COMPETITION LAW IN THE EUROPEAN COMMUNITIES

March, 1999

Volume 22, Issue 3

FAIRFORD PRESS

Publisher and Editor: Bryan Harris

Fairford Review : EU Reports : EU Services : Competition Law in the European Communities

PO Box 3, Fairford GL7 4YF, UK

Tel & Fax (44) (0) 1451 861 464

P O Box 323, Eliot ME 03903-0323, USA

Tel & Fax (1) (207) 439 5932

March, 1999

Volume 22 Issue 3

COMPETITION LAW IN THE EUROPEAN COMMUNITIES

ISSN 0141-769X

CONTENTS

Law and Economics

One of the many differences between European and American lawyers is a tendency for the American lawyers' education and training to be more broadly based and often to follow a university education in business studies or economics. As a large generalisation, the European lawyer is less familiar with economic and commercial language and techniques than his American counterpart. In the field of competition law, this can have its drawbacks. The rules on competition, more than most bodies of law, reflect the application in law of economic concepts, some of them rather refined and arcane.

In the Commission's Communication on the application of the Community competition rules to vertical restraints, of which we published extracts in our December and February issues, there is a perceptible dividing line between the Sections of the Communication dealing with legal problems and proposals and the Section on "Economics of Verticals". It is a serious disadvantage of this otherwise interesting Section that it is almost entirely theoretical: it does not illustrate, as most lawyers - European or American - might wish, the theoretical points by reference to actual cases. Here was an excellent opportunity to bridge the gap between legal experience and economic concepts; but it was not taken.

For example, the Section suggests that, to analyse the negative effects which may result from vertical restraints, it "is appropriate to divide vertical restraints into four groups: an exclusive distribution group, a single-branding group, a resale price maintenance group and a market-partitioning group". Although this is not indisputable, it is a fair enough starting-point; but, in the paragraphs which follow, it is wholly unrelated to the practical considerations which have arisen in the voluminous case-law. It also serves as a Procrustes' bed. Where licensing fits into this bed, or the ice-cream cases, is far from self-evident; yet these are the very cases in which vertical restraints have been found to result in serious distortions of competition.

There is an irony here, in that the Commission is right, in what it calls its more economics-oriented approach to competition problems generally and the problems of vertical restraints in particular, to focus on the importance of market power. Yet it is easier for a medium-sized trader to recognise and probably suffer from a competitor's market power than for him to analyse and quantify it. There are questions on the form of notification which, in the last event, it is wholly unrealistic to expect medium-sized firms to be in a position to answer. Officials and economists probably think it absurd for businesses to enter markets unless they have an exact appreciation of market power, market shares and the like; but, unless firms can afford sophisticated economic analyses, they may well base their appreciation on experience and instinct. They may be right: it is notoriously difficult to pin down an objective test of market power. "Somewhere between 20% and 40%" is vague for lawyers and economists alike. □