

## CLIENT ALERT

### General Court Confirms Commission Decision Not To Investigate Cartridge Market For Ink Jet Printers

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On 24 November 2011, the General Court of the European Union ("GC") in Luxemburg confirmed a decision of the European Commission ("Commission") not to open a formal antitrust investigation against Hewlett Packard, Lexmark, Canon and Epson. The case is interesting because, *inter alia*, the court had to assess whether competition on the primary market might exclude the finding of dominance on the consumables market and under which conditions.

The decision of the GC marks the (temporary) end to the long lasting attempts by the European Federation of Ink and Ink Cartridge Manufacturers ("EFIM") and certain ink manufacturers to induce the Commission to open up the markets for ink and ink cartridges for ink jet printers. EFIM has, however, two months to appeal against the GC's decision.

**Background:** Since March 2000 Pelikan, an ink manufacturer, and subsequently EFIM had brought several complaints to the Commission alleging first that Hewlett Packard and subsequently that Hewlett Packard, Canon, Epson and Lexmark had engaged in anticompetitive conduct to exclude ink manufacturers from the markets for ink and ink cartridges. The Commission undertook a market investigation and, after several meetings with EFIM, concluded, using its discretion, that there would not be sufficient Community interest to justify further investigations. Following a formal request by EFIM, the Commission took a formal decision on 20 May 2009 rejecting EFIM's request to open a formal investigation against the four printer manufacturers.

The Commission was of the opinion that EFIM had not provided sufficient indications or evidence for a violation of Article 101 TFEU (formerly Article 81 EC). Nor did the Commission consider it likely, on the basis of the information in its hands, that it would be possible to prove an abuse of dominance by the printer manufacturers according to Article 102 TFEU (formerly Article 82 EC). It concluded, therefore, that any further investigation would be disproportionate in light of the substantial means required for the completion of such investigation.

On 30 July 2009 EFIM appealed against that decision to the GC. The GC's assessment in substance mainly concerned the question whether the Commission was right to deny the Community interest to open a formal investigation and whether it has properly stated its reasons in the decision. Whilst these aspects relate to the conduct of the Commission and are thus related to the specific procedure, the decision provides some interesting findings for the relationship between primary and secondary markets as well as the situation on the printer markets.

It was a key assumption for the Commission when assessing the matter at hand and denying the likelihood of finding an abuse of dominance and thus a Community interest in a further investigation that existing competition on a primary market may exclude dominance on the related secondary market irrespective of the market shares on this secondary market (and even if the secondary market is in fact a monopoly). The Commission's idea is that competition on the primary market disciplines the behavior on the secondary market ("disciplining theory"). To put it differently, consumers would switch to another printer if cartridge prices were excessive.

The Commission had, however, held that such disciplinary effect could only arise if the primary and the secondary market have a very narrow link with each other. This is the case if four conditions are met: (1) the consumer can make a conscious decision also on prices for consumables during the life time of the primary product; (2) it is likely that the consumer would in fact make such a decision; (3) it is likely that a sufficiently large number of consumers would actually adapt their purchasing behavior on the printer markets in case the prices on the primary markets rose to a level which amounts to abuse and (4) such adaptation would occur within a reasonable time frame (para 60 of the judgment).

The GC assessed these considerations and, first, has acknowledged that the disciplining theory is a reasonable thought model on which the Commission may rely in order not to open formal proceedings.

Second, the GC confirms a number of findings regarding the printer and consumables industry. These include that Hewlett Packard does not enjoy single dominance just on the basis of a 43% market share (para 79). The GC also held that a position below dominance does not suffice - without further explanation at least - to rebut the assumption based on the disciplining theory (para 77).

Finally, the GC did not demand a perfect fulfillment of the four conditions listed in para 60 (see above). Whilst this finding was on the basis of the burden of evidence (the GC found that the plaintiff had not put forward convincing arguments against the existence of the four criteria) the GC in fact accepted the rather limited evidence of the Commission for the existence of the four conditions in the first place. The latter seems to be in line with the reasons for the UK Office of Fair Trading not to open a procedure against printer manufacturers in 2005.

[Click here for the judgment of the GC in case T-296/09, EFIM/Commission, is available in German and French.](#)

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