



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels,

**Subject: Case No IV/E 2/36.431 - Info-Lab/Ricoh**  
**(Please quote reference in all correspondence)**

Dear Sirs,

1. I refer to your application made pursuant to Article 3(2) of Council Regulation No. 17 regarding alleged infringements of Article 86 of the EC Treaty by Ricoh Corporation.
2. The application, which was received on 7 March 1997, concerns the refusal by Ricoh to sell empty toner cartridges to Info-Lab, which would enable it to compete with Ricoh on the market for filled toner cartridges compatible with Ricoh photocopier machines. Info-Lab claimed that the alleged behaviour of Ricoh would constitute an abuse of a dominant position contrary to Article 86 of the EC Treaty.
3. The Commission has examined in detail your application and has carried out an investigation. Particular attention has been paid to your letters of 25 July 1997, 23 January 1998, 10 March 1998 and to your comments<sup>1</sup> dated 30 September 1998 in response to the Commission's letter dated 27 July 1998, pursuant to Article 6 of Commission Regulation No. 99/63.
4. On the basis of the information in its possession, the Commission considers that there are insufficient grounds to grant your application, for the reasons set out below. In view of the analysis below, the Commission informs you that your application received by it on 7 March 1997, as amended, is hereby rejected.

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<sup>1</sup> Observations 1 to 8

## **I. FACTS**

### **1. The parties**

5. Info-Lab Ireland is an Irish company engaged in the manufacture of various products including toner for photocopiers. It is a wholly-owned subsidiary of Info-Lab Ltd. which in turn is a wholly-owned subsidiary of Michael Huber Munich GmbH. The Huber company manufactures printing inks.

6. Ricoh Company, Ltd. (in the complaint also called Ricoh Corporation) is a Japanese company and the ultimate parent of the Ricoh group. This group produces office automation equipment, including photocopiers, facsimile machines, data processing systems and related supplies. One of the various members of this group is the UK company Ricoh UK Products Ltd.

### **2. The complaint**

7. The complaint concerns the refusal by Ricoh to sell empty toner cartridges to Info-Lab, which would enable it to compete with Ricoh in the sale of toner cartridges compatible with Ricoh copiers.

8. The toner cartridges in question are used in the photocopier machines Ricoh FT 4022, FT4527 and FT 5535. They are also sold under other brand names, namely Nashuatec 3522, 3527 TD, 3535 TD, Gestetner 2822, 2627 TD, 2635 TD, Rex Rotary 8622 Z, 8627 DZ, 8635 DZ and Infotec 5221 Z, 5271 DZ and 5351 DZ.

9. Ricoh has design rights in the UK, France and Germany for the toner cartridges in question. An application for protection in Italy is currently pending. In addition Ricoh has filed two European Patent applications which are currently being examined by the European Patent Office. Patent protection is sought for the UK, Germany, Spain, France and Italy.

10. The complaint alleges that it is not possible to design a toner cartridge which would fit into the Ricoh machines and at the same time would not violate Ricoh's intellectual property rights. It would be technically possible to refill used cartridges but Info-Lab does not believe this to be profitable. According to both parties, Info-Lab and Ricoh, only Ricoh sells toner cartridges for the aforementioned photocopier machines at the present time.

11. Info-Lab would therefore like to purchase empty toner cartridges from Ricoh, fill them with toner which it already manufactures and then sell the filled toner cartridges in competition with Ricoh. It carried out negotiations with Ricoh UK Products Ltd. which, however, were not successful. Ricoh has not expressly refused to deal with Info-Lab but rather has insisted on getting further information on Info-Lab and its business plan before considering a deal. Info-Lab feels that under the circumstances Ricoh's wish to gather further information is inadequate and only a pretext not to supply Info-Lab with toner cartridges.

12. Ricoh has not so far licensed its design rights or sold empty cartridges to anyone. Info-Lab does not complain about any discriminatory behaviour on the part of Ricoh but it claims that Ricoh cannot refuse to supply it with a product which it needs in order to be

able to compete with Ricoh. The complainant thinks that such a refusal is an abuse of Ricoh's dominant position on the market for empty toner cartridges which are compatible with certain Ricoh photocopier machines.

## **II. LEGAL ASSESSMENT**

### **1. The relevant market**

#### **(i) Product market**

##### **(1) Empty toner cartridges compatible with Ricoh copiers**

13. Info-Lab wishes to purchase from Ricoh empty toner cartridges which fit into the Ricoh photocopier machines. Substitutes for these toner cartridges are not available since cartridges of other manufacturers cannot be used in the Ricoh copier machines. According to Info-Lab's submission the relevant product market would therefore be the market for empty toner cartridges compatible with Ricoh copiers. This would be a market for industrial use only since end-users exclusively purchase filled toner cartridges and have no demand for empty toner cartridges. Even if end customers capable and ready to refill toner cartridges exist, they will use their own used toner cartridge. The relevant market would therefore be the market for empty toner cartridges compatible with Ricoh copiers which are supposed to be filled with toner powder and sold to end users.

14. A market for empty toner cartridges compatible with Ricoh copiers however does not exist. No producer or dealer sells empty toner cartridges compatible with Ricoh copiers. Aside from Ricoh, no company can produce these toner cartridges, since they are protected by intellectual property rights held by Ricoh, which so far has not licensed its design rights. Nor does Ricoh sell empty toner cartridges to other companies or end-users.

15. At the retail level there is no demand for empty cartridges either. Cartridge and powder are sold together as a single product. Other copier manufacturers and independent toner cartridge manufacturers, such as Info-Lab itself, sell filled cartridges to end-users. This satisfies a recognised consumer need, reduces costs, and means that the components have to be used together. Powder and cartridge have therefore to be considered as a single product.

16. Since a market for empty toner cartridges compatible with Ricoh copiers does not exist, the question is whether Ricoh, which has neither licensed its design rights nor sold empty cartridges, could be forced to start selling them so as to allow Info-Lab to enter the market. This principle question will be analysed under II.2.

17. Info-Lab alleged the existence of a potential market for empty toner cartridges, since it would be a commercially viable option to enter the market for filled toner

cartridges<sup>2</sup>. This comment sustains the Commission's view that a market for empty toner cartridges in fact does not exist. To enter the market for filled toner cartridges might be a commercial viable option for Info-Lab, but this refers to the above mentioned question of whether Ricoh could be forced to co-operate with Info-Lab in order to allow the latter to compete with the former on the market for filled toner cartridges and will be addressed below.

18. According to Info-Lab, the Commission would be mistaken by stating that a demand at the retail level for non-Ricoh produced cartridges does not exist<sup>3</sup>. This however is a misunderstanding of the Commission's argumentation. The Commission takes the view that there is no demand for *empty* cartridges at the retail level, since cartridge and powder are sold together as a single product. The separate question of whether there is a compelling consumers' need for enabling Info-Lab to compete with Ricoh on the market for filled toner cartridges will be discussed below under II.2.

### (2) Filled toner cartridges compatible with Ricoh copiers

19. The existing market is the market for filled toner cartridges. During the lifetime of a photocopier machine, toner cartridges have to be replaced numerous times. The Ricoh photocopier machines in question are constructed in such a way that only cartridges specifically designed for these machines can be used. Toner cartridges used in photocopier machines of other manufacturers are not compatible with the Ricoh machines.

### (3) Photocopier machines

20. A further relevant market is the one on which the Ricoh photocopier machines are sold. As the Commission has stated in its Olivetti/Canon<sup>4</sup> and Viho/Toshiba<sup>5</sup> decisions, for the customers, photocopiers are not all sufficiently interchangeable to compete with each other in terms of price, speed, physical characteristics and additional facilities (sorter etc.). With regard to plain-paper photocopiers it has made a distinction between three markets: low-end range photocopiers (up to 30 copies per minute), mid range photocopiers (31 to 69 cpm) and high-end range photocopiers (from 70 cpm upwards). This market segmentation which appears to have been derived from the segmentation in the Dataquest statistics is still valid. Another market analyst, Infosource, however, defines the segments in a slightly different way. According to this segmentation the low-end range would be up to 39 cpm, the mid range from 40 to 89 cpm and the high-end range from 90 cpm upwards.

21. The photocopiers mentioned in the complaint make 22 cpm, 27 cpm and 35 cpm. According to the segmentation of Dataquest two of Ricoh's photocopiers in question belong to the low-end range, the third one to the mid range. Following the approach of Infosource all three photocopiers fall into the low-end category.

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<sup>2</sup> Observation 1

<sup>3</sup> Observation 2

<sup>4</sup> Case No IV/32.306, 1988 OJ L 56, p.51.

<sup>5</sup> Case No IV/32.879, 1991 OJ L 287, p.39.

22. In this case, however, it is not relevant for the final outcome which source one relies on, since according to both sources there is no dominant position of Ricoh in the photocopier market.

23. Info-Lab is of the opinion that the market for photocopiers should not be taken into account<sup>6</sup>. The only relevant market according to Info-Lab would be the market for toner cartridges compatible with Ricoh copiers. However the Commission is of the opinion that the assessment of a possible dominant position on the consumables market must take into account the situation on the photocopiers market. The details will be discussed under point II.2.

## **(ii) Geographic market**

### **(1) Filled toner cartridges**

24. There are no regulatory or technical barriers to the supply of consumables in the various Member States. In each Member State the same consumables are sold and prices seem to be relatively homogeneous throughout the EC. The relevant geographic market therefore should be considered as EC-wide. In this case, however, the fact that Ricoh has intellectual property rights for toner cartridges or has sought for protection only in some Member States (Germany, Spain, France, Great Britain and Italy) has to be taken into account. Therefore, the relevant geographic market might be defined in a more narrow way. However, there is no need to precise the exact market in this case, since there is no abuse of dominance even in the narrower market.

### **(2) Photocopiers**

25. In Olivetti/Canon the Commission found that for photocopier machines, the EC represents an area in which the conditions of competition are similar for all suppliers. National laws do not make trade between Member States difficult, nor do costs of transport or consumer preferences. The standard specification of photocopiers is the same in each Member State, there are no national technical standards.

26. However, the need for after-sales services and the existence of a reliable source of consumables are important elements in the decision-making process of a potential buyer and could require a definition of national rather than EC-wide markets.

27. In this case, however, there is no need to decide definitively on the relevant geographic market since Ricoh has neither a dominant position in the EC nor in the relevant Member States.

## **(iii) Position of the parties**

### **(1) Filled toner cartridges**

28. Ricoh is the only undertaking on the market for toner cartridges (irrespective of the geographic market) compatible with the aforementioned Ricoh photocopiers.

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<sup>6</sup> Observation 4

29. With regard to this fact, Info-Lab remarked that a new supplier for filled toner cartridges might be welcomed by the consumers<sup>7</sup>. The relevant question however is whether this could be a sufficient reason for forcing Ricoh to co-operate with Info-Lab as to allow Info-Lab to enter the market. Again this question will be discussed below under II.2.

## (2) Photocopiers

30. According to Infosource, Ricoh's market shares in the EC as well as in the Member States where it has or is seeking intellectual property rights are below 20% for low-end plain paper copiers. According to Dataquest, Ricoh's market shares are slightly higher than the ones according to the market segmentation of Infosource. However, they are below 25% for low-end range and for mid range photocopiers in the EC as well as in the relevant Member States. There is strong competition in the market with Canon as the market leader and other major sellers like Xerox followed by a number of medium sized and smaller competitors.

31. Irrespective of the market analyst which is relied on, there is neither in the EC nor in any of the relevant Member States any evidence for a dominant position of Ricoh.

32. Furthermore Info-Lab's complaint is not based on allegations that Ricoh has a dominant position in the photocopier market but rather that it has a dominant position in the market for toner cartridges. However, Ricoh's position on the photocopier market might be relevant for other purposes which will be shown below.

## **2. Application of Article 86**

33. As already indicated above the question to be examined is whether Ricoh, which never sold empty toner cartridges, could be forced to do so. Since there is no consumer-demand for empty toner cartridges, because the components cartridge and powder are used together by end customers, the sole purpose of selling empty cartridges would be to enable Info-Lab to compete with Ricoh in the market for filled toner cartridges. The Commission is of the opinion that a company cannot be obliged to such forced co-operation with prospective market-players or that such forced co-operation could only be envisaged under exceptional circumstances (see restrictive approach of Court of Justice to doctrine of "essential facilities" in the recent Oscar Bronner case; 26 November 1998 Case C-7/97).

34. The application of Article 86 in a case like the present one could at most be envisaged were Ricoh to have a dominant position on the consumables market, which would allow it to act independently of possible competitors and especially to be free in setting prices.

35. Ricoh is the only undertaking which sells filled toner cartridges compatible with Ricoh photocopiers. This, however, raises the issue whether a company could be considered as dominant on the consumables market where there is no dominance in the

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<sup>7</sup> Observation 3

upstream market, i.e. the photocopier market. Central to this issue is the existence of a close link between these two markets.

36. In the Pelikan/Kyocera case<sup>8</sup> the Commission took the view that Kyocera could not be considered to have a dominant position in the market for toner and other consumables which were compatible with its proprietary system in the market for printers, since Kyocera's market share in the market for printers was relatively low and there was considerable competition on this market. The Commission found that the printer market and the consumables market were interrelated in such a way that the horizontal competition on the printer market constituted effective discipline in the vertical market.

37. For assessing whether there was sufficient interrelation between the primary and the secondary market the Commission used four criteria, which should also be applied in the present case.

a) The consumer can make an informed choice including lifecycle pricing

38. According to a number of photocopier manufacturers, the producers also offer service support agreements or all-inclusive rental and leasing contracts to photocopier machines customers at an annual fee, where the toner for a fixed number of copies is included. When purchasing a photocopier machine the customer can choose between such an "inclusive contract" or an "exclusive contract", where he purchases the toner cartridges separately. The consumer therefore gets a general idea of the average costs for consumables during the lifetime of the photocopier machines and is able to compare prices.

b) The consumer is likely to make an informed choice

39. Since the consumer can calculate the price per copy by simply comparing the various inclusive and exclusive contracts offered by the different photocopier manufacturers, it is very likely that this factor is taken into account when a purchase decision is made.

40. A report by the Monopolies and Mergers Commission of October 1991, which the Commission mentions in Pelikan/Kyocera, quotes the Association of the Electronics, Telecommunications and Business Equipment Industries as saying that "Competition is centered on price per copy" with regard to photocopiers, most purchasers acquire a service rather than a product.

41. Both parties, Ricoh and Info-Lab, agreed that consumers evaluate the cost of peripherals (cartridges, other parts etc.) together with the cost of the machine itself and take the "decision to buy" based on the overall cost per copy.

c) In case of an apparent policy of exploitation being pursued in one specific aftermarket a sufficient number of customers would adapt their purchasing behaviour at the level of the primary market

42. The assessment as to whether there is a likelihood that a sufficient number of customers would switch to other manufacturers' products, should exploitation occur in a

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<sup>8</sup> see XXVth Report on Competition Policy 1995, p.140 (Case No IV/34.330)

given aftermarket, does not only have to take into account the installed base of users but also potential new users. In cases where there is sufficient potential for new customers, the existing customer base appears to be protected from exploitative behaviour by the attentive eye of the new customer.

43. Regarding the low market share of Ricoh in the relevant photocopier market and the normal life of a photocopier of about 3 years it follows that there is a large number of customers that qualify as potential new customers of Ricoh machines.

44. Info-Lab claimed that the attentive eye of the potential new customer is not able to prevent Ricoh from refusing to supply empty toner cartridges to Info-Lab<sup>9</sup>. This however is not the point. The question is whether the existing customer base is protected from exploitative pricing for consumables by potential new customers. As shown above this is indeed the case since the potential new customers, who take the cost per copy into account when making their purchase decision, would switch to another photocopier manufacturer if they considered the prices for Ricoh consumables as too high.

#### d) Adaptation within a reasonable period of time

45. Also with respect to this criteria the installed base cannot be considered to be the decisive customer group, since to the extent that these customers have already made their investment, it would be unrealistic to expect them to change products within a time period which the Commission would normally consider sufficient under substitutability standards. In Pelikan/Kyocera the Commission rather considered it to be decisive whether, should Kyocera start raising prices for its consumables today, such behaviour would trigger an adaptation in the purchasing pattern of new customers.

46. The Commission held that such an adaptation would take place on the printer market. There are no indications that the situation would be any different if Ricoh began to raise its prices for photocopier consumables.

47. While Ricoh is the only supplier of toner cartridges for certain Ricoh photocopier machines, there is no indication that Ricoh has a dominant position in the market for the photocopier machines in question. The former market is, however, closely linked to the latter. Under the approach adopted by the Commission in Pelikan/Kyocera, Ricoh cannot be considered to have a dominant position.

48. There is no evidence for any significant prejudice to the consumer resulting from Ricoh being the only supplier of consumables compatible with Ricoh photocopiers. The consumer considers costs per copy to be the main cost-indicator when making a purchase decision for a given photocopier machine. As Ricoh is not in a dominant position on the photocopier market, the consumer can easily choose a photocopier machine of another producer if the costs for Ricoh's consumables seem to be significantly higher than those of other manufacturers.

49. Info-Lab claimed the Commission's assumption that a company cannot be obliged to supply potential competitors with empty toner cartridges when there is no consumers' need which might justify this, would presuppose that consumers' needs were best served

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<sup>9</sup> Observation 8



by a monopoly situation<sup>10</sup>. This, however, results from a misunderstanding of the Commission's argumentation. The question examined by the Commission was, whether Ricoh could be forced to sell empty toner cartridges with the sole purpose of enabling a prospective market-player to compete with it on the market for filled toner cartridges. The Commission is of the opinion that such a forced co-operation with prospective market-players would only be envisageable if there was a compelling consumers' need, which presupposes the existence of a dominant position in the consumables market. This however is not the case here, as shown above. Even if Info-Lab could actually offer filled toner cartridges at a lower price than Ricoh, this would not be in itself sufficient to conclude that a dominant position in filled cartridges, which could perhaps justify an obligation on Ricoh to sell empty toner cartridges to Info-Lab, existed.

50. Info-Lab admitted that the consumers' purchase decision on a photocopier may focus on the price per copy. However, according to Info-Lab consumers would perhaps adjust to a more sophisticated cost analysis by separately assessing the machine itself and the filled toner cartridge supply if given the opportunity<sup>11</sup>. This is merely Info-Lab's hypothesis and even if the customer could make a more sophisticated cost analysis (than the one he already makes) if Info-Lab sold Ricoh compatible toner cartridges, this does not lead to the conclusion that a dominant position in filled cartridges exists. Improved possibilities for cost analysis might be useful for consumers, but this is not sufficient to justify imposing an obligation on Ricoh to co-operate with a prospective market-player.

51. Info-Lab further claimed that the decision of the European Court of Justice in the Hugin<sup>12</sup> case would be binding for the Commission<sup>13</sup>. In this case the European Court confirmed the Commission's view that Hugin had a dominant position on the market for spare parts for its own cash registers. However the Commission's decision that Hugin had infringed Article 86 by not supplying its spare parts to independent undertakings, which specialised in the maintenance and repair of cash registers, in the reconditioning of used machines intended for re-sale or renting out, was annulled, since according to the Court Hugin's conduct was not capable of affecting trade between Member States. The Hugin case differs fundamentally from the case in question. Even a very generous interpretation of the Hugin decision cannot ignore that in the Hugin case spare parts constituted a separate product market. As for Info-Lab/Ricoh, however, a market for *empty* toner cartridges compatible with Ricoh copiers does not exist as the Commission stated above under point II.1.(i).(1).

### **III. CONCLUSION**

52. In view of the above analysis the Commission informs you that your application received by it on 7 March 1997, as later supplemented, is hereby rejected.

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<sup>10</sup> Observation 5

<sup>11</sup> Observation 6

<sup>12</sup> Judgement of 31.05.1979, (1979) ECR 1869

<sup>13</sup> Observation 7

53. Irrespective of this rejection the Commission will examine separately your complaint submitted on 10 March 1998 concerning the alleged refusal of Ricoh to supply you with cartridges for its digital copiers/printers, a market where Ricoh would be dominant, as soon as you provide us with further information on this matter.

Yours sincerely,

For the Commission