WILLKIE FARR & GALLAGHER LLP

NEW YORK WASHINGTON HOUSTON PARIS LONDON FRANKFURT BRUSSELS MILAN ROME

Issue 3 2016

ANTITRUST & COMPETITION LAW DIGEST

Contributors

Jacques-Philippe Gunther
David Tayar
Susanne Zuehlke
Adrien Giraud
Faustine Viala
Agathe M. Richard
Dounia Ababou
Maxime de l'Estang
Mathilde Saltiel
David Kupka
Alice Guérin
Mathilde Ayel
Anouk Falgas
Camille Smadja
Sylvain Petit
Sara Ortoli
Guillaume Melot

Contents

EUROPEAN UNION - MERGERS

Prohibition of Hutchison's proposed acquisition of Telefónica's O2

Decision of the European Commission M.7612 – Hutchinson 3G UK / Telefonica UK, May 11, 2016

On May 11, 2016, the European Commission (the "EC") blocked the transaction between the two mobile operators Hutchison (active in the UK market through Three) and O2 (Telefónica's subsidiary). The EC found that the transaction raised the following serious competition concerns with respect to the UK mobile market:

- on the one hand, a reduction in the number of operators would have led to a reduction in choice for consumers, as well as a decrease in quality and an increase in price;
- on the other hand, the involvement of Three and O2 in two separate network-sharing agreements with each of the remaining competitors (EE and Vodafone, respectively) would have allowed the merged entity to be part of these two agreements and thereby to have a good overview of the network strategies of its competitors; and
- lastly, the transaction would have led to a reduction in the number of operators willing to host mobile virtual network operators ("MVNOs").

Furthermore, the EC found that the corrective measures offered by the parties were not sufficient to address such competition concerns and blamed the reduction in the number of operators in the market on the lack of remedies allowing the entry of new mobile operators. The EC stated in its press release that the proposed remedies "aimed at strengthening the development of existing mobile virtual operators or supporting the market entry of new ones" would not have allowed the emergence of viable operators independent of the merged entity.

Commissioner Vestager's statements in October 2015 following the withdrawal of the contemplated merger between Telenor and Teliasonera in Denmark assured that the Commission does not apply any general rule requiring that a certain number of operators should be active in mobile markets ("*no magic rule*") and its assurances that all the decisions to be made would be examined on a case-by-case basis. This case nevertheless sends a strong message concerning the sector's various acquisition projects, especially for transactions leading to a shift from four to three operators. Indeed, prohibition decisions of the Commission are rare in practice, this being the first one since 2013. However, other consolidation projects collapsed lately in the sector, such as the abovementioned merger between Telenor and Teliasonera in Denmark in 2015 and the acquisition of Bouygues Telecom by Orange in France in 2016.

The second project of Hutchison in Europe, the creation of a joint venture with the Italian VimpelCom – which led to the elimination of the fourth national telecom player – had a different fate: on September 1st, 2016, the Commission decided to authorize the deal. The approval is conditional on the divestment of sufficient assets in order to allow a new competitor, the French operator Iliad, to enter the market.

Finally, Hutchison stated that it will challenge the prohibition decision before the General Court of the European Union.

EUROPEAN UNION - PROCEDURE

The Court of Justice annuls a request for information from the European Commission deemed insufficiently motivated

Case C-247/14 of the Court (Third Chamber), *HeidelbergCement AG* v. *European Commission* , *March 10, 2016*

In its ruling dated March 10, 2016,[1] the Court of Justice of the European Union (the "Court") annulled the request for information addressed by the Commission to various cement manufacturers as part of an investigation covering potential restrictions on imports, market sharing and pricing coordination.[2] The Court overruled the decision of the General Court of the European Union[3] adopted on 2014 pursuant to which the General Court had rejected the cement manufacturers' appeal.

The disputed measure, which consisted of a 94-page questionnaire, was sent out within a very specific procedural context. In 2008 and 2009, the Commission conducted two series of unannounced inspections at cement manufacturers, premises located in various Members States. In 2009 and 2010, the Commission addressed three requests for information to cement manufacturers before sending out this fourth disputed and very burdensome request for information at the end of 2010.

The Court ruled that the Commission had not complied with its duty of motivation considering that the requests were drafted in a broad and imprecise manner. The decision to open formal proceedings against cement manufacturers, which was taken by the Commission only one month after the disputed information request, was also vague and generic, including regarding the products and the geographic scope concerned.

The Commission's duty to state the reasons for its requests not only ensures that a request is justified but also provides companies with an indication on the information sought. Failing to state reasons appropriately and with precision prevents companies from interpreting the scope of their duty to collaborate with the Commission, and raises issues of legal certainty.

The Commission defended itself by invoking precedents where unannounced visits had been deemed legal by the Court even though the Commission had not set out

1 Court, March 10, 2016, cases C-247/14, *HeidelbergCement AG/Commission*, C-248/14, *Schwenk Zement/Commission*, C-267/14 *Buzzi Unicem/Commission*, C-268/14 *Itamobiliare/Commission*.

2 Commission, Decision n° C (2011) 2361 dated March 30, 2011 (case COMP/39.520 – Cement and related products).

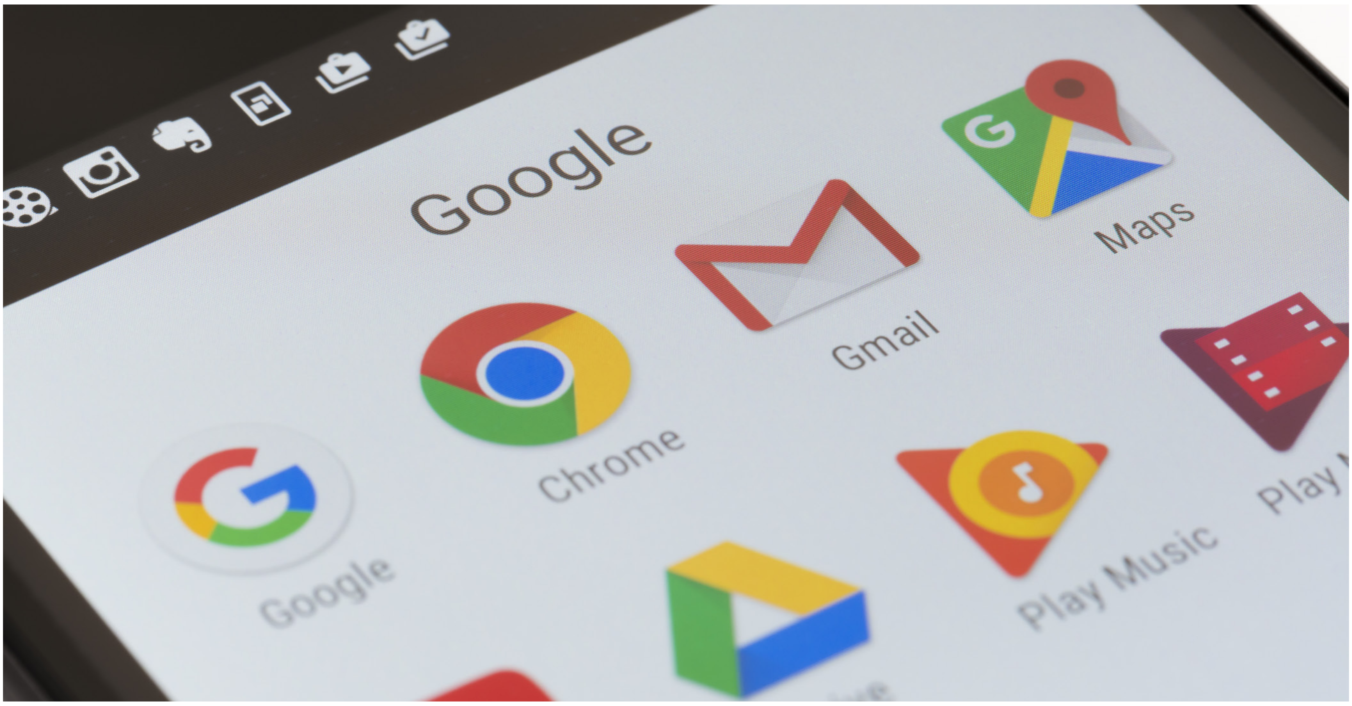
3 General Court, March 14, 2014, case T-302/11, *HeidelbergCement AG/ Commission*.

the exact legal nature of the presumed infringements. The Court discarded this justification on the ground that a certain level of imprecision may be acceptable only when the Commission is in the very early stages of its investigation. In the present case, the Commission had already conducted two series of inspections and had been working on the case for more than two years, which should have allowed the Commission to be more precise in its requests.

This ruling gave the Court the opportunity to reaffirm that the duty to state reasons for requests is an essential guarantee of the rights of defense, in particular as it protects companies from self-incrimination. A request lacking a state purpose is indeed comparable to what the Court has considered in other cases to be a "fishing expedition".[4] One can expect that this decision will encourage the Commission to be more cautious in drafting requests for information, which should strengthen legal certainty. However, the impact of this decision is not as broad as one might have expected. Indeed, the Court referred to and ruled on the basis of only the first plea of seven brought forward by the applicant. The Court did not rule on the other pleas concerning, among other things, the deadline for responding to the questionnaire, the extent to which the requested information was necessary and the requirement for precision of legal acts.

Lastly, one cannot ignore that this annulment took place after the Commission eventually decided in 2015, more than a year after the applicant's appeal, to close the case.

[4] The decision quotes decision *Roquette Frères*, C-94/00, point 47, itself quoting decision *Dow Benelux/Commission*, 85/87 dated October 17, 1989, point 27; decision *Deutsche Bahn e.a./Commission*, C-583/13, points 56 & 57.



EUROPEAN UNION - ABUSE OF DOMINANT POSITION

Commission sends a Statement of Objections to Google on Android operating system and applications

European Commission, Press release no 40099, April 20, 2016

Google has undoubtedly gained a place in the European competition law news. The European Commission seems to even acknowledge this fact as it created a new special title, "*Google inquiries,*" on its news web page dedicated to its antitrust activities.

Indeed, Google is under close scrutiny from the European Commission. The company has already received a Statement of Objections on April 15, 2015, following the collapse of the commitment procedure, in which the Commission claims that Google may have abused its dominant position in the market for general Internet search services by favoring its own comparison-shopping product in its general search results pages. A new supplementary Statement of Objections was delivered to Google on July 14, 2016 in this case in an attempt to reinforce the Commission's preliminary conclusions.

On the same day, a second Statement of Objections was sent to Google. The Commission informs the company that it reached a preliminary conclusion that Google abused its dominant position also in the field of online advertisement, by artificially restricting the possibility of third-party websites to display search advertisements from Google's competitors.

In another inquiry relating to the Android operating system and applications opened in April 2015, the Commission also sent a Statement of Objections to Google on April 20, 2016.

The Commission's preliminary analysis provides that Google may be abusing its dominant position by forcing device manufacturers and mobile network operators to use its Android operating system and install its applications in order to protect and expand its dominant position in the market for Internet searches using mobile devices.

The Commission states that Google holds a market share of 90% or more in the market for general Internet search services in most EU Member States. The Commission also considers that Google holds a dominant position in both the market for licensable smart mobile operating systems and the market for app stores used with the Android mobile operating system.

First, the Commission's preliminary findings state that manufacturers wishing to pre-install Google's app store for Android, Google Play Store, on their mobile devices are compelled by Google to install Google Search as well and to set it as the default search engine on those devices. In addition, manufacturers wanting to pre-install Google Play Store or Google Search also have to install Google's Chrome Browser.

Second, should a manufacturer wish to pre-install Google's proprietary apps, including Google Play Store or Google Search, on any of its devices, Google would, according to the Commission's preliminary findings, require it to enter into an anti-fragmentation agreement. Such agreement would force the manufacturer to refrain from selling devices running on alternative versions (forks) of Android that are not developed by Google.

Finally, third, according to the Commission's preliminary findings, Google may have granted significant financial incentives to some of the largest smartphone and tablet manufacturers, as well as to mobile network operators, on the condition that they exclusively pre-install Google Search on their devices.

It is now incumbent on Google to respond to the Commission's accusations and to explain that its behaviour have not infringed EU antitrust rules, impeded competition nor harmed consumers.

EUROPEAN UNION - STATE AIDS

The General Court clarifies the application of the presumption of selective advantage

Cases T-479/11 and T-157/12 of the General Court, *République française et IFP Énergies nouvelles contre Commission européenne,* May 29, 2016

In a judgment handed down on May 26, 2016, the General Court ("GC") clarified the standard of proof applicable to the notion of advantage.

This judgment is in line with the GC's 2006 judgment against Le Levant where the GC sanctioned the Commission for having qualified a measure as entailing state aid without conducting an assessment of all the criteria of Article 107 TFEU, particularly the condition on distortion of competition.[1]

In the case at hand, the Commission stated that the change in the legal form of the Institut français du Pétrole ("IFP") into an establishment of an industrial and commercial character (établissement public à caractère industriel et commercial) ("EPIC") granted a selective advantage to the IFP.[2]

First, the Commission noted that EPICs, as legal entities governed by public law, are not subject to insolvency and bankruptcy procedures, which amounts to an unlimited state guarantee. Then the Commission concluded that the state guarantee would give an advantage to the IFP in dealings (i) with banks and financial institutions and (ii) with customers and suppliers. In this respect, the Commission noted that IFP customers or suppliers had rewarded the low risk of default of the IFP by granting it price reductions, thus giving an economic advantage to the IFP.

The plaintiffs did not challenge the first finding of the Commission, i.e., that the legal status of EPICs constituted an unlimited state guarantee. However, the plaintiffs challenged the fact that this unlimited state guarantee granted a selective advantage to the IFP.

The GC ruled in favor of the plaintiffs and sanctioned the Commission for its "purely hypothetical legal approach, which was moreover lacking clarity and coherence" (para. 94). The position of the GC is interesting because it clarifies previous case law on the legal status of EPICs. In the *La Poste* judgment, the Court of Justice determined that the Commission could establish the existence of a selective advantage arising from a state guarantee by way of a presumption without assessing the effects of the guarantee.[3]

In the case at hand, the GC considered that the Commission could not operate with such a presumption. The GC stressed that the validity of the presumption depends on the plausibility of the assumptions on which it is grounded.

1 General Court, February 22, 2006, case T-34/02, *Le Levant*.

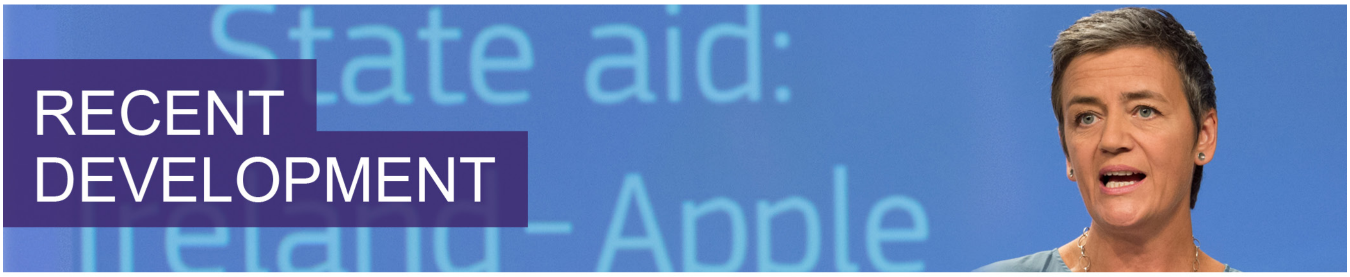
2 General Court, May 26, 2016, cases T-479/11 and T-157/12, *République française et IFP Energies nouvelles c/ Commission*.

3 Commission, Decision n° 2010/605/EU dated January 26, 2010; confirmed by the ECJ on April 3, 2014 in its judgment C-559/12 P, *La Poste*.

Therefore, the Commission was entitled to assume that the state guarantee would give a selective advantage to the IFP in dealings with banks and financial institutions through advantageous credit conditions. However, the Commission erred in law in extending the presumption to demonstrate the existence of a selective advantage in dealings with suppliers or customers. According to the GC, any price decrease provided by the suppliers or the customers could have been explained by several different factors (joint buying, long payment periods, etc.), which were not assessed by the Commission.

Thus, the GC partially annulled the contested decision on the grounds that the Commission extended the presumption developed in the *La Poste* judgment to dealings with suppliers and customers and did not properly assess the existence of a selective advantage.

RECENT DEVELOPMENT



On August 30, 2016, the European Commission ordered the Irish government to revise tax assessments which allegedly led to tax advantages of up to EUR 13 billion and to recover taxes due from Apple, Inc. ("Apple"). The magnitude of this recovery order shows the Commission is determined to enforce its interpretation of State aid rules wherever it believes a fiscal advantage is being granted. While some have applauded the decision, the Commission's approach is also subject to potentially significant questions: some of the concerns raised include (i) whether the Commission has competence to review the tax regime of a member state, (ii) how a tax ruling which simply interprets the existing tax code can be considered to provide an advantage, and (iii) whether the Irish tax code itself should be considered as an existing aid scheme, since presumably it has been in force for more than 10 years. The decision can be appealed by the Irish Government and Apple. However, it is important to note that the Commission has the right to enforce the decision even while the appeal is pending.

Earlier this year, the Commission published, on May 19, 2016, its Communication on the notion of State aid, mostly summarizing its decisional practice and European case law regarding the criteria of qualification of a State aid. In this Communication, the Commission further explains its position with respect to tax rulings. The Communication is available at this **link**.

Now that the Commission's position is clearly stated, undertakings may anticipate and assess the risks they face in relation to their rulings. For further information in this regard, please see our client memorandum: *Tax rulings under EU State aid rules after Apple: What is targeted and what can be done?*, available at this **link**.

FRANCE

Competition law and big data: French and German competition watchdogs issue joint report

Joint paper of the French Competition Authority and the Bundeskartellamt, May 10, 2016

On May 10, 2016, the French Competition Authority (the "FCA") and the German Bundeskartellamt (the "BKA") published a joint paper on data and its implications for competition law (the "Report").[1]

In the Report, the FCA and the BKA analyzed the implications and challenges for competition authorities resulting from data collection in the digital economy.

The purpose of the Report is not to provide universally valid conclusions as to how data and competition law interrelate, but rather to "feed this debate by identifying some of the key parameters that may need to be considered when assessing the interplay between data, market power and competition law."

The Report focuses primarily on merger control, as well as "data-based" conduct by dominant firms. The crux of the Report resides in the insight it provides on assessing the market power of online industries. The Report does not, however, provide definitive answers on how to assess the complex question of market power stemming from data ownership. Instead, it highlights the relevant considerations in this context. In particular, according to the two competition watchdogs, consideration should be given at the outset to the essential features of the online industry, namely network effects, multi-homing and market dynamics. Then, to assess whether data indeed contribute to creating, preserving or strengthening market power, competition authorities will have to evaluate the extent of the economic advantage that data provide. The Report identifies two factors particularly relevant

1 The full report can be found here: http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf.

when considering whether data contribute to market power: (i) the scarcity of data or ease of replicability, and (ii) whether the scale/scope of data collection matters to competitive performance. The conclusion of the Report is particularly nuanced. The FCA and the BKA recognize that in this particular sector, "competition assessment needs to be supported by extremely refined and case-related considerations."

The Report may therefore prove to be a useful tool for entities facing data-related antitrust probes. In this respect, the FCA recently launched a sector inquiry in the digital sector, and sector inquiries usually lead to formal antitrust probes. The first few cases stemming from this endeavor will be of paramount importance for established entities assessing the lawfulness of their online behavior.

FRANCE - MERGERS

The French Competition Authority fines Altice/Numericable Group for non-compliance with some of its commitments

Decision of the French Competition Authority 16-D-07, April 19, 2016

The French Competition Authority (the "FCA") fined Altice/Numericable Group EUR 15 million for its failure to comply with one of the commitments agreed upon with the FCA in the context of the FCA's approval of the acquisition of SFR. Altice/Numericable Group agreed to divest the mobile phone activities of its subsidiary Outremer Telecom ("OMT") in La Réunion and Mayotte. Altice/Numericable Group further agreed to ensure that the economic viability, the market value and the competitiveness of the activities to be sold would not be altered during the period preceding the sale.[1]

As the FCA reiterated in the present decision, it imposed these conditions in order to (i) avoid an excessive market power gain for Altice/Numericable Group on the mobile telephony market in the Indian Ocean, (ii) ensure that the acquisition would not affect the competition dynamics of the market, and (iii) safeguard the pricing position of OMT.

The FCA blames Altice/Numericable Group for increasing OMT's mobile services prices prior to its sale to Telecom Réunion Mayotte – the subsidiary of Iliad and the Hiridjee Group – and therefore for not respecting its commitment to making its best efforts to avoid any risks of loss of competitiveness of the activities to be sold.

After the entry into force of the commitments, OMT implemented various price increases in both its new subscription offers and its existing subscriptions, increases ranging from 17% to 60%. The FCA noted that these price increases led to a cancellation rate three times higher than the average cancellation rate one year earlier. The FCA further observed that the decrease in pricing competitiveness triggered a deterioration in OMT's commercial image among customers. The FCA was not convinced by the argument made by the parties about the improvement of the quality and the diversity of the services offered by OMT. The FCA noted that the main characteristic of OMT was its aggressive price packages and not a "high end" strategic position, which actually defines its competitors.

[1] Decision of the FCA n°14-DCC-160, October 30, 2016 relating to the sole control of SFR by Altice Group (the "transaction Numericable/SFR").

The FCA concluded that the practices implemented by Altice/Numericable Group were violations of a serious nature. The FCA mentioned two aggravating factors: first, the fact that the FCA was not informed of the planning or implementation of the price increases, and, second, that Altice/Numericable Group did not comply with its commitment to refrain from interfering with and being involved in the management of the activities to be sold.

Even though the maximum legal penalty to which Altice/Numericable Group was subject was more than EUR 600 million, the EUR 15 million fine imposed by the FCA appears to be quite high. However, this fine cannot be compared to the one imposed in 2011 on Canal Plus Group for failing to respect several of its commitments, which was followed by a withdrawal of the decision authorizing the merger.[2]

[2] Decision of the FCA n°11-D-12, September 20, 2011 relating to the compliance with the commitment provided in the decision authorizing the acquisition of TPS and CanalSatellite by Vivendi Universal and Canal Plus Group (fined up to EUR 30 million).

FRANCE - MERGERS

The French Competition Authority authorizes Fnac group to acquire Darty

Decision of the French Competition Authority 16-DCC-111 regarding the acquisition of Darty by the Fnac group, July 18, 2016

After a five-month investigation and a Phase II in-depth review that has been conducted since March 2016, the FCA finally approved the exclusive take-over of the Darty group by Fnac. The FCA's approval is subjected to the divestment of six Fnac and Darty stores in Paris and its region.

Fnac won the take-over battle against another major player in the sector, Conforama. The group thereby succeeded in ensuring its control over Darty, one of the leaders in the French electrical retailing sector. This acquisition gives Fnac the opportunity to substantially strengthen its position over "brown" (TV, cameras and audio sets) and "grey" (communication and multimedia) products and to penetrate the "white" (electrical household appliance) products market.

This decision is remarkable insofar as the FCA admitted for the first time that relevant markets in the retail sector included both in-store and online retail channels. The FCA stressed in its press release that the inclusion of both in-store and online retail sales is justified by the fact that "*competitive pressure exerted by online sales has become significant enough to be integrated in the concerned market, whether it comes from pure players (such as Amazon or Cdiscount) or from the stores' own websites which complete in-store physical sales*".

In practice, the FCA specified that it conducted its analysis on local-sized markets considering, on the one hand, in-store physical sales and, on the other hand, online sales in the area. On that basis, the FCA considered that although the deal did not threaten competition in most local markets, such was not the case in Paris and in the Paris region, where, in the absence of sufficient alternatives, the Fnac group had to commit to divest itself of six stores in the area.

The divestiture of these six stores will include five Darty stores (Belleville, Italie 2, Paris Saint Ouen, Paris Wagram and Vélizy II) and one Fnac store (Beaugrenelle).

FRANCE - PROCEDURE

Dawn raids in competition investigations: no direct access to the judge for the visited businesses

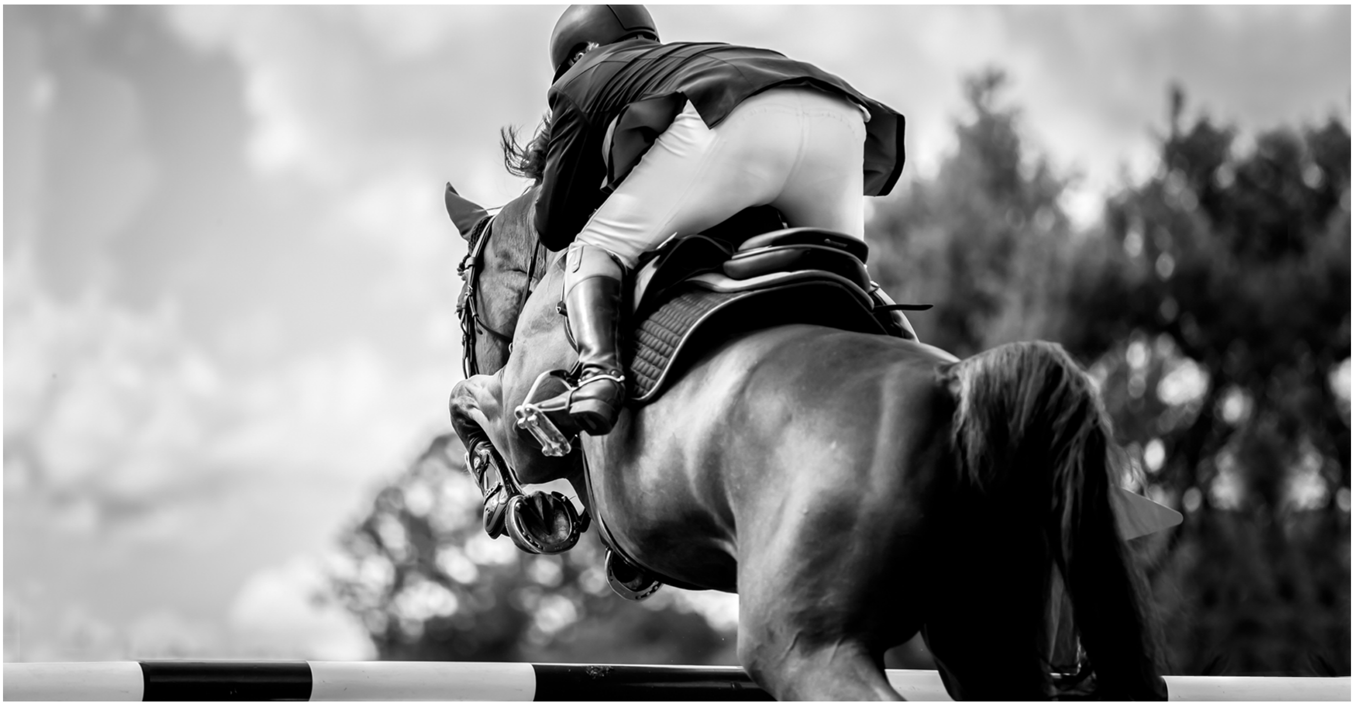
Criminal chamber of the Cour de cassation, March 9, 2016, n°14-84.566

Within the framework of its role as market watchdog, the French Competition Authority (the "FCA") has broad investigative powers. In particular, Article L.450-3 of the French Commercial Code allows FCA officials, when authorized by the judge of liberty and detention (the "JLD"), to enter the premises of businesses targeted by such investigations and to proceed with the seizure of all documents "which facilitate the accomplishment of their mission". These powers of investigation and seizure are, however, governed by Article L.450-4 of the same Code, which reads as follows: "The visit and seizure are carried out under the authority and control of the judge who authorized them."

The question has been raised as to whether this provision grants businesses the right to refer the difficulties encountered during these visits directly to the JLD. In a decision dated March 9, 2016, the French Court of Cassation replied in the negative, pointing out that it was the responsibility of the investigating police officer (the "IPO") present during these visits to inform the judge of any such difficulties. In two other decisions delivered the same day, the court also indicated that the right to contest the JLD's decision to authorize these visits and seizures before the Chief Judge of the Court of Appeal was sufficient to guarantee an effective judicial remedy.

These decisions raise two major problems. On the one hand, they impose a filter between the company visited and the judge, that is, the IPO. On the other hand, they exclusively allow an ex post facto recourse against these operations, which would in no way prevent the seizure of documents that should not be seized in the first place, such as attorney-client correspondence, and would allow them to be returned only a posteriori.

In a decision issued on July 8, 2016, the French Supreme Court confirmed that this position did not violate the rights provided in the Constitution. A claim before the European Court of Human Rights now appears to be the only way to obtain recognition that the absence of an immediate and autonomous judicial remedy against the investigative measures of the FCA's officers constitutes a violation of the rights of defense and the right to a fair trial.



BELGIUM

Belgian Competition Authority vs. International Equestrian Authority: second round

Brussels Court of Appeal, Case 2015/MR/1, Fédération Equestre Internationale/Autorité Belge de la Concurrence, April 28, 2016

On April 28, 2016, the Brussels Court of Appeal dismissed the appeal by the Fédération Equestre Internationale ("FEI") of an injunction issued by the Belgian Competition Authority (the "BCA") that suspended the application of the rule on non-approved competitions (Article 113 of the FEI General Regulations).

On June 22, 2015, the BCA issued a provisional measure that partially suspended the exclusivity clause that penalized participants in the Global Champions Tour ("GCT") League by preventing them from competing in FEI-approved events if they had taken part in unapproved events within the preceding six months. According to the BCA, this rule was in breach of competition law and should have been suspended before a final decision was adopted.

In FEI's view, the BCA had no authority to impose an injunction on events organized outside Belgium, FEI further claimed that the rule was intended to protect the well-being of horses and riders and the integrity of the competition. The Court of Appeal rejected these arguments, stating that the BCA has to safeguard the effective application of EU competition law against FEI's restrictive measures and that the competitors' well-being was already protected by specific regulations adopted at the international level.

The court's dismissal represents a second attempt to overturn the injunction of the BCA following a first request for suspension rejected by the same court on October 22, 2015. Nevertheless, the FEI has made clear that it will continue its legal battle to defend the legitimacy of this rule as a fundamental provision to protect athletes and to maintain a level playing field.

GERMANY

Proposed amendments to the German Act Against Restraints on Competition

On July 1, 2016, the German Federal Ministry for the Economy published its draft for the ninth amendment to the German Act Against Restraints on Competition ("ARC").[1] The draft covers three main areas: (i) changes to the merger thresholds and minor adjustments to the substantive test, (ii) changes to address and expand group liability for cartel offenses under German law, and (iii) amendments to implement the EU private damages directive.[2]

The draft will now be debated by the German Parliament and one should anticipate implementation by the end of the year to ensure timely implementation of the EU private damages directive, which is due no later than December 27, 2016.[3]

1 Amendments to the German merger thresholds and the substantive test

The draft proposes two main changes to the German merger control rules: (i) a new merger review threshold in Section 35 ARC and (ii) clarifications in the substantive test in Section 18 ARC.

A German merger filing is required if the global revenues of all parties to a merger are EUR 500 million or more or if one party has revenues of EUR 25 million or more in Germany and one other party has revenues of EUR 5 million or more in Germany. The draft proposes to include a new Section 35(1)(a), amending the German merger threshold to capture transactions where the combined global revenues are EUR 500 million or more, one party has revenues in Germany of EUR 25 million or more, the value of the transaction is EUR 350 million or more, and at least one other party is active in Germany or plans to be active in Germany. The nexus requirement in the last prong is not further defined, but one may assume that revenues, even if below EUR 5 million or an intent to start selling to German customers, or any other potential connection to Germany, will be considered sufficient.

One may recall that in 2009, the ARC threshold, which could be triggered by one party alone, was amended to require that a second party have revenues of at least EUR 5 million in Germany, which significantly reduced the number of transactions that were notified each year. However, the Federal Cartel Office considered that it should have had an opportunity to review some transactions (or at least one: Facebook/WhatsApp), especially in the technology sector, where the EUR 5 million revenue threshold was not met. The draft accommodates this desire. The change is

1 *See* (last checked July 22, 2016): http://www.bmwi.de/DE/ThemenWirtschaft/Wettbewerbspolitik/wettbewerbsrecht,did=162818.html.
2 There are also some smaller changes and clarifications, in particular an antitrust exemption for certain print media, which are not discussed here.
3 Directive 2014/104/EU of the European Parliament and of the Council of November 26, 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, OJ L 349, of December 5, 2014, pages 1-19.

somewhat unfortunate and is likely to effectively erase the positive effect of the previous amendment and lead to a significant increase in merger notifications.

The draft also amends the substantive test in Section 18 ARC, which applies to the assessment of transactions as well as to the assessment of unilateral conduct. Section 18(2)(a) states that one may consider that a market exists even if services are provided free of charge. This is rather controversial, because it subjects free offerings to the antitrust rules.[4] It will be especially important in the assessment of new business models. Section 18(3)(a) clarifies that the assessment of multisided markets or networks should include an analysis of the parallel use of multiple services and switching costs, and the advantages of size in connection with network effects, access to data and innovation competition.

2 Expansion of liability of groups for cartel fines under German law

The draft proposes to amend Section 81 ARC to clarify and expand the liability of corporate groups for cartel offenses under German law. Corporate liability for antitrust offenses was previously assessed based on the general rules applying to antitrust offenses in Germany. There were several cases, namely relating to the insurance and the sausage cartel cases, where cartel participants escaped fines through corporate restructuring measures. The German Federal Supreme Court requires in its consistent practice that for a succession to liability by way of a merger, the original entity and the new entity must be "almost identical." Where the cartel participant is merged into a significantly larger unit this is not the case, and so the cartel offender disappears and cannot be fined by the Federal Cartel Office.[5] The amendment addresses this (actual or perceived) enforcement gap and creates a special liability regime for administrative offenses that are subject to the ARC.

3 Implementation of the EU private damages directive

Finally, the draft significantly expands the cartel damages provisions of Section 33 ARC. It includes amendments to implement the EU private damages directive and clarifies a range of previously unaddressed or controversial issues, such as access to files, settlements, joint and several liability, etc. The amendments include a rebuttable presumption that a cartel agreement has caused damages, the right of the judge to estimate the damages and the obligation to pay interest on damages claims, detailed rules on the assessment of the passing on of cartel damages, including a rebuttable assumption in favor of the indirect purchaser that the damages were passed on to it, joint and several liability of cartel participants, with exceptions for small companies and leniency applicants, rules addressing the effect of a settlement in the context of joint and several liability, extensive provisions detailing the access of a potential claimant to the file, documents and other evidence, and, last but not least, extension of the statute of limitations from three to five years as well as detailed provisions for start, tolling and expiration of the statute of limitations.

[4] *See* OLG Duesseldorf, Judgment of January 9, 2015, VI-Kart1/14 (V); Wiedmann/Jaeger, Kommunikation & Recht, 2016, 217ff, Bundeskartellamt gegen Facebook: Marktmißbrauch durch Datenschutzverstöße.

[5] *See* Federal Supreme Court, Decision of August 10, 2011, KRB 55/10 (insurance); *see also* Federal Supreme Court, Decision of December 16, 2014, KRB 47/13 (roof tiles); Monopolkommission, Sondergutachten, Criminal Sanctions for Antitrust Offences, BT-Dr. 18/7508, page 4 (Nr. 1) (sausages).

ITALY

The Italian authority fines four companies for media rights collusion

On April 20, 2016, the Italian competition authority issued a fine of EUR 66 million on broadcasters Sky Italy and RTI-Mediaset, as well as the Italian Football League and the marketing agency Infront Italia, for rigging an auction for football broadcasting rights.

According to the authority, the parties altered the outcomes of the league's June 2014 tender worth nearly EUR 1 billion for the allocation of media rights for "Serie A" matches for seasons 2015 through 2018. In particular, the authority held that the tender organizer Infront Italia and the Football League ignored the results of the auction and proposed private negotiations with only two broadcasters, RTI-Mediaset and Sky Italy. The agreement prevented competitors like Eurosport from winning the bid and discouraged potential new entrants from submitting bids. This case was brought to the attention of the competition authority following protests by unsuccessful bidders claiming a lack of transparency on the part of the organizers.

The authority imposed the highest fine on RTI-Mediaset (EUR 51.4 million), which it found responsible for collusion from the opening of the bid envelopes. Infront Italia received a EUR 9 million fine, while the Football League was fined approximately EUR 2 million. Sky Italy, which initially opposed the collusion but later adhered to it, received a fine of EUR 4 million.

RTI-Mediaset, Infront Italia and the Football League have decided to appeal the decision, while Sky Italy said in a statement that it had not yet made a decision whether to launch an appeal. RTI-Mediaset indicated that it will claim unequal treatment and ask the Administrative Tribunal for an interim order suspending the payment of the fine pending its full judgment.

UNITED STATES

Legality of conditional discounts in the U.S.: effects test assessment

Eisai v. Sanofi (Lovenox Suit)

Eisai, Inc. v. Sanofi/Aventis U.S., LLC, No. 14-2017 (3d Cir. May 4, 2016)

On May 4, 2016, the Court of Appeals for the Third Circuit affirmed a lower court's decision dismissing an antitrust suit brought by the pharmaceutical company Eisai Inc. against rival Sanofi-Aventis U.S. LLC ("Sanofi"). Eisai Inc. alleged that Sanofi's marketing and sales tactics for Lovenox, its market-leading anticoagulant drug, were anticompetitive.

Sanofi sold Lovenox to hospitals using a threshold-based discount program and allegedly aggressive sales tactics. If a hospital bought 75% or more of its anticoagulants from Sanofi, it received a progressively increasing 9% to 30% discount.[1] If, however, the hospital bought less than 75% of its anticoagulants from Sanofi or favored competing drugs over Lovenox, the hospital received a flat 1% discount.[2]

Eisai Inc. marketed a competing anticoagulant called Fragmin and sued Sanofi, alleging that Sanofi's practices constituted illegal monopoly maintenance. Lovenox maintained a market share of 81.5% to 92.3% during the relevant period, while Fragmin had the second-largest market share at 4.3% to 8.2%.[3]

In March 2014, the lower court granted summary judgment for Sanofi.[4] The lower court applied the defendant-friendly "price-cost test," under which the plaintiff must show that the defendant sold its product below the relevant measure of cost and was likely to recoup its initial losses through subsequent sales at supracompetitive prices.[5] The parties did not dispute that Sanofi never sold Lovenox to hospitals at a price below its cost.[6]

The Third Circuit affirmed, albeit under a different analysis. Instead of applying the price-cost test, as had the lower court, the appeal judges analyzed the discounting scheme as an exclusive dealing arrangement and applied an effects test under the rule of reason.[7] The Third Circuit stated that, in determining the proper legal standard to apply, the court must consider "whether the conduct constitutes an exclusive dealing arrangement or simply a pricing practice."[8]

Here, Eisai Inc. alleged that Sanofi obtained a unique "indication" (i.e., medical use) and offered a discount that bundled incontestable and contestable indications.

1 *Eisai, Inc. v. Sanofi/Aventis U.S., LLC*, No. 14-2017, at *6 (3d Cir. May 4, 2016) ("*Eisai*").
2 *Eisai* at *6-7.
3 *Id.* at *5.

4 *Eisai, Inc. v. Sanofi/Aventis U.S., LLC*, No. 08-cv-4168, at *1-2 (D.N.J. Mar. 28, 2014).
5 *Id.* at *35, 40.
6 *Id.* at *10, 35.
7 *Id.* at *4, 12-13.
8 *Id.* at *25.

The Third Circuit found that Sanofi's bundle resembled a multi-product bundle and that the bundling – not the price – served as the primary exclusionary tool. Accordingly, the appeal judges followed the rule of reason/exclusive dealing analysis.[9]

To determine whether substantial foreclosure occurred, and thus whether the conduct constituted an illegal exclusive dealing arrangement, the *Eisai* court asked whether competing products were available to consumers, not whether consumers ultimately chose to purchase a competitor's product.[10] Here, the Third Circuit concluded that hospitals were free to switch to other anticoagulants and would not be penalized beyond the loss of the discount.[11]

The decision is in apparent conflict with the European courts' analysis in the Court of Justice's 2015 Post Danmark II (C-23/14) and the General Court's 2014 Intel (T-286/09; on appeal before the Court of Justice) cases on rebates.

[9] *Id.* at *27.
[10] *Eisai* at *14.
[11] *Id.* at *21.

For example, the *Intel* court found that the so-called exclusivity/loyalty rebates at issue, when offered by a dominant company, "are incompatible with the objective of undistorted competition within the common market" and therefore applied a by-object analysis.[12] The *Intel* court added that the term "exclusivity rebates" will also be used for rebates that are conditional on the customer's obtaining "most of its requirements" from the dominant undertaking, suggesting that purchasing obligations covering 75% or 80% of a customer's requirements are sufficient to constitute "most of its requirements".[13]

Accordingly, it appears that, in the United States at least, the Third Circuit assesses under an effects test forms of conditional discounting that would likely be prohibited in Europe as a by-object violation. Companies operating in both the United States and Europe should tailor their discount programs to the laws of each jurisdiction with care.

[12] *Intel* at § 77.
[13] *Id.* at §§ 76, 135.

WILLKIE'S CONTACTS

Jacques-Philippe Gunther
Partner
33 1 53 43 4538
jgunther@willkie.com

David Tayar
Partner
33 1 53 43 4690
dtayar@willkie.com

Susanne Zuehlke
Partner
32 2 290 1832
szuehlke@willkie.com

William H. Rooney
Partner
Chair, Antitrust Practice
1 212 728 8259
wrooney@willkie.com

Faustine Viala
National Partner
33 1 53 43 4597
fviala@willkie.com

Adrien Giraud
National Partner
32 2 290 1836
agiraud@willkie.com

Please visit our Antitrust and Competition webpage.

If you have any questions regarding this newsletter, please contact any of the above attorneys or the Willkie attorney with whom you regularly work.

WILLKIE FARR & GALLAGHER LLP

NEW YORK WASHINGTON HOUSTON PARIS LONDON FRANKFURT BRUSSELS MILAN ROME

www.willkie.com

in alliance with Dickson Minto W.S., London and Edinburgh