



A GOOD FRIDAY

There should have been gasps of relief in boardrooms across the country last Friday. Was it confidence, insouciance or ignorance that led to the deafening silence?

Last year the High Court decided that the price of data concerning horse races could only be set at cost of production plus a reasonable margin. Perhaps people read that judgment as limited to the particular facts. But it is not clear why. Had last Friday's judgment of the Court of Appeal upheld that view, the repercussions could have been substantial.

Any rule that said dominant companies could only price at cost plus a reasonable margin could have a very significant impact. It would be particularly important where intangible products are concerned.

As commercial activity relies more and more on the licensing and exploitation of data and content, judges telling industry only to price on a cost-plus basis might mean some painful board meetings and wild share price movements. While the direct costs attributable to such products may be low, their prices can often be very high and there may be no substitutes for customers. If only direct costs plus a reasonable margin could be recovered,

In 2006 the High Court held that the cost of commercial sales be set on a 'cost plus reasonable margin' basis. Lucky for some the Court of Appeal disagreed. **Daniel Beard reports**

that could hit some valuable revenue streams very hard indeed.

Is the fair price of broadcasting rights the cost of allowing the cameras in to film plus a reasonable margin on that cost?

Thankfully, the Court of Appeal concluded that the competition rules do not create a European cost-plus limit on prices. But the very fact that the appeal court felt it necessary to make such an explicit statement underscores the important issue at stake here.

In the proceedings, Attheraces, the racing broadcaster, had alleged that the British Horseracing Board (BHB), which administers UK horse racing, was abusing its dominant position in the supply of pre-race data. It contended that BHB was charging excessive prices for data that was necessary for it to provide its services to bookmakers overseas. The price at which that vital data was sold was way above its direct costs of production.

The High Court had said such a discrepancy must be excessive and, therefore, constitute abusive pricing. The Court of Appeal disagreed. It considered that simply comparing direct costs with prices would be to misapply competition law and, in particular, the anti-abuse of dominance provisions. Those provisions

are there to protect consumers, not to impose price regulation.

Beyond that clear statement of principle, however, a good deal of uncertainty remains. It is all very well — rightly — to reject a simple cost-plus model in favour of one that allows suppliers to price to the 'economic value' of their product, but the question of value is one that is difficult for legal rules to resolve. It clearly does not mean that suppliers can price as they wish no matter what their market power. But neither does it require some 'competitive price' benchmark against which to assess justifiable pricing. Indeed, such benchmarks are often as elusive and contentious as the notions they are used to explain.

Faced with a problem such as this, the Court of Appeal appears to consider it too complex a matter for courts. It seems to concur with the maxim of the legal scholar Lon Fuller that "we must face the plain truth that adjudication is an ineffective instrument for economic management".

The appeal court's judgment is prefaced with the statement that such issues might "be solved more satisfactorily by arbitration or by a specialist body equipped with appropriate expertise and flexible powers". It is unclear,

however, how the non-judicial great and good must be better able to solve this conundrum. The real question is what rules and principles be applied, not who should apply them.

To its credit, the European Competition Commission has been seeking to make matters clearer. It is engaged in a wide-ranging consultation exercise which, it hopes, will result in guidelines on abuse of dominance. However, that exercise focuses only on exclusionary abuses — those actions which keep competitors out of the market. It does not cover so-called exploitative abuses such as excessive pricing.

Of course, high prices to downstream competitors can be exclusionary as well as exploitative. In such cases of margin-squeeze we may need to conjure with the hypothetical 'reasonably efficient competitor' to assess a fair price. That analysis may be helpful but is clearly a matter of continuing debate and does not generally solve the principal problem: what can a dominant company charge its customers?

The challenge for lawyers and economists remains. For the moment we can at least console ourselves that last Friday provided us with the 'good news' form of 'no news'. ■

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