ABUSE OF DOMINANT POSITION (PACKAGING): THE DSD CASE

Subject: Abuse of dominant position
Complaints
Trade marks

Industry: Packaging
(Some implications for other industries)

Parties: Commission of the European Communities
Duales System Deutschland AG (Green Dot)

Source: Commission Statement IP/01/584, dated 20 April 2001

(Note. The interest of this case lies mainly in the fact that the Commission's objections to DSD's commercial practices were directed at the restrictions associated with the use of DSD's trade mark. Other aspects of the case were either accepted or, where they were covered by Article 81 of the EC Treaty, rather than Article 82, governing the abuse of a dominant position, deferred to a later decision.)

The Commission has adopted a decision finding that Duales System Deutschland AG (DSD), a company which created "The Green Dot" (Der Grüne Punkt) trade mark, is restricting competition by abusing its dominant position in the market for organising the collection and recycling of sales packaging in Germany. The decision is limited to one provision of DSD's trade mark agreement and does not call into question the existence and overall functioning of the DSD system. The Commission finds that, in certain cases, the payment system used by DSD puts its customers at a disadvantage and prevents the entry of competitors in the market concerned. The Commission believes that, as soon as DSD has taken measures to end its abusive behaviour, it will be able to adopt a favourable decision on the remaining agreements of the DSD system.

Commenting on this decision, the Competition Commissioner Mario Monti said that the Commission had a duty to ensure that markets remained open to competition, including new, deregulated markets like waste recovery, and that new entrants should not fall victim to a dominant undertaking's conduct. This decision would lead to an improved choice of service providers and lower costs for companies complying with their environmental obligations.

DSD is currently the only company which runs a countrywide system for the collection and recycling of sales packaging in Germany. It had a turnover of DM 4.2b in 1998. DSD itself does not collect the waste but uses local collecting companies. The German Packaging Ordinance, as well as EU Directive 94/62 on packaging and packaging waste, require manufacturers and distributors to take back, free of charge, used sales packaging from consumers at or near the point of

sale. Manufacturers and distributors which adhere to a comprehensive collection system like DSD are exempted from this obligation.

DSD enjoys an almost monopolistic position with a market share of at least 80%. At the moment, opportunities for competition through "self-management solutions" (where the take-back obligation can be delegated to third parties) exist only at the fringes of the market and the operators present cannot be compared to DSD in terms of commercial strength and market position. Against the background of this dominant position, it is of the utmost importance for the emergence of competition in the waste recovery market that there is unrestricted market access for alternative service providers.

The Commission has objected to a provision according to which DSD customers have to pay fees corresponding to the volume of packaging bearing the Green Dot trade mark rather than fees corresponding to the volume of packaging for which DSD is actually providing a take-back and recycling service. According to the Commission, DSD abuses its dominant position when it claims the full fee for use of its Green Dot trade mark in situations in which it provides no service because the collection and recycling is carried out by competitors. The underlying principle followed by the Commission is "no service, no fee". Several companies had expressed concerns about DSD's practices.

In the Commission's view, the licence fee requirement means that customers have no realistic economic possibility of contracting with competitors of DSD. While paying for the service provided by DSD's competitors, these customers would either have to pay an additional fee to DSD (the only provider, at present, of a comprehensive countrywide system), or organise separate packaging, distribution and merchandising lines (packaging with and without the Green Dot).

The Commission therefore came to the conclusion in its decision that the payment system operated by DSD represented an abuse of a dominant position within the meaning of Article 82 of the EC Treaty. Under the Commission's decision, DSD may therefore no longer charge a fee in Germany for that part of the sales packaging bearing the "Green Dot" for which it can be shown that the take-back and recovery obligation, as set out in the German packaging ordinance, has been properly fulfilled by another party, be that a competing system or a self-management solution.

The Commission would normally levy a fine against an undertaking which had abused its dominant position in this way. In this case, however, the Commission recognised that DSD could not easily assess, on the basis of previous decisions of the Commission or the European Court of Justice, the compatibility of its behaviour with the competition rules of the Treaty. Following the clarifications given in this decision, the Commission will not hesitate in the future to bring proceedings in similar cases and, where necessary, to impose fines.

With this decision, the Commission has laid down recognisable conditions to allow competition and a better quality of service in the area of collection and recovery of used sales packaging in Germany. Realistic possibilities of market

entry and growth now exist for both competing systems and self-management solutions. Thus, it is likely that this will lead to an improved choice of service providers for manufacturers and distributors and that the associated improved efficiencies will be passed on to the final consumer. The existence and overall functioning of the DSD system are not put into question by this Commission decision.

DSD had notified a number of agreements to the Commission with a view to obtaining clearance or an exemption from the prohibition on restrictive practices. After lengthy, informal discussions, the Commission opened a formal investigation in this case on 25 October 1996. Following the publication in the Official Journal on March 27, 1997 of the main contents of the DSD notification, one of the comments received from third parties was that the notified trade mark agreements could lead to a restriction of competition. This was because it would not be economically viable for undertakings to consider an alternative service to that of DSD because of the double-payment obligation that such an alternative would entail.

On November 15, 1999, hair-care product manufacturers L'Oréal, Wella, Goldwell and Schwarzkopf, the hairdressing supplies industrial association (Industrieverband Friseurbedarf) and the waste disposal contractor Vfw addressed a formal complaint to the Commission. The complainants wished to organise a self-management system for the collection and recycling of packaging of products used by hairdressers and accused DSD of abusive behaviour.

In August 2000, the Commission sent a Statement of Objections to DSD which set out how, in the opinion of the Commission, DSD had infringed Article 82 of the EC Treaty. After the usual procedure, the Commission reached its formal decision. DSD can appeal this decision before the European Court of First Instance in Luxembourg.

The service agreements between DSD and its collectors are not affected by this Article 82 procedure. These agreements, which are central to the original notification under Article 81, have been amended to reduce their duration to the end of 2003 at the latest. In the context of these proceedings, the Commission intends to issue a decision under Article 81 of the EC Treaty during the course of this year. ■

Austrian Airlines and Lufthansa

The Commission has sent Austrian Airlines and Lufthansa a statement of objections formally warning that, as things stand, their plans for co-operation would eliminate competition on a large number of routes between Austria and Germany. The Commission fears that the deal would leave consumers travelling between the two countries with no choice of airline and would lead to higher prices. Source: Commission Statement IP/01/696, dated 15 May 2001