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FRANCE

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Major development in competition policy on merger control in France with online distribution brought into the definition of relevant markets

by Louis Vogel & Joseph Vogel

The decision to clear FNAC/Darty merger (Decision No. 16-DCC-111 of 27 July 2016) represents a significant development in the decision-making practice of the French Competition Authority in the field of merger control. It is also likely to influence the law on anticompetitive practices.

The full text of the decision has not yet been made public. In effect, there is always a delay between the announcement of the decision on the Competition Authority's website or publication of a press release and its publication in full, in order to allow the parties to redact any confidential information they wish to have protected.

The press release published on 18 July 2016 is however sufficiently explicit and shows the distinct change in the Competition Authority's decisional practice. In effect the Authority expressly declares that it is "develop[ing] its market assessment and considers that retail distribution of brown (TV, cameras and audio sets: MP3, DVD and Blu-ray players...) and grey products (communication and multimedia: tablets, laptops, smartphones, etc.) includes both sales completed in-stores and online. It deems that competitive pressure exerted by online sale 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".

This development is not a one-off decision on a particular case but a deliberate change of direction. The President of the Authority had previously announced the advent of this new approach on several occasions, including on 21 June 2016 during a hearing by the National Assembly's Economic Affairs Commission and on 6 July 2016 during a presentation to the press of its 7th Activity Report.

• It is however important to be clear about the scope of this breakthrough.

It does not mean that the Authority did not previously take account of competitive pressure from the Internet in its assessment of merger operations. It has done so for some although not at the market definition stage but during its competitive analysis. It was thus able to authorize a concentration which resulted, inter alia, in the acquisition of a market share of 47% on the retail market for Internet access distribution in light of the competitive pressure exerted on brick and mortar distributors by online sales (see Decision No 14-DCC-15 of 10 February 2014, LawLex201400001751JBJ).This same approach has also been taken by other national authorities (see for the UK: OFT Decision of 26 October 2011, Amazon/The Book Depository; CMA Decision of 30 June 2016, Mapil Bidco Ltd/Chain Reaction Cycles Ltd, Hotlines Europe Ltd and Decade Europe Ltd; and in the Netherlands, NMa Decision of 28 August 2008, Gouden Gids/De Telefoongids).

The inclusion of online sales in the market definition phase constitutes a fundamental and welcome change to the law in France given the massive growth of this type of distribution channel. It had become increasingly absurd for the competition authorities to pursue an intransigent policy with regard to the restriction of online sales compared to sales in stores while continuing to assert that the channels did not belong to the same market. The Authority has in fact merely aligned itself to more advanced laws in this area. The US authorities have been authorizing mergers based on the competitive pressure exerted by online trade for a number of years now (see relative to the office stationery market, Office Depot/Office Max merger, FTC Decision of 1 November 2013)

It is also important to be aware of the limitations of this breakthrough. FNAC considered that the competitive pressure from online sales required a national market definition since the pricing policy of pure players such as Amazon or Cdiscount is national. The Authority has not yet crossed that bridge and has stayed with the traditional analysis of local competition by catchment area estimating for each local area the market share of the new entity and its competitors, including online operators, which resulted in it ordering six stores to be divested in Paris and its suburb, i.e. operation of stores under another brand.

We can only hope that the Authority will take this evolution to its logical conclusion by abandoning the analysis by catchment area too.

In any case, this significant breakthrough in competition policy could allow for the recognition of national markets integrating Internet sales within conventional markets. We are referring in particular to TV advertising for which the competitive pressure from the Internet is head-on and unrelenting. Other sectors, where competition from the Internet is much less intense, the conventional market rationale may continue to prosper.

• To what extent will the law on anticompetitive practices be affected?

The FNAC/Darty decision concerns merger control. We know that the definition of markets is not necessarily the same for merger control as for abuse of dominant position and even less so with regard to the law on restrictive agreements. Merger control is subject to a prospective analysis while a finding of abuse of dominant position is based on a post hoc analysis of past behavior. For a case in the pet food sector, the European Commission was thus able to give a broad definition in the field of merger control (Commission Decision EC No M.2544 of 15 February 2002) while the French Competition Council at the same time adopted a very strict and limited definition of the market of top-of-the-range dry dog food sold in specialized channels in a matter of abuses of a dominant position (Competition Council decision No 05-D-32 of 22 June 2005, LawLex200500006651JBJ).

However, in the present case, the difference of approach should not lead to

outcomes that are fundamentally different from each other. The rise in the power of the Internet and competitive pressure is not new. The economic weight of the Internet giants (GAFA) has been upsetting the balance of power for some time now. In the field of online sales in particular, marketplaces now have the market power, rather than conventional distributors or suppliers. Therefore, there is no reason that the new approach of the Competition Authority adopted in the context of the control of concentrations should not also develop in the field of anticompetitive practices.

This decision could also be an opportunity for the competition authorities to revisit their highly favorable approach to online operators in the area of vertical agreements. For many authorities, any restriction of online sales and even any difference in the conditions of remuneration between online sales and sales in physical stores (see Germany, Bundeskartellamt decision of 13 December 2011, Dornbracht; of 28 November 2013, Gardena; of 23 December 2013, Bosch Siemens Hausgeräte GmbH; of 18 July 2016, Lego) constitutes a restriction by object and a hardcore restriction. The considerable market power of Internet players that the decision of the Authority has finally addressed should perhaps lead competition authorities to show less bias and more neutrality towards online operators.

GREECE

M&P BERNITSAS LAW OFFICES

Legislative efforts towards the liberalization of the public and private use passenger vehicles' sector

by Augustine Almyroudi & Tania Ptasalia

The legislation governing the operation of public use passenger vehicles (i.e., taxis, special hire and special transport vehicles) has been remodeled in the past years with a view to liberalize the market. In this context, new provisions have also been established gradually, which have shaped the framework regarding hire of private use passenger vehicles with a driver (chauffeur services) and the provision of transport services by tourist accommodations to their clients (shuttle services).

By way of a legislative amendment of 2012, the public use passenger vehicles' sector (i.e., vehicles of up to five seats (taxis) and vehicles of six to nine seats (special hire vehicles)), has been reformed in order to open the market and implement the issuance of licences through a competitive process.

A new procedure for the licensing of public use passenger vehicles is set forth, according to which the number of licences shall be determined at a regional level by the Head of each Region every two years on the basis of a formula which takes into account local needs.

Private use passenger vehicles, travel agencies, car rental companies and public use passenger vehicles' companies and joint ventures have been granted the right to let out for hire private use passenger vehicles with a driver (chauffeur services) only following pre-booking, for a minimum of six hours at a pre-agreed consideration, with the aim to bolster quality tourism.

Finally, with a view to increase country's touristic attractiveness, tourist accommodations have been granted the right to use private use passenger vehicles, owned or leased, for the transport of their clients, from arrival or departure points to their facilities and vice versa, without a fare (shuttle services). Tourist accommodations may also enter into contract(s) with public use passenger vehicles' companies or joint ventures, for the transport of their clients from and to arrival or departure points with a fare.

ROMANIA

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Reduction of the fine imposed on the fuel market by Georgina Dinui

At the end of 2011, the Competition Council sanctioned 6 oil companies with a fine of around 206 million euro (at that time), for participating in an anticompetitive agreement on the fuel market. As a result of the investigation, the authority held that the six companies infringed the national competition provisions as well as article 101 TFUE by concluding an agreement of withdrawal from the market of a particular gasoline product (Eco Premium).

On 24th of March 2016, in the appeal submitted by one of the sanctioned undertakings, OMV Petrom Marketing, the High Court of Justice partially modified the Competition Council's decision no. 97/2011, through which it was imposed a fine of 366,5 million lei. The Supreme Court thus reduced by 20% the fine applied to OMV Petrom Marketing. This solution follows the Supreme Court's practice in the annulment of the decision no. 97/2011, where other three companies benefited of a similar reduction of the fine imposed by the Competition Council (Rompetrol Downstream, Mol and ENI).

The fine imposed to the oil companies in the Eco Premium file continues to represent the highest fee ever imposed by the Competition Council in one case.

TURKEY Paksoy

Attorney-client privilege by Togan Turan

Within the investigation launched against Dow Turkey, represented by Paksoy, the Competition Board decided to return the documents among the ones seized by the case handlers during the on-site inspection following the request based on the attorney-client privilege (02.12.2015, 15-42/690-259).

Although the Board previously recognized the attorney-client privilege, this decision has shed light on the principles applicable for this privilege.

The relevant decision refers to the principle of confidentiality of information/documents arising from the professional relationship between an attorney and its client and defines this principle as (i) non-disclosure of correspondences between an attorney and its client and information provided by these parties during the legal services and (ii) protection of the attorney-client communications. To that end, the documents that may benefit from the privilege are: (i) correspondences concerning right of defense between an independent attorney (i.e. without an employment relationship with the client) and its client and (ii) documents prepared by an attorney for the legal services. Notably, the privilege is not applicable for in-house lawyers.

The Board indicates that the confidentiality of the attorney-client relations is linked to the right of defense through stating that the documents that are not directly related to use of the client's right of defense or aim to facilitate/conceal an ongoing/a future violation do not benefit from attorney-client privilege, even if they are related to the subject of investigation or inspection.

Moreover, the Board's decision sets forth the principles for using the attorney-client privilege. In this respect, if the case handlers intend to obtain a document protected by attorney-client privilege, all objections should be raised during the on-site inspection through putting into writing in the minutes, if possible and objections should be justified by providing information on (i) the document's addressor and addressee, (ii) the parties' obligations and responsibilities and (iii) purpose of the document.

UNITED KINGDOM SHEPHERD+WEDDERBURN

When is a patent settlement a competition issue? by Krzysztof Kanton

In February, the UK's Competition and Markets Authority (CMA) fined a number of pharma companies a total of £45m for breaches of competition law (https://www.gov.uk/government/news/cma-fines-pharma-companies-45-million). This case is of interest as it is one of the first patent settlement cases which was examined by the UK authority. There are a number of parallel EU cases (some of which are currently under appeal).

The case concerned various patent settlements between the originator GSK and various generic companies. As part of the court settlement, GSK agreed to make monetary payments to generic companies as well as supplying them with a generic version of their product. In the CMA's view these payments and supply agreements were aimed at delaying the potential entry of generic competitors into the UK market.

This constituted both an abuse of dominance by the patent holder as well as a restrictive agreement between the patent holder and generic companies. One company (IVAX) was cleared of being party to a restrictive agreement (I represented IVAX in these proceedings. The views expressed in this note are personal and do not necessarily reflect the views of Shepherd and Wedderburn or any of its clients).

Why is this relevant? These cases are polemically called 'pay for delay' cases, as the authorities believe that the only reason for any payment or value transfer is to achieve delayed market entry. The existence of patent protection is not necessarily relevant for the analysis.

Could this have relevance beyond pharma? Yes, there is no reason why the analysis could not be read across other industries where patents over a product or components are regularly used to prevent entry or where product innovation and ever-greening are part of the competitive process. The analysis is complex and multi-layered. It presents challenges but also opportunities to both sides of the supply chain or potential litigation.

UKRAINE  Asters

Merger Filing Procedures Simplified in Ukraine by Tetiana Vovk

On 19 August 2016 the updated Ukrainian merger regulation, generally making the filing process far less formalistic, came into effect.

The Anti-monopoly Committee of Ukraine announced the upcoming revision of merger procedural rules in mid-July 2015. After the new filing thresholds were introduced in May 2016, re-thinking of the applicable procedures became, possibly, the next major merger control reform's priority on the agenda.

The new document significantly reduces disclosure requirements and simplifies filing forms especially for mergers with no or limited overlaps that qualify for the fast-track proceeding.

In particular, it aims to lift an enormous administrative burden for filers, who earlier had to provide rather voluminous documents and information that had no relevance for the substantive analysis of the notified transactions. The following will no longer need to be filed under either simplified or regular proceeding: detailed information on sales, market shares, customers' and competitors' data with respect to non-relevant markets (now, only a summary of such other activities); lists of all group subsidiaries (now, only the Ukrainian ones and those with Ukrainian turnover); lists of minority shareholdings; detailed information on the officers/directors and relatives (subject to conditions), etc. On the other hand, the AMC intends to more thoroughly analyze information on the filers' ownership structure and financing of notified transactions.

While generally the filing process becomes more business-friendly, in cases where competition concerns are potentially possible the applicants will need to provide detailed justifications based on the economic analysis of post-transaction effects for the markets involved.

Notably, disclosure requirements under the concerted practices regulation remain the same for now. Thus, the filers seeking clearance for the non-compete and similar restrictive provisions related to a concentration are still required to disclose the same extensive amount of information and documents (similar to what was required under the old merger regulation).

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