Two weeks later, after the deadline for the submission of undertakings had already passed, GE proposed a new set of remedies. The Commission could not accept this new package either because it did not resolve the competition concerns in a sufficiently clear way at such a very late stage in the procedure.

B. *Schneider/Legrand,* Prohibition Decision of the European Commission

The Commission also prohibited the merger of Schneider Electric and Legrand, the two main French manufacturers of electrical equipment, on the ground that the merger would have reduced competition in a number of countries, particularly in France. According to the Commission, Schneider Electric failed to timely offer undertakings that would ensure the maintenance of effective competition following the merger.

The competitive effects of the merger related primarily to low-voltage electrical equipment, *i.e.*, equipment that is used to trigger electrical currents and control electrical circuits in homes, offices or factories. Such equipment covers many different types of products, ranging from electrical distribution boards and sockets and switches to cable trays.

The Commission found substantial competitive overlaps between the activities of Schneider and Legrand in the following markets:

- electrical switchboards (distribution boards and final panel boards, together with their components, where the combined market share would have been between 40% and 70% depending on the country);

- wiring accessories (in particular, sockets and switches and fixing and connecting equipment, where combined market shares ranged from 40% to 90%); and

- certain products for industrial use (industrial pushbuttons and low-voltage transformers) or for more specific applications (*e.g.*, emergency lighting).

In France, the Commission found that the merger would have led to serious problems for virtually the whole range of products concerned and that on most markets it have resulted in the strengthening of a dominant position. Schneider and Legrand are by far the largest players on the French market, and the Commission's considered that there was little chance of any significant market entry in the short and medium term. Competition problems were also identified in Denmark, Spain, Greece, Italy, Portugal and the United Kingdom.

In an attempt to remedy these competition problems, Schneider submitted an initial series of undertakings to the Commission, but these were not considered sufficient to restore the conditions of effective competition. Once the deadline for undertakings had passed, the Commission was not permitted to accept any "last minute" undertakings unless it was able to establish immediately, without any possible doubt, that they would restore the conditions of competition. Schneider's new undertakings "left serious doubts as to the competitive capacity of the entities to be sold off, notably as regards access to distribution in France and the economic risks associated with the actual separation of these entities from the rest of the group to which they belonged."

Competition Commissioner Mario Monti later stated that "this unfortunate outcome illustrates the absolute need for the partners in a merger which involves clear competition problems to give thought, at a very early stage in the project, to possible remedies and to enter into discussion without delay with the competition authorities." Mr. Monti added that "this precautionary step should obviate the need to submit last minute remedies which, by their very nature, may be inappropriate and may raise uncertainties which cannot be dissipated within the brief period of time remaining."

This prohibition should be considered in the wider context of the merging of two companies originating in one and the same Member State with a view to creating a "national champion," here, in France. The Commission has pointed out that such a merger cannot be authorized unless the conditions of effective competition, ensuring in particular fair prices for consumers, continue to apply or are rapidly restored.

C. *Tetra Laval/Sidel,* Prohibition Decision of the European Commission

In *Tetra Laval/Sidel,* the Commission blocked the acquisition by Tetra Laval B.V. (part of the Swiss-based Tetra Laval Group, which owns the Tetra Pak packaging businesses) of the French company Sidel SA. According to the Commission, the takeover would have combined Tetra's dominant position in carton packaging (80% market share in Europe) with Sidel's leading position in PET plastic packaging equipment, thus creating a dominant position on the market for PET packaging equipment, including, in particular, stretch blow molding (SBM) machines. These machines are used for packaging sensitive products, namely fruit juices, liquid dairy products, fruit flavored drinks, and iced tea beverages. The Commission added that the merger would have strengthened Tetra's dominant position in carton packaging and would thereby have significantly reduced competition in liquid packaging. This, in turn, would have stifled innovation, choice, and competitive prices. The Commission further found that the concentration would have led to a strengthening of a dominant position in aseptic carton packaging equipment and aseptic cartons in the EEA. Aseptic packaging is used for long life products which do not require chilled distribution.

There are four major packaging materials used for liquid food packaging, namely: carton, plastic (including PET and HDPE-high density polyethylene), cans and glass. The Commission found that the use of PET for "sensitive products" would grow significantly in the coming years due to consumer preferences. Sensitive products are those which are sensitive to light or oxygen, such as liquid dairy products, fruit juices, fruit flavored drinks, iced tea, and coffee drinks.

According to the Commission, while carton and PET packaging equipment are currently distinct relevant product markets, the two neighboring markets are nevertheless closely linked and belong to the same industry sector, *i.e.*, liquid food packaging. Technically, the Commission explained, PET and carton are substitutes because PET can function as an alternative packaging material for all products for which carton is currently used. In fact, PET and carton are already used as packaging materials for certain common product segments (liquid dairy products, juices, fruit flavored drinks, and tea/coffee drinks).

The Commission was concerned that the combination of Tetra's dominant position in carton packaging and Sidel's leading position in PET packaging equipment would provide the merged entity with the ability and incentives to leverage its dominant position in carton to gain a dominant position in PET packaging equipment. In addition, by eliminating Sidel as a competitor in a closely neighboring market, the Commission considered that Tetra's dominant position in carton would be strengthened. Furthermore, in the Commission's view the the merged entity's dominant positions in two closely neighboring markets would be likely to further reinforce one another, and would also raise barriers to entry and reduce competition in the overall market for aseptic and non-aseptic packaging of sensitive products in the EEA.

The Commission also cited the lack of buyer power on the part of customers in Europe, since even the largest customer represented only five percent of sales while most others were small and medium sized enterprises. Furthermore, those firms that were considered competitors in PET and carton competitors, including Elopak of Norway and Germany's SIG and Krones, were small and unlikely to exert a competitive pressure on Tetra/Sidel.

D. *Compaq/HP,* Decision of the Commission to approve HP takeover

The Commission approved the acquisition of Compaq Computer Corp. (Compaq) by Hewlett-Packard Co. (HP), a deal which united two US-based global providers of computing and enterprise technology solutions. According to the Commission, a careful analysis of the merger - the largest ever in the IT sector - has shown that HP would not be in a position to increase prices and that consumers would continue to benefit from sufficient choice and innovation.

The Commission's analysis focused on the combination of HP and Compaq's activities in the markets for personal computers, servers, handheld products, storage solutions and services. In addition, the Commission also assessed the impact of the merger on HP's joint development with Intel of the “Itanium” processor, as well as the importance of HP's increased opportunity for joint sales of PCs and printers following the integration of Compaq's PC products.

With regard to PCs, the Commission concluded that the merged entity will continue to face strong competition in Europe from a number of credible rivals including IBM, Dell, and Fujitsu-Siemens. This competitive pressure, together with the absence of significant barriers to entry and the practice of non-exclusive contractual relationships between retailers and manufacturers, would prevent the new HP from any attempt to raise prices significantly. On the market for servers, which are central computers linking PCs, workstations, printers, and related devices into a network, the Commission similarly concluded that the proposed transaction was not likely to raise competitive issues.

While the servers market can be broken down according to price bands into entry-level servers, mid-range and large servers, HP and Compaq are largely complementary except in the entry-level market segment, where the Commission found that the combined entity would have relatively high market shares. However, an analysis of that segment confirmed that the new HP would not be able to act independently from customers or competitors. This finding was based on several factors, including the dynamic and growing nature of the market, the absence of entry barriers, and the presence of several strong competitors as well as a series of fringe suppliers.

As to the potential impact of HP and Intel's jointly developed Itanium processor, the Commission concluded that the merged entity would not be able to foreclose competitors' access to this processor and indeed that it was in the interest of HP and Intel's interest to guarantee unrestricted access. Furthermore, the Commission found that the merged entity's modest share of the relevant PC market and the limited impact that joint PC/printer sales would have on the new HP's printer market share implied that the

transaction was unlikely to give HP the ability to foreclose competition from the printer markets.

E. *K&S/Solvay,* Decision of the Commission to clear salt joint venture

The European Commission also approved the creation of a joint venture called European Salt Company (ESCO) between Kali & Salz AG (K&S) of Germany and Solvay S.A. of Belgium. ESCO will combine the parent companies' businesses for the production and sale of salt, thus creating Europe's second largest producer for crystallized salt behind Akzo of the Netherlands.

K&S and Solvay notified the Commission of their plan to combine their activities in the field of production and distribution of salt (crystalline salt and brine, a highly concentrated salt water) in a joint venture in which K&S will hold a 62% interest while Solvay will hold 38%. Solvay will retain control of facilities related to the production of salt and brine for its internal consumption in various chemical processes. The joint venture will have sole responsibility for the production of salt and its sale to third parties.

Salt is used for a variety of applications, the most important being electrolysis (a chemical transformation process which changes salt or brine into other chemical products used in the production of PVC, aluminum, and paper, among other things), de-icing of roads, and human consumption. These three applications account for roughly 40%, 25%, and 15%, respectively, of all salt uses. Other applications include dishwasher salt, water-softening salt, animal feed, and pharmaceutical use. ESCO salt will be used for all these applications. A total of about 21 million tons were consumed in the EEA in the year 2000, of which approximately 5 million tons were produced by K&S and Solvay together.

The Commission examined the impact of the merger in all relevant markets and concluded that ESCO's behavior would be sufficiently constrained by the presence of Akzo, the EEA's largest salt producer, as well as other competitors such as Salins du Midi (France), Südsalz (Germany), and Salt Union (UK).

According to the Commission, the situation of excess capacity in the salt sector means that competitors will be able to increase production for a particular application without having to reduce output for other applications. This will exert a restraining effect on the ability of any market player to raise prices. In addition, all the important competitors in the salt markets operate extensive and homogeneous distribution networks throughout Europe and can therefore compete in each country.

Although the proposed transaction was expected to result in high market shares in de-icing salt in the Nordic countries, the Commission found that customers (mainly public authorities) exercise considerable countervailing buyer power and allot orders in a transparent and open way by organizing annual invitations for tender. The Commission also took into account the fact the Nordic countries import all the de-icing salt consumed locally from as far away as Chile, which accounts for 15.5% of all Nordic countries' imports, compared 3% for the EEA overall.

The combined market share of the parties for water-softening and pharmaceutical applications in the central regions of the Community are also high. However, the Commission pointed out that, with regard to pharmaceutical applications (*e.g.*, dialysis solutions and physiological salt solutions), there are also large European customers which can obtain supplies from a variety of suppliers, including Akzo, Südsalz, OSAG of Austria, and the British company New Cheshire Salt. The Commission added that entry barriers to the production of pharmaceutical salt are low. With regard to water-softening, the Commission also established the existence of large customers as well as powerful retailers and chemical distributors. In addition, market entry for producers of salt of food grade purity, which is used for this application was thought to be relatively easy, as they only have to compress the food grade salt into tablets or pebbles to produce salt for water-softening.

V. ABUSE OF A DOMINANT MARKET POSITION

A. IP rights: Court affirms suspension of compulsory licensing remedy

IMS Health, Orders of the Court of Justice and the Court of First Instance

On 11 April 2002, the Court of Justice ("ECJ") upheld a previous ruling by the Court of First Instance ("CFI") which had suspended the European Commission's interim measures in the *IMS Health* case. "Interim measures" are the EC analogue to a preliminary injunction. In that case, the Commission found that IMS Health ("IMS") had abused its dominant position in violation of Article 82 EC Treaty by refusing to license competitors to use its copyrighted "1860 brick structure." This copyrighted database is tailored for the collection of pharmaceutical sales information broken down into 1860 geographical zones or "bricks" within Germany. In essence, this system is a mapping technique that enables IMS to classify sales of pharmaceutical products with a high degree of geographical accuracy without pinpointing the information so precisely as to compromise Germany's data protection laws.

According to the Commission, IMS' competitors need access to the system in order to operate on the market because customers are unwilling to switch to a different kind of system. The Commission therefore imposed interim measures in its decision of 3 July 2001. However, these interim measures were suspended by an Order of the CFI dated 26 October 2001. The Order of the ECJ only holds the Commission's compulsory licensing remedy in suspension until the CFI rules on IMS' substantive challenge to the Commission's decision. The Order does not predetermine the outcome of the CFI's judgment of the case on the merits.

The President of the CFI, Bo Vesterdorf, had expressed some scepticism as to whether it was proper for the Commission to rely on the well-known *Magill* case as a basis for imposing the compulsory licensing remedy. Vesterdorf suggested that the Commission's reliance on that case was novel since, in *Magill,* the party seeking a copyright license from the dominant firms was not a direct competitor but rather intended to launch a new product (*i.e.*, comprehensive weekly television guides) on a market

downstream of the market occupied by the copyright holders. Vesterdorf stated that the Commission's "provisional conclusion that the prevention of the emergence of a new product or service for which there [is] potential consumer demand is not an indispensable part of the notion of 'exceptional circumstances' developed by the Court of Justice in *Magill* constitutes, at first sight, an extensive interpretation of that notion." Thus, he continued, "there is, at the very least, a serious dispute regarding the correctness of the fundamental legal conclusion underpinning the contested decision." However, Vesterdorf abstained from sharp criticism, stating merely that the case "raises delicate questions as to the exact scope of Article 82 EC" and that a "detailed examination of these questions is manifestly beyond the scope of the present interim-relief proceedings." Those questions are therefore to be answered in the context of the CFI's proceedings on the substance of the case.

Vesterdorf indicated that, since the Commission's view on the substance of the case depended on a novel interpretation of the ECJ's case law, interim measures were not an appropriate remedy. The Commission's novel construction of the case law was an important factor for Vesterdorf as he balanced the interests of IMS, its competitors, and the general public and appears to have tipped the scale in IMS' favour. Vesterdorf recognized a clear public interest in IMS' efforts to enforce and profit from the specific subject-matter of its copyright in the 1860 brick structure, and reasoned under those circumstances that the imposition of interim measures should normally be limited to clear violations of the EC's competition rules. Here, however, the abusive nature of IMS' conduct was "not unambiguous" under the ECJ's case law. Thus, since interim measures would imply the compulsory licensing of its competitors, Vesterdorf concluded that the balance of interest favored the protection of IMS' copyrighted database until judgment could be reached in the main action. He added that this was particularly the case where, as here, the public interest invoked by the Commission related primarily to the interests of the copyright holder's competitors.

Interestingly, prior to the CFI's Order suspending the interim measures, the Commission distinguished the copyrighted materials at stake in IMS Health from other kinds of intellectual property. In particular, Commission spokesperson Amelia Torres rejected comparisons with patented products that depend on innovation to dominate a market, including many successful drug treatments: "It's ludicrous to be saying that sort of thing – there are patents protecting those drugs for a number of years."

B. IP Rights: compulsory, royalty-free licensing of trademark

The DSD ("Green Dot") Case, Decision of the Commission

On 20 April 2001, in another compulsory licensing case, the Commission issued a decision against DSD, a German provider of packaging waste management services and the holder of the "Green Dot" trademark. In essence, the Commission found that DSD's abuse consisted in requiring customers to pay fees for take-back and recovery that corresponded to the volume of packaging bearing its Green Dot trademark, as opposed to fees linked to the volume of packaging for which DSD was actually providing a take-

back and recovery service. Although DSD was not fined, the Commission did subject it to a series of commitments to ensure that DSD's charges related to the recovery service actually provided, and not simply to the use of the trademark. Among the most important of these commitments, DSD was required to allow customers to use its Green Dot trademark free of charge.

The German Packaging Ordinance requires manufacturers and distributors to take back, free of charge, used sales packaging from consumers at or near the point of sale, and to recover it outside the public waste management system in accordance with certain quotas. However, manufacturers and distributors may be exempted from the individual recovery obligations by adhering to an officially recognised extensive collection and recovery system. DSD operates the only such exemption system to be officially recognised in all of the German Länder (federal states). Manufacturers and distributors must make their participation in this system known to the public by marking packaging or through other suitable means (*e.g.*, by informing customers at the point of sale). DSD ensures that manufacturers and distributors meet this requirement by licensing them its Green Dot trademark, which is placed on the relevant packaging. Manufacturers and distributors become members of the DSD scheme by signing the standard-form Trademark Agreement, which obliges the member to pay DSD a license fee for all packaging bearing the Green Dot mark that it sells on German territory.

The Commission was concerned by the fact that, where part of the packaging marked with the Green Dot was not collected through the DSD system, manufacturers and distributors could nevertheless be forced to pay for a service they did not require. Moreover, this could deter market entry, as manufacturers and distributors would not want to pay for both the unused DSD system and a competing system. Given that DSD was the only exemption system operating countrywide, the Commission concluded that undertakings would often be obliged to use DSD for at least part of their packaging and would therefore mark all their products marketed in Germany with the Green Dot.

The Commission rejected the argument that manufacturers and distributors could avoid the double-payment problem simply by refusing to affix the Green Dot trademark to packaging that was not meant to be recovered by the DSD system. The Commission concluded that this solution would be unrealistic because of the additional costs involved. Furthermore, it was impractical to identify those packages that would ultimately be collected through the system. Given that separate marking was not a possibility, the Commission's solution was essentially to require DSD to allow manufacturers to continue placing the Green Dot trademark on their packages, without regard to whether the DSD system was in fact used to collect those products. Moreover, based on its conclusion that the costs incurred by DSD resulting solely from the use of the Green Dot trademark were virtually zero, the Commission concluded that it was anti-competitive for DSD to charge those manufacturers for using its trademark on packaging that was not ultimately collected by the DSD system.

Given the Commission's remedy, *DSD* may perhaps be seen as what appears to be part of a growing trend to require intellectual property holders to issue a compulsory

license. What makes *DSD* particularly unique in regard to other cases such as *Magill* and *IMS*, however, is the Commission's determination that the compulsory license must be provided at no charge.

Another important feature in *DSD* is the Commission's approach to what is called in EC law the "essential function" of trademark rights. This concept is important because the exercise of an intellectual property right can infringe EC competition rules when it goes beyond what is necessary to protect the essential function of the right in question. In contrast to previous cases, the Commission here did not define the "essential function" of a trademark right in generic terms, but rather referred to the essential function of the specific right at issue, *i.e.*, the Green Dot trademark. Arguably, this deviates from what had hitherto normally been viewed as the essential function of a trademark, *i.e.*, a guarantee of "the identity of the origin of the marked products to consumer or ultimate user by enabling him without any possibility of confusion to distinguish that product from products which have another origin."

C. Discounts and rebates offered by a dominant firm

Michelin, Decision of the Commission

In June of 2001, the European Commission decided to impose a fine of nearly Euro 20 million on Michelin, the French tire manufacturer, for allegedly abusing its dominant position in replacement tires for heavy vehicles in France. According to the Commission's allegations, Michelin's system of quantitative rebates, bonuses, and other commercial practices illegally tied dealers and foreclosed the French market to other tire manufacturers.

The Commission found that the tire market consisted of two specific segments, *i.e.*, the original and the replacement equipment markets. As to the second of these, replacement tires can be new or "retread." Retread tires are tires whose casing remains in sound condition and which can therefore be fitted with a new tread.

After finding that Michelin held a dominant position on the French market, the Commission claimed that Michelin had engaged in abusive market behavior by maintaining:

- annual quantity rebates where the benefit of reaching certain thresholds was greater than the value of the incremental sales above those thresholds;

- individual target rebates that left Michelin substantial discretion to determine whether or not a dealer qualified for such rebates; and

- obligations on dealers to sell Michelin tire "carcasses" for retreading.

In respect of Michelin's annual quantity rebates, the Commission recalled the jurisprudence of the Court of Justice, according to which quantity rebates with

exclusionary effects may only be offered by dominant firms for a maximum of three months. Moreover, the Commission considered the rebates to be improper because they were not linked to economies of scale generated by incremental sales. In respect of Michelin's individual target rebates, the Commission regarded the grant of rebate points to be too subjective. The Commission was further concerned by the fact that a number of points could only be earned by the transfer of strategic market information. As for the obligations on the part of dealers to sell their tire carcasses to Michelin, the Commission considered that this arrangement enabled Michelin to leverage its position in the new tire market in order to gain an advantage in the retread market. By the same token, it was argued, Michelin was able to leverage its position in the retread market in order to gain an advantage in the new tire market. It is unclear from the Commission's discussion of the case whether an assessment had been made regarding real market foreclosure.

The fine imposed by the Commission took account of the fact that Michelin cooperated fully with the investigation and had ended the impugned practices before the Commission sent the company a Statement of Objections detailing the allegations made against it. As for the Commission's substantive findings, Michelin filed an appeal in November of 2001 and has requested that the Court of First Instance annul the Commission's decision on various factual and legal grounds.

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