

## Final Exam<sup>1</sup>

The 'medeur Ltd.' with seat in Vienna is specialised on EU-wide import of medical drugs of other manufacturers. These parallel-imports are always carried out according to the same scheme: 'medeur' buys the drugs in a MS and sells them in another. It takes advantage of the price differences between the various MS. Since February 1996 'medeur' buys repeatedly pills of the drug 'ciphopan' which the producer, the Bingelheim KG, Berlin, sells in Spain at sizes of 50 and 100 pills per package. The Bingelheim KG owns in all MS for 'ciphopan' a trademark right. 'medeur' repacks the pills after purchase in Baden-Baden, Germany, into packages of 30 and sells them afterwards in Austria and Germany below the price that Bingelheim charges for its original packages there. Through the repackaging only the exterior package is changed and a leaflet in German is added. The pills, however, remain in their sealed straps. 'medeur' distributes the pills under the name of 'ciphopan' and declares explicitly on the packages that the drug has been repackaged by 'medeur GmbH', Wien.

'medeur' decides in February 1997 to expand its market share in Germany and Austria. The company therefore starts a big advertising campaign for its products, amongst others also for 'ciphopan'. 'medeur' campaigns with price reductions by clearly comparing the old and new prices. Furthermore, it publishes in German newspapers advertisements with crossword puzzles.

Since the German newspapers are also sold in Austria the Austrian competition authorities are alerted. In Austria it is prohibited to publish crossword puzzles in newspapers. This prohibition also applies to imported newspapers with the effect that the relevant parts must be blackened. The attorneys of 'medeur' challenge this prohibition as negatively affecting advertising and therefore restricting cross-border trade. The freedom of goods would be violated since marketing of medical drugs would be constrained. Furthermore it would affect the cross-border sale of newspapers. The Austrian authorities counter that the national provisions would serve the protection of smaller newspapers that could not afford to offer crossword puzzles and therefore were in a competitive disadvantage. The concentration of the press in Austria would be very high: the biggest media company would hold 54,5% of the market. Analyses would have also shown that the crossword puzzles of the big newspapers had led to an increase in demands at the expense of smaller newspapers. In the interest of the protection of media diversity and thus the freedom of opinion the prohibition would therefore be justified.

The Bingelheim KG as the manufacturer of 'ciphopan' becomes increasingly upset by the activities of 'medeur' in Germany. It approaches the competent German authorities and request that 'medeur' may be prevented from importing the drug 'ciphopan'. Bingelheim argues that the

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<sup>1</sup>You have 24 hours to submit your answer to the case question/solution based on the sent-time of the email.

Please send me your answer/solution by email. Compliance with the deadline will be assessed based on the sent-time of your email. The exam is designed in such a way that you should be able to finish it within 10 out of 24 hours.

You may very well discuss the case with the others (the German group has the same case). However, *everyone* has to submit his/her *own* answers/solution! In the event that I received two essentially identical answers/solutions I will subtract points or even give a no-pass to *both* papers!

I expect you to submit a comprehensive solution with a well reasoned argumentation! Quasi in return you may use whatever sources are available to you (if you use sources academic principles apply: no plagiarism, and appropriate citations: the reader must be able, based on the information given, to find the source on its own).

And now: Much success!

authorities would be compelled to intervene by reasons of health protection since the German law on medical drugs required an import licence that could be obtained by 'medeur' only if the pill packages carried labels in German and contained leaflets in German. 'medeur', however, would import 'ciphopan' from Spain with a leaflet in Spanish and in a package format that complies with Spanish requirements. When crossing the border the packages would therefore not comply with the German law and an import licence should accordingly not have been issued.

The German authorities examine the information from Bingelheim and find that the facts are indeed like Bingelheim put them. They therefore take steps against 'medeur'. 'medeur' raises a complaint and alleges that by repackaging in Baden-Baden it would timely comply with the German provisions. Anyway, this would happen prior to distributing the drugs to the retailers. Health risks could therefore not arise. If the import licence would be conditioned on compliance with the provisions already at the border crossing the import would become virtually impossible, at least 'medeur' would be forced to undertake the repackaging abroad.

The Bingelheim KG is not satisfied: it arranges for an administrative procedure on the basis of § 6e of the German competition law with the aim to levy a charge on 'medeur'. § 6e of the German competition law prohibits advertising with price comparisons. The attorneys of 'medeur' challenge the procedure on the basis of EC-law. § 6e would not be in compliance with Community law. The sale of goods would be restricted without a justification in sight. 'medeur' would only advertise facts. The German authorities counter that § 6e UWG would not intend to restrict the trade of goods between countries. The objective of § 6e would be the consumer protection against exaggerating attractions and excessive purchase incentives.

Both procedures finally end up on the table of Judge Whatistheclue. He is just back from a seminar on European law and now intends to get help from the top. Thus he submits with reference to the pending procedures the following questions to the ECJ:

- Is the intervention of the authorities against the import by 'medeur' in compliance with EC-law?
- Is the prohibition of the sale of newspapers containing crossword puzzles in compliance with EC-law?
- Can, in compliance with EC-law, a charge be levied on 'medeur' on the basis of § 6e of the German competition law?

What are the prospects of Whatistheclue's submission to the ECJ? How will the ECJ decide?