

Standard & Poor's

Data licensing under the spotlight (...again)



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Introduction

Topics to be covered today

- Commission investigation into Standard & Poor's ("S&P")
- The facts and legal issues involved
- Compulsory data licensing and the terms on which access to valuable data should be granted



The Commission investigation

- 12 January 2009, the European Commission (“EC”) announces it has opened an investigation into S&P’s licensing of International Securities Identification Number code (“ISIN”s):
 - S&P’s ISINs are CUSIPs (The Committee on Uniform Security Identification Procedures which is the North American National Numbering Agency)
- This followed complaints made in July 2008 by:
 - the European Fund and Asset Management Association;
 - French and German asset management associations; and
 - Associations of financial market data users in the UK/Switzerland



The Commission investigation

- Complaint alleged that S&P had abused its dominant position contrary to Article 82 EC by:
 - i. Demanding a licence fee not only from financial data vendors but also directly from financial institutions which use ISINs when accessing third party data services e.g. Bloomberg, Reuters.
 - ii. Forcing data vendors to cut off data feeds of US securities to any financial institutions which refuse to sign a licensing agreement directly with S&P for the use of its ISINs.

Legal basis of the complaint (i)

Abuse of a dominant position

- Article 82 of the EC Treaty prohibits:
 - an abuse;
 - by one or more undertakings;
 - of a dominant position;
 - within the common market or a substantial part of it;
 - having an effect on trade between Member States.
- UK equivalent: Chapter II prohibition (effect in the UK)
- No exemption (unlike Article 81)
- Dominance usually only over 40% (but has been found below 40%)
- Article 82 does not prohibit the *holding* of a dominant position but regulates the *way* in which companies with market power do business
- Consequences: fines, damages, adverse publicity, unenforceability, time and cost of investigation.

Legal basis of the complaint (ii)

- **“Abuse”**
 - Unilateral and contractual / bilateral activity
 - Discriminatory behaviour – pricing, other terms
 - Exclusionary behaviour
 - Unjustified refusal to deal / continue dealing / allow access to an “essential facility”;
 - Fidelity rebates / discounts / pricing;
 - Exclusive dealings;
 - Predatory pricing.
 - Exploitative behaviour
 - Excessive pricing;
 - Tying/bundling

The law applied to the case (i)

Dominance?

- S&P is the only issuer of identifiers for US securities
- S&P is the only operator to receive first-hand information from all securities issuers, which it includes in a database that is licensed to data vendors
- Arguably at least, S&P has a monopoly over:
 - (i) issuing US ISINs (CUSIPs); and
 - (ii) the data it licenses to data vendors through the S&P database.

The law applied to the case (ii)

Abuse?

- S&P's actions potentially infringe two categories of conduct:
 1. Making the purchase of the product the buyer wants conditional on the purchase of another unconnected product (tying or bundling)
 - Financial institutions obtain US ISINs from multiple sources - not from S&P.
 - Are they paying for a service (S&P's ISIN database) they are not interested in and do not use?
 2. Refusing to supply existing customers without objective justification or denying access to an "essential facility"
 - ISINs are the only universal or common identifier for US securities - they are arguably **essential** for the day-to-day business of financial institutions as securities cannot be exchanged without ISINs due to international agreements that seek to prevent duplication / potential loss of assets
 - Is ceasing supply to a data vendor if the financial institutions it deals with don't enter into a direct licence with S&P (or only supplying if they do) a (constructive) **refusal to supply**, that cannot be objectively justified?



Compulsory licensing under Article 82

The debate about compulsory licensing

- The controversy about the extent to which the owner of an intellectual property right can be compelled to grant a licence of it to third parties under A82 continues
- It is not the *holding* of the IPR that is at issue: the key question is at what point the *exercise* of an IPR is so harmful to consumer welfare that competition law should override it
- Need to balance the competing interests of promoting internal market competition (Articles 81/82) and protecting of exclusive rights conferred by national IPRs
- Therefore, higher standards apply when claiming a compulsory licence to IP than when seeking to access a tangible essential facility e.g. port
- The S&P case is the latest in a series of competition challenges in recent years, which have tested
 - i. the ability of IPR holders to refuse access to “essential” data and
 - ii. the terms (especially price) on which data should be licensed.

Compulsory licensing under Article 82 (ii)

1. Does the data(base) constitute an IPR?

e.g. ECJ judgment in *William Hill v British Horseracing Board* (2004)

- Did BHB have database rights in pre-race data which enabled it to stop WH using information derived from BHB's website on WH's internet betting site?
- It did not – for the following reasons:
 - Database right protects investment in making the database i.e. collecting “existing independent materials” NOT creating the data itself
 - Company with a monopoly over information it creates does not have a database right
 - Even where the database right applies, where the database structure is not also copied, there is only an infringement where a “substantial” part of the data is used
- Narrowed the scope of protection afforded to those who collect valuable information under the Database Directive

Compulsory licensing under Article 82 (iii)

.....**BUT**, following on from *William Hill / BHB*, the Court of Appeal in *Attheraces* (“ATR”) (2007) decided that:

- the BHB could still exploit the information commercially, even without the added protection of IP rights
- The BHB could impose contractual restrictions on third parties, who acquired the information, for use in a particular way
- BHB could also take into account the economic benefit *Attheraces* derived from the data, when setting its prices

Compulsory licensing under Article 82 (iv)

2. Compulsory licensing of data protected by IPRs

- No general obligation for an IPR holder to license IP, even where it is dominant
- Only in exceptional circumstances is a refusal to license an IPR an abuse:
 - there is a **refusal** to supply;
 - refusing undertaking is **dominant** on a relevant market;
 - the input is **indispensable** – duplication is not possible, no alternative source;
 - the refusal **excludes all effective competition** on a neighbouring market;
 - would produce **new goods** or services not offered by the owner of the IPR for which there is potential **consumer demand**; and
 - **no objective justification** for the refusal to license.

Compulsory licensing under Article 82 (v)

2. Compulsory licensing of IPRs (cont)

- *Microsoft* (2007) stretches the meaning of “exceptional circumstances”
 - ‘indispensability’: MS competitors had to be given the opportunity to make their server software *fully* interoperable with MS’ – does this amount to a sustainability requirement?
 - ‘new product’: includes a restriction on technical development
 - ‘elimination of all competition’: that there was only a risk of such elimination sufficed - do not have to wait until this is certain / imminent before taking action under Article 82
 - BUT is *Microsoft* a “special case” given Microsoft's market position and the significance of interoperability? Further clarification is likely....

Compulsory licensing under Article 82 (vi)

3. Setting licence fees for data

- A dominant IPR holder that licenses its data it is entitled to a reasonable return for the investment it has made in developing the subject matter of the IP
- It cannot charge an excessive price – one which bears no "reasonable relation to the economic value" of the data supplied (Article 82)
- BUT can take into account the economic benefit third parties will derive from using its data (*Attheraces*).



Comment

- The S&P investigation shows continuing regulatory attention to data and databases, which is extending out towards data in other sectors
- S&P maintains its licensing is “in line with industry practices” – therefore, the progress and outcome of this investigation will be monitored by suppliers of financial/market data and those wishing to gain access to such data
- Also worth noting the increased scrutiny of credit ratings agencies generally – November 2008, the Commission proposed legislation to regulate credit agencies strictly, including:
 - registration in a central European database
 - Committee of European Securities Regulators should gather historic performance information and make this available to investors
 - monitoring by a "home" regulator in their main country
 - new rules to address conflicts of interest e.g. how staff members are paid and how long they can work with clients



Next steps in the S&P investigation

- The instigation of proceedings by the European Commission indicates that the Commission intends to conduct its investigation as a matter of priority
- It does not indicate that the Commission has yet found any proof of any breach by S&P of Article 82.
- The Commission has wide powers to obtain all necessary information from companies, trade associations and Member States
- If the Commission does uncover proof of infringement, the next formal stage in the proceedings will be the issuance of a statement of objections
- The European Commission is under no strict deadline to complete its inquiries
- Duration of the investigation depends on a number of factors, including the complexity, the level of co-operation by the companies concerned, and S&P's exercise of its rights of defence

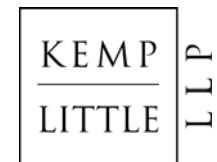
Any questions?

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Jargon buster

ANNA – the Association of National Numbering Agencies: responsible for the ISIN and other standards for securities and related financial instruments.

ABA – the American Bankers' Association: owns the CUSIP distribution system.

CSB – the CUSIP Service Bureau: the US NNA, which assigns the unique issuer code (the ISIN) for all North American securities to facilitate the clearing and settlement of trades. The CSB is operated by S&P.

CUSIP – the Committee on Uniform Security Identification Procedures.

EFAMA – the European Fund and Asset Management Association: the representative association for the European investment management industry.

ISIN – International Securities Identification Number code: a standard developed by the ISO, which provide unique cross-border identification for securities (shares, bonds, etc.) issued throughout the world.

NNA – National Numbering Agency: attributes the ISIN shares issued within its own country.