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Antitrust & Competition

Parental liability: One Step Forward, Two Steps Backward...

In the past weeks, the Court of Justice of the European Union has delivered several judgments addressing parental liability issues and more precisely the presumption of decisive influence.

The European Commission indeed relies on a presumption of decisive influence from the parent company over its wholly owned or almost wholly owned subsidiary. As a result, group holding companies frequently bear the liability of infringements, even where they have not directly participated in the infringement. Parental liability automatically increases the level of fine incurred since the maximum of 10% of total turnover then applies to the group as a whole and not only to the subsidiary concerned.

It is then up to the parent company to bring sufficient evidence that it has not exercised a decisive influence on its subsidiary to rebut the presumption. Providing material evidence of such negative facts (not exercising a decisive influence) however amounts to a real *probatio diabolica* and the evidence brought by companies is almost always considered insufficient to rebut the presumption.

This presumption first seemed in danger when Advocate General Yves Bot concluded in the Steel Beams Cartel case that such a reversal of the burden of proof unquestionably affects the rights of the defence. The Advocate General recommended that the Commission be required to corroborate the presumption by other elements in order to consider the parent company liable (opinion delivered on 26 October 2010 in joined cases C 201/09 P and C 216/09 P). However, for the moment, this suggestion has not been followed by the Court.

A few months later, the presumption was again called into question in the Bleaching Agents cartel case (T-185/06, 16 June 2011). For the first time, the General Court questioned the analysis conducted by the Commission on the evidence submitted by the group concerned to prove the autonomy of its subsidiary. The General Court considered that the Commission had not provided sufficient reasoning to justify setting aside these elements. If it is the first time the Commission is criticized on such grounds, it is to be noted that the Commission's motivation in this case was not fully developed.

However, so far, the presumption still fully applies. The Court and the General Court still approve the Commission for applying this presumption, including in cases involving purely financial holding companies on the ground that it cannot be excluded that the investments' coordination at the holding level allows this holding to exercise a decisive influence over its operational subsidiaries. The General Court confirmed this solution in its judgment of 7 June 2011 in the Methacrylates cartel case (cases T-206/06 and 217/06) as well as in its judgment of 14 July 2011 in the Bleaching Agents cartel case (cases T-189/06 and 190/06).

http://curia.europa.eu/jcms/jcms/j_6/

French Competition Authority Obtains a Significant Decrease of Interbank Cards Fees

Last year, the Competition Authority took action against interbank fees related to the implementation of the dematerialization of the check-exchange system. Heavy penalties were imposed on the most important French banks for charging nonjustified interbank fees (case n°10-D-28).

This new case concerned the “*Groupement des cartes bancaires*” (Payment Cards’ Group) representing the main banks that are operating in France, and more specifically the “*Commission interbancaire de paiement*” (CIP, Interbank Payment Fee) and the “*Commission interbancaire de retrait*” (CIR, Interbank withdrawal fee) between four parties : the cardholder, the merchant, the cardholder’s bank and the merchant’s bank.

The authority considers that the joint determination of the level of interbank fees within the group qualifies as an agreement by establishing one unique fee for all banks without possibility for them to adjust its amount. If the joint determination of fees is not necessarily anticompetitive in itself, the level of such fees has to be justified by objective factors.

Coming back to a 20-year-old case, in which fees had been set on the basis of the Competition Council’s injunctions, the Authority expressed new competition concerns about the level of those fees. Neither the Competition Council’s prior decision nor the letter of comfort issued by the European Commission are considered as frustrating new assessment and findings on the fees’ level by the Competition Authority.

The Payment Cards’ Group submitted commitments consisting of a decrease of 36% on CIP fees and of 20% on CIR fees. Those commitments, which apply for four years, are considered sufficient to close the proceedings.

There are other pending procedures concerning other payment cards systems and other means of payment.

<http://www.autoritedelaconurrence.fr/pdf/avis/11d11.pdf>

Sua Sponte Action by the Competition Authority on the Competition Between E-Commerce and Traditional Distribution

The Competition Authority is once again investigating the e-commerce sector.

After making important decisions and affirming its positions on the new Guidelines on Vertical Restraints, the Competition Authority announced that an opinion will be issued June 2012 in order to:

- assess the competitive pressure online commerce exerts on traditional distribution;
- identify the barriers that may restrict the competitive pressure of online distribution over traditional distribution.

This *sua sponte* action is probably related to the investigation launched in 2009 by the Authority’s economic department to compare online prices and prices in physical shops for a number of products.

The Authority’s aim is to assess whether e-commerce effectively translated into decreased prices online as well as in traditional distribution outlets. The Authority’s message is clear.

<http://www.autoritedelaconurrence.fr/pdf/avis/11soa02.pdf>

In Brief – European Union

THE COMMISSION PUBLISHES ITS ANNUAL REPORT FOR 2010

The annual report starts with the observation that 2010 was a very active year in competition enforcement and reforms. Antitrust fines almost reached a historical record with nearly €3 billion and mergers slightly progressed compared to 2009 with 270 notifications.

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/861&format=HTML&aged=0&language=EN&guiLanguage=en>

THE COMMISSION TAKES ACTION AGAINST A WASHING POWDER CARTEL

The Commission has fined two producers of washing powder a total of €315.2 million for operating a cartel in the market for laundry powder detergent. The third cartel participant got immunity for revealing the cartel to the Commission. This is the first cartel case in 2011.

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/473&format=HTML&aged=1&language=EN&guiLanguage=en>

THE COMMISSION DECIDES TO REPEAL THE HEAT STABILISERS CARTEL DECISION FOR TWO OF THE UNDERTAKINGS CONCERNED

The Commission has decided to repeal its 2010 decision for two of the undertakings concerned in the Heat Stabilisers cartel case. According to a Court judgment of 29 March 2011, actions against investigative measures have suspensive effects only for the party that brought the action. In this case, the ten-year limitation was over for the two undertakings concerned and the only suspensive element was the action brought against investigative measures by other companies involved in those proceedings.

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/820&format=HTML&aged=0&language=EN&guiLanguage=en>

PUBLIC CONSULTATION ON A DRAFT GUIDANCE PAPER ON QUANTIFYING HARM IN ACTIONS FOR DAMAGES

The Commission invites all interested parties to submit comments before 30 September 2011 on this draft guidance paper on quantifying harm action for damages based on breaches of articles 101 and 102 of the Treaty.

http://ec.europa.eu/competition/consultations/2011_actions_damages/draft_guidance_paper_en.pdf

PUBLIC CONSULTATION ON DRAFT BEST PRACTICES ON COOPERATION BETWEEN EU COMPETITION AUTHORITIES IN MERGER REVIEW

The Commission had invited interested parties to submit comments before 27 May 2011 on draft Best Practices on Cooperation between EU National Competition Authorities to enhance and facilitate exchanges of information in merger cases which are notifiable in more than one Member State.

The observations received by the Commission, which are not numerous, are now available online.

http://ec.europa.eu/competition/consultations/2011_merger_best_practices/en.pdf

TOWARDS INCREASED DUE PROCESS IN THE SETTING OF FINES?

Speaking at the European Competition Day taking place in Budapest on 30 May 2011, Commissioner Almunia stated that due process will be improved by the inclusion of a section on fines in the Statement of Objections. Companies will have a better idea, at an early stage, of the elements that will be taken into account to calculate fines.

The Best Practices will be amended in this respect before the end of this year with a view to limiting modifications of fines after the release of decisions (as it happened twice in the recent Prestressing Steel case).

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/396&format=HTML&aged=0&language=EN&guiLanguage=en>

In Brief – France

ANNUAL REPORT OF THE COMPETITION AUTHORITY

The Competition Authority published its annual report for 2010. This year, the thematic study focuses on food retail. It naturally addresses issues linked to the barriers to the entry of new players (following the 2010 opinion adopted on this subject) and, more widely, merger control in the retail sector, issues related to the assessment of buyer power, etc.

The number of *sua sponte* opinions delivered by the Authority is significantly increasing, as evidenced by opinions delivered on food retail and online advertising.

In 2010, the Authority received 213 merger notifications, an increase over last year. Finally, in 2010, the Authority imposed total fines of € 442.5 million, including € 384.9 million imposed by one single decision in the case on the digital system for processing checks.

http://www.autoritedelaconurrence.fr/user/standard.php?id_rub=22&id_article=1636

LEFEBVRE BILL ON RETAIL FOOD AND OTHER COMPETITION ISSUES

A Bill related to the retail food sector was introduced before the Parliament. One of this Bill's aims is to improve the mobility of independent outlets. It follows an opinion released last November by the Authority where it expressed doubts on a number of provisions such as noncompete. Among the large number of amendments filed, some do not relate to retail food. One of them proposes to introduce a power of intervention of the Authority as *amicus curiae* in competition-related judicial proceedings.

http://www.assemblee-nationale.fr/13/dossiers/protection_information_consommateurs.asp

THE COMPETITION AUTHORITY INTERVENES ON EXCLUSIVITY CLAUSES IN THE GIFT CARDS SECTOR

The Competition Authority has again taken action against exclusivity clauses. Those were for a large part compliant with the conditions laid down in the Block Exemption Regulation on Vertical Restraints, except that they benefited a company with market shares far over the 30% maximum set by the Block Exemption Regulation.

The commitments proposed allowed to close the procedure. Commitments will not generally prohibit such exclusivity provisions in the future but will only open a period of several months without exclusivity to allow competitors to enter the market. The company concerned will be allowed to conclude exclusivity clauses afterwards, but for a maximum duration of 3 years.

<http://www.autoritedelaconurrence.fr/pdf/avis/11d08.pdf>

TWO PHASE II LAUNCHED IN MERGER CONTROL

Within a few days, the Competition Authority has opened a phase II in two cases. The first one concerned an acquisition by the market leader in the package delivery sector. This was the third time since 2009 that the company notified the Authority about its plans for a horizontal merger.

The notification was withdrawn a few days after the opening of a phase II.

The Competition Authority also opened a phase II on 5 July 2011 on an acquisition of Quartier Français Spiritueux by COFEPP, another horizontal merger in the rum and spirits sectors.

Finally, time periods are presently suspended in several cases, requests for additional information conditioning the completeness of the notification.

http://www.autoritedelaconurrence.fr/user/standard.php?id_rub=388&id_article=1619

http://www.autoritedelaconurrence.fr/user/standard.php?id_rub=388&id_article=1652

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