

The French Administrative Supreme Court holds that aids to the daily press financed by a tax levied on advertising expenses affects trade between Member States and consequently amount to State aid (Auchan)

France, State Aids, Effect on trade , State aid classification, State intervention, Press

French Administrative Supreme Court (Conseil d'État, 8ème et 3ème sous-sections réunies), 21 December 2006, SA Auchan France, n°288562

<http://www.legifrance.gouv.fr/WAspa...>

Background and facts

Article 23 of Law n° 97-1269 of 30 December 1997 ([1]) introduced a tax levied on certain advertising expenses (the *Tax*). The revenue of the *Tax* is used for the financing of a fund dedicated to the modernization of the daily press. Fund subsidies were granted to undertakings with several purposes, in particular the enhancement of the productivity of press enterprises and agencies, the promotion of the diversity of publications and the use of new technologies for the recording, broadcasting and spreading of information.

SA Auchan France, a French retailing group, brought an action before the *Tribunal administratif de Lille* (administrative court of Lille) to obtain reimbursement of the *Tax* paid on the advertising leaflets it distributes. SA Auchan France claimed that the *Tax* amounted to State aids which were not notified at the European Commission prior to its entry into force in accordance with article 88(3) EC. As a general reminder, State aid schemes cannot be implemented prior to public authorities obtaining the Commission's approval, otherwise they amount to "*illegal*" State aids. As a direct effect of these principles, national courts have to take all measures necessary to suspend the implementation of any illegal State aids.

By judgment of 27 May 2004, the *Tribunal administratif de Lille* (administrative first instance court of Lille) granted SA Auchan France's application and ordered the repayment to SA Auchan France of the *Tax* paid. By judgment of 25 October 2005, the *Cour administrative d'appel de Douai* (administrative court of appeal of Douai), to which the Minister of Economy appealed, confirmed the first instance judgment. The Minister of Economy entered an appeal in law before the Conseil d'État (French administrative supreme court).

Findings of the Conseil d'État

By judgment of 21 December 2006, the Conseil d'État rejects the appeal from the Minister of Economy. The Conseil d'État holds that the State is liable for the reimbursement to SA Auchan France of the *Tax* paid, as part of an aid scheme which

was not notified to the Commission.

The Conseil d'État's judgment is two-folds :

it make a classical application of State aid rules to parafiscal tax mechanisms ;

it applies a broad interpretation given the notion of effect on trade between Member States in State aid cases.

Admissibility of the action for reimbursement of the Tax

As a reminder, pursuant to established case law of the ECJ on parafiscal charges, when an aid measure of which the method of financing is an integral part has been implemented in breach of the obligation to notify, national courts must in principle order reimbursement of charges or contributions levied specifically for the very purpose of financing that aid [2].

In the line with these principles, the Conseil d'État points out the Tax is levied solely and specifically for the purpose of financing the aid scheme to the daily press. Consequently, the Tax should be considered as part of the aid scheme.

Effect on trade between Member States

To challenge the application of the rules on State aids, the Minister of Economy alleged that the aid scheme did not affect trade between Member States. The Minister of Economy insisted on the geographical, cultural and linguistic specificities of the markets in the press sector to exclude the existence of a transnational market and show the lack of effect on intra-Community trade and of any restriction on competition as a result of the aid scheme.

The Conseil d'État rejected the argumentation of the Minister. First, the Conseil d'État noted that the national press is distributed on the territory of other Member States, even if only to a limited extent.

Furthermore, the Conseil d'État focuses on the Tax mechanism, considering that, irrespective of the distribution areas of the national press, the regional press and freesheets, the aid scheme financed by the Tax is likely to affect inter-State trade. Indeed, the Conseil d'État points out in particular the impact that the Tax may have on the sale of advertising spaces which may trigger intra-Community exchanges.

This broad interpretation of the requirement of effect on trade between Member States appears to be in line with the practice of Commission and the CFI/ECJ in State aid cases. Aids only very rarely fall out of the scope of the prohibition set by article 87 EC. Hence, Advocate General Jacobs held that *"It is clear from the Court's case-law that the requirement of an effect on trade between Member States is easily satisfied"* [3].

The concept of effect on trade between Member States is also interpreted very broadly and easily satisfied in articles 81 and 82 EC cases, where the national scope of the practices concerned does not prejudice the potential impact on intra-Community trade [4].

However, the solution of the Conseil d'État appears to take the opposite view of a position adopted by the Commission in 1996 in response to a written question from an Austrian MEP [5] concerning an aid scheme to the Austrian press [6]. Karl Van Miert (Commissioner for Competition at that time) had held that subsidies granted by Austria to daily and weekly political, economical and cultural newspapers and magazines did not fall within the scope of article 87 EC, since the distribution of these newspapers and magazines was essentially limited to the national territory and the aid therefore did not affect trade between Member States.

The apparent discrepancy between the Conseil d'État's judgment and the position of the Commission should however be put in perspective:

First, in 1996 the Commission was only responding to a question raised by a MEP : this position was not taken in the course of formal proceedings and cannot therefore be considered as a binding ruling.

The aid scheme to the French daily press examined by the Conseil d'État was financed by a tax levied on advertising expenses, including expenses by undertakings from other Member States. This difference with the Austrian case (where the financing of the aid scheme was not looked at) could explain why the French aid scheme was found to have an impact on intra-Community trade. One of the key criteria taken into account by the Conseil d'État to assess the impact on trade between Member States lies actually in the financing mechanism of the aid scheme, rather than in the aid scheme and its beneficiaries as such.

Notwithstanding the position held by the Commission in 1996, it could be argued the Conseil d'État could also, in line with the case law on articles 81 and 82 EC mentioned above, have grounded its decision on the fact that France represents, as such, a substantial part of the common market, and that this is sufficient to consider that the aid scheme has an effect on trade between Member States.

[1] JORF n° 303 of 31 December 1997, p. 19261.

[2] ECJ, October 21th, 2003, van Calster and Cleeren and Openbaar Slachthuis, Joined Cases C-261/01 and C-262/01, [2003] ECR I-12249, paragraph 54

[3] Opinion of Advocate General Jacobs delivered on 23 March 1994, ECJ, September 14th, 1994, Spain v. Commission, Joined Cases C-278/92 C-278/92, C-279/92 and C-280/92, [1994] ECR I-4103.

[4] Courts have even ruled that agreements which operates in only one Member State is also capable of affecting trade between Member States (ECJ, February 28th, 1991, Delimitis, Case C-234/89, [1991] ECR I-935) and that the mere fact that a cartel relates only to the marketing of products in a single Member State is not sufficient to exclude the possibility that trade between Member States might be affected (ECJ, July 11th, 1989, Belasco a. o. v. Commission, Case 246/86, [1989] ECR 2117). Similarly, in abuse of a dominant position cases, it has been held that a Member State (ECJ, November 11th, 1986, British Leyland v. Commission, Case 226/84, [1986] ECR 3263), or even part of a Member State (ECJ, May 31th, 1979, Hugin Kassaregister and Hugin Cash Registers v. Commission, Case 22/78, [1979] ECR 1869), is likely, in itself, to be a substantial part of the common market.

[5] MEP : Member of the European Parliament

[6] Response to written question E-2260/95 from Susanne Riess-Passer (NI) to the Commission, *OJEU* C 300, 13 November 1995, p. 51 and *OJEU* C 161, 05 June 1996, p. 2

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The French Competition Council orders the electricity incumbent to amend early termination clauses in supply contracts (EDF)

France, Unilateral practices, Abuse of dominant position, Interim measures, Liberalisation, Energy

Competition Council (Conseil de la concurrence), 25 April 2007, Decision n° 07-MC-01, concerning interim measures requested by KalibraXE

<http://www.conseil-concurrence.fr/u...>

Communication from the Commission - Inquiry pursuant to Article 17 of Regulation (EC) n° 1/2003 into the European gas and electricity sectors (Final Report) (SEC(2006) 1724), COM (2006) 851 Final

DG Competition report on energy sector inquiry, SEC(2006)1724, 10 January 2007

<http://ec.europa.eu/comm/competitio...>

Background and facts

Pursuant to Directive 96/92/EC [1] and subsequently Directive 2003/54/EC [2], all non-household customers (i.e. any natural or legal persons purchasing electricity which is not for their own household use) became eligible customers as of 1st July 2004, meaning that they are free to purchase their electricity supplies from alternative suppliers, rather than from EDF.

On 1st July 2007, the French electricity markets will be fully liberalized, as all electricity consumers (i.e. both non-household and household customers) become eligible.

In this context, a trading operator, KalibraXE, argued before the French Competition Council (the Council) that exclusivity clauses contained in EDF supply contracts prevent other suppliers from entering the market with alternative or complementary offers. In addition to a complaint on the merits for alleged abuse of a dominant position, KalibraXE requested interim measures pursuant to article L. 464-1 of the French Commercial Code.

Findings of the Competition Council

Market definition and market position of EDF

The Council defined the relevant market as the market for the supply of electricity to eligible end customers who have exercised their eligibility, taking into account the difference between regulated and non-regulated tariffs and the legal

impossibility of returning to EDF regulated tariffs once eligibility has been exercised.

The Council stated that EDF is likely to hold a dominant position, with a market share between 53.5% and 88% depending on the applicable figures and assessment method.

Exclusivity provisions

As a general rule, the Council stated that exclusivity provisions to the benefit of a dominant operator do not per se amount to an abuse of a dominant position. Nevertheless, the Council set out the criteria for assessing the actual or potential anti-competitive effects of exclusivity provisions:

Scope of exclusivity : in line with the observations of the Commission's final report on the Sector Inquiry [3], the Council distinguishes between (i) partial exclusivity where customers only commit to buying a fixed share of their needs from one supplier and remain free to buy the remainder from other suppliers (with a possible distinction according to the delivery time period and subject to various consumption limits) and (ii) full exclusivity. Subject to its future decision on the merits, the Council raised no obvious objections concerning the scope of exclusivity in EDF supply contracts.

Duration : excessive duration could freeze market positions. The Council simply notes that the duration of most EDF contracts is between 2 to 3 years (and up to 4 years), corroborating the findings of the Commission's Sector Enquiry.

Technical justifications : in some cases, exclusivity can be justified as it allows the customer to enter into a single and global contract with EDF for supply, transport and distribution of electricity (article 23 of the French Law of 10 February 2000 on energy) rather than several transport agreements when there are two or more suppliers.

Efficiencies for customers : in principle, trading exclusivity commitments for predetermined volumes against fixed prices for the duration of the contract could constitute an advantageous trade-off for both suppliers and customers, in particular in the context of price increases on the free market. However, the Council considered that it does not have sufficient information at this stage to determine the impact of EDF's market position on the balance of the contracts.

This very preliminary assessment will be completed by the future review on the merits of the case to determine whether EDF exclusivity provisions could amount to an abuse of a dominant position, based on the assessment of their impact on competition. However it appears that these exclusivity provisions do not raise obvious concerns, apart from the issues dealt with through the interim measures.

Early termination provisions

In the final report of the Sector Inquiry, the Commission emphasized the crucial role of termination provisions, which enable eligible clients to look for alternative suppliers [4]. In its decision, the Council stressed more specifically that the analysis of exclusivity provisions should also take into account conditions relating to early termination.

According to the Council, (i) customers should, prior to entering into the contract, be fully informed of the conditions under which early termination can be sought and (ii) the amount of the indemnity should be reasonable and sufficiently predictable.

In this respect, the Council found that, in most EDF contracts to which the claim relates, conditions for early termination were either inexistent or defined in incomplete or inaccurate terms especially with regard to indemnification. Although EDF claimed the application of a standard 45-90 day notice period and an indemnity amounting to 10% of the price to be paid until the regular term, EDF general terms and conditions did not expressly grant an early termination option to the client, except in the event of EDF's default.

Accordingly, the Council considered that EDF contracts are unclear concerning the precise level of indemnity and circumstances where such indemnity is applicable. Without providing further details, the Council noted that the fact that the indemnity consists of a lump sum might have a deterrent effect.

Therefore, the Council considered that the ambiguity and lack of transparency on early termination could amount to an abuse of a dominant position under national legal provisions only (art. L. 420-2 Commercial Code). In this respect, there would be no legal objection should the Council also apply article 82 ECT, when considering the merits of the case with regards to the entry on the French market of EC electricity operators.

Interim measures

Under article L. 464-1 Commercial Code, interim measures can be granted by the Council if there is (i) a *prima facie* infringement of competition rules, (ii) serious and immediate harm and (iii) a direct causal link between the infringement and the damage suffered.

On this basis, KalibraXE requested the Council to order EDF to suspend and stop including exclusivity provisions in supply contracts. However, the Council refused to take such measures on the grounds that there was no proof of a damage suffered by KalibraXE or of a direct link between the exclusivity provisions and such damage, in line with its usual and quite restrictive practice on this issue.

However, the Council took an alternative option granting interim measures to remedy the damage caused to competition in the electricity sector as a result of the deficiencies of EDF contracts with respect to early termination. Considering that:

- (i) the ambiguity and lack of transparency observed concerning early termination, combined with the presence of partial or total exclusivity, could discourage customers from switching suppliers and hence preclude the development of new competitors on the free market;
- (ii) the resulting anticompetitive effect is even more significant as a consequence of the dominant operator's practices, and
- (iii) this situation should be urgently resolved in view of the full liberalization of the French market in July 2007, since industrials, which have not yet exercised their eligibility, should be in a position to take advantage of the development of alternative supply offers by switching suppliers;

the Council ordered EDF to provide detailed and objective conditions applicable to early termination (in particular for

calculation of the indemnity) and to include such rules in its general business terms within two months, at least for contracts with customers who have exercised their eligibility.

Conclusion

Although a decision on the merits of the case will only come out within a year or two further to an in-depth analysis, it is worth noting that the Council has already insisted on the fact that exclusivity provisions which benefit a dominant incumbent operator do not *per se* amount to an abuse of a dominant position, even in the context of the liberalization of the market. Considering that the Sector Inquiry focused on the analysis of the anticompetitive effects of long term exclusive supply contracts, it will be interesting to see how the Council will treat exclusivity provisions in contracts of a much shorter duration (2 to 4 years maximum).

As regards termination issues, although it does not deny that the payment of an indemnity in the event of early termination is justified, the Council seems to be acting as a regulator of the contract by considering that early termination of a fixed term contract should be provided for in the contract itself, thus suggesting that termination before the expiry of the term can have pro-competitive effects.

[1] Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, OJEC L 27, 30 January 1997, pp. 20-29.

[2] Directive 2003/54/EC of the European Parliament and of the Council, of 26 June 2003, concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, OJEU L 176, 15 July 2003, pp. 37-56.

[3] Communication from the Commission, 10 January 2007, Inquiry pursuant to Article 17 of Regulation (EC) n° 1/2003 into the European gas and electricity sectors, SEC(2006) 1724, COM (2006) 851 Final.

[4] DG Competition report on energy sector inquiry, SEC(2006) 1724, 10 January 2007, § 933, p. 285.

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The French Civil Supreme Court requested a preliminary ruling from the ECJ with regards to the implementation of the Ferring case law : Advocate General Tizzano supports the reimbursement of the tax on direct sales paid by French pharmaceutical laboratories (Boiron/ACOSS)

France, State Aids, Burden of proof, Reimbursement, Tax, Pharmacy

French Civil Supreme Court (Cour de Cassation, Chambre commerciale), 14 December 2004, Laboratoires Boiron SA v. Agence centrale des organismes de sécurité sociale (ACOSS), case n° 02-31241

<http://www.legifrance.gouv.fr/WAspa...>

Opinion of Advocate General Antonio Tizzano delivered on 30 March 2006 in the case C-526/04, Laboratoires Boiron SA v. Agence centrale des organismes de sécurité sociale (ACOSS)

<http://curia.eu.int/jurisp/cgi-bin/...>

Background

Law n° 97-1164, of 19 December 1997, on social security funding for 1998 set up a special 2.5 % tax payable only by pharmaceutical laboratories on sales of medicines made directly to pharmacies. Proceeds from the tax were aimed at financing the social security system.

However, wholesale distributors were voluntarily exempted from this tax. Wholesale distributors must fulfil certain public service obligations which are imposed by the French authorities in order to ensure an adequate supply of medicines in France. The purpose of the tax on direct sales was arguably to restore the balance of competition between wholesale distributors and pharmaceutical laboratories who compete with wholesale distributors by directly distributing medicines to pharmacies, as laboratories do not bear public service obligations.

Several pharmaceutical laboratories took the view that the tax was contrary to EU rules, arguing in particular that restricting the tax to direct sales by pharmaceutical laboratories amounted to State aids in favour wholesale distributors.

Actions were brought before the French administrative courts by pharmaceutical laboratories seeking the reimbursement of the tax paid, including homeopathy manufacturers Ferring and Boiron.

Further to the action brought by Ferring, the European Court of Justice (ECJ) ruled that levying the tax solely on direct sales by pharmaceutical laboratories must be regarded as State aid to wholesale distributors where their exemption exceeds what is strictly necessary to offset the additional net costs incurred in discharging the public service obligations imposed on wholesalers (ECJ, 22 november 2001, Ferring, Case C-53/00, [2001] ECR I-9067).

In relation to the proceedings brought by Boiron, the French Civil Supreme Court requested a preliminary ruling from the ECJ under article 234 of the EC Treaty, with regards to two other issues relating to the tax on direct sales (Judgment of 14 December 2004) :

Outlining at least seeming discrepancies in the past case law of the ECJ on the issue of tax restitution and uncertain whether restitution could be admitted in the present case, the Supreme Court asks if a pharmaceutical laboratory liable for the payment of a contribution such as the tax on direct sales is entitled to plead that the exemption granted to wholesale distributors is a State aid to obtain the reimbursement of the taxes paid?

If yes, are the French procedural rules providing that - in order to obtain the reimbursement of the tax - the claimant should prove that the benefit to those not assessed to the tax exceeds the costs resulting from their public service obligations, contrary to EU law as these rules would make the reimbursement impossible or at least excessively difficult?

Opinion

- 1st question : reimbursement of the tax paid by laboratories

In its opinion, Advocate General Tizzano argues that the case of the tax on direct sales is specific and distinct for tax issues previously examined by the ECJ under State aid rules.

In previous cases (in particular ECJ, 20 september 2001, HJ Banks, Case C-390/98, [2001] ECR I-6117), the ECJ had mostly examined State aids granted to a specific category of individuals/undertakings, by setting up a selective exemption from a pre-existing general tax. In such a situation, it is undeniable that the tax in itself is not part of the State aid measure and it is clear that the State aid derives from the *a posteriori* exemption mechanism. In those cases, it is well-established case law that the undertakings liable to the tax payment can not obtain the reimbursement of their payment on the sole ground that tax exemption granted to other undertakings amounts to State aids. The present case may lead to a benchmark ruling of the ECJ as to the reimbursement of illegal State aids.

Indeed, Advocate General Tizzano underlines that the case of the tax on direct sales does not concern an exemption granted from a pre-existing tax: the State aid directly arises from the asymmetrical assessment of the tax which is voluntarily provided for in the original text setting up the tax.

According to Advocate General Tizzano, the tax itself and the exemption benefiting to wholesale distributors derive from a single legislative scheme. There is therefore a direct and necessary link between the two: the law was purposely designed to apply only to direct sales by pharmaceutical laboratories thereby favouring sales made by wholesale distributors by making them less costly. In this respect, the higher the tax is the greater the competitive benefit for wholesale distributors is.

It is worth noting that such argumentation would actually be in line with ECJ's case law, although not express. The ECJ had previously ruled that a tax would have to be reimbursed but this solution was limited to cases where proceeds from the tax are used to fund an illegal State aid (ECJ, 21 october 2003, van Calster and Cleeren and Openbaar Slachthuis,

Joined Cases C-261/01 and C-262/01, [2003] ECR I-12249).

More importantly, in the *Ferring* case, the ECJ had not rejected the tax reimbursement in its principle, as it agreed to examine whether the levying of the tax solely on direct sales could amount to a State aid measures in relation to an action brought by Ferring in order to obtain the reimbursement of the tax.

With regards the above, Advocate General Tizzano argues that the best way to restore competition and to return to the *statu quo ante* is to let the pharmaceutical laboratories assessed to the tax to request the reimbursement of the tax they were required to pay, which represents an innovative solution with regards to ECJ's previous case law. The reimbursement would be actually limited the amount of the tax which goes beyond the costs incurred by wholesale distributors in discharging the public service obligations imposed on them, in line with the position of the ECJ in the *Ferring* case.

Indeed, since the tax is part of the State aid mechanism, distortions of competition will be abolished if the tax itself is reimbursed. Moreover, EU case law (e.g. ECJ, 21 november 1991, *FNCPA and Syndicat national des négociants and transformateurs de saumon*, Case C-354/90, [1991] ECR I-5505) provides that all measures deriving from the text setting up of the State aid are also illegal if the State aid is deemed illegal : in the present case, the legality of the collection procedure against Boiron (in particular the various notices of assessment) is therefore directly affected by the illegality of the State aid mechanism in favour of wholesale distributors.

Finally, Advocate General Tizzano considers that alternative solutions, such as the payment of the tax on direct sales by wholesaler distributors, are unsatisfactory since (i) the French government abandoned the tax on direct sales in 2002 and (ii) it does not correspond to the *statu quo ante* (i.e. the situation before the adoption of Law n° 97-1164, of 19 December 1997, on social security funding for 1998).

- 2nd question : burden of proof

French procedural rules provide that - in order to obtain the reimbursement of the tax - the claimant has to prove that the benefit to those not assessed to the tax exceeds the cost incurred in discharging their public service obligations, especially with regards to the *Altmark* case (ECJ, 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, Case C-280/00, [2003] ECR I-7747). This would makes it very difficult and almost impossible for a claimant to prove that the measure amounts to State aid since most financial elements concerning the costs incurred for the provision of the public service are known only from the undertaking fulfilling the public service obligation.

However, Advocate General Tizzano considers that this can be solved by using the French New Civil Procedure Code which enables the national Court itself to order all the necessary investigations to obtain the required financial information or document, at any stage of the proceedings.

Moreover, since the conditions set out in the *Altmark* case concerning State aid definition are cumulative, Advocate General Tizzano points out that the claimant is only required to show that one of them is not fulfilled to prove the existence of a State aid.

Although the ECJ's ruling is not predictable, the opinion of Advocate General Tizzano tends to strengthen the claimant position in State aids cases before national Courts. The *Boiron* case confirms the key role of national Courts in State aids cases under art. 88.3 of the EC Treaty as they have to assess the claimant argumentation on the basis of applicable national provisions, especially with regards to investigation to be made. In any event, allowing the reimbursement of the tax concerned would reduce the number of undertakings harmed by the measure by enabling other pharmaceutical laboratories to engage proceedings to seek the reimbursement of the tax, as Advocate General Tizzano pointed out.

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NB: The e-Competitions Bulletin will report the implementation of the ECJ's ruling to come by the French Supreme Court.

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The French Civil Supreme Court partly annuls the Court of Appeal's judgment on illicit exchange of sensitive information in the mobile telephony cartel, thus strengthening the standard of proof (Bouygues Telecom SFR and Orange)

France, Anticompetitive practices, Burden of proof, Exchange of information, Sanctions/Fines, Telecommunications

French Commercial Supreme Court [Cour de cassation (Chambre commerciale, financière et économique)], 29 June 2007, Bouygues Telecom, Orange, SFR, Cases n° U 07-10.303, Z 07-10.354 and W 07-10.397

<http://www.legifrance.gouv.fr/WAspa...>

<http://www.conseil-concurrence.fr/d...>

Proceedings

In its decision of November 25, 2005, the French Competition Council imposed record fines - up to a global amount of € 534 million - on the three main mobile phone operators in France (namely Bouygues Telecom, SFR and Orange France) for cartel practices infringing of Articles L. 420-1 of the French Commercial Code and 81 EC [1]. As reported previously in the Bulletin [2], the practices concerned exchange of sensitive information between competitors on an oligopoly market on the one hand, and market sharing through freezing of market shares on the other hand. The Competition Council's decision was confirmed by the Paris Court of Appeal (hereafter the "Court of Appeal") on December 12, 2006 [3]. The judgment of the French Civil Supreme Court (hereafter the "Supreme Court") of June 29, 2007 (hereafter the "Judgment") partially annuls the judgment of the Court of Appeal.

Ruling

The three mobile operators raised two main series of arguments before the Supreme Court :

Alleged breaches of the three undertakings' procedural safeguards in the proceedings before both the Competition Council and the Court of Appeal: (i) the principle of equality of arms, (ii) the presumption of innocence, (iii) the privilege of non-disclosure in relation to judicial inquiry, (iv) the need for a clear and precise statement of objections, (v) the non bis in idem principle and (vi) the principle of non-retroactivity.

Insufficient motivation of the appeal judgment and lack of legal basis, *i.e.* : (i) the alleged intention of the parties to collude was not supported by a body of corroborating and serious evidence (ii) the Court of Appeal did not show that the alleged collusion was followed by the actual implementation of parallel conduct by the operators, (iii) no verification was made by the Court of Appeal as to whether parallel conduct could be justified by external factors, (iv) no causal link was evidenced between the alleged collusion and parallel conduct, (v) no sufficient evidence of effect on trade between Member States and (vi) competition in the absence of the alleged practices was not taken into account in the assessment.

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The Supreme Court rejected all the objections raised against the Court of Appeal's ruling concerning the market partition practices which resulted from the agreement to freeze their respective market shares for the 2000-2002 period. However, the Supreme Court annulled the Court of Appeal's decision inasmuch as the specific practices of exchange of information practices from 1997 to 2003 were concerned as such, provided that the information concerned figures on terminated contracts and raw sale volumes in particular.

The Supreme Court held that the Court of Appeal has not provided sufficient ground for declaring the information exchange practices illegal on the basis of articles 81 EC and L. 420 of the French Commercial Code. According to the Supreme Court, the mere fact that the information exchanges took place on a regular basis for information non (or not yet) published by the French telecommunications regulatory body (ART) was not sufficient. Hence, for the information exchange to be deemed illegal, not only has the information to be sensitive and exchanged on a regular basis but they must also have as their object or their actual or potential effect to enable each of the operators to adapt their commercial strategy considering the foreseeable behavior of the competitors so that the information exchanges would restrict competition on the oligopoly market. In this view, the Court of Appeal should have explicated its ruling on the alleged anti-competitive information exchanges with express reference to the market features, the functioning, the nature and the level of aggregation of the exchanged data and the periodicity of the exchanges.

Analysis

Attention should be drawn on two interesting points :

First, it is worth noting that the Supreme Court's decision has a limited impact on the fine assessment. As a reminder [4], the exchange of information practices accounted for less than 30 % of the fine imposed by the Competition Council on Bouygues and for 16 % of the fine borne by SFR and Orange. The market share freezing practices which justified the major part of the EUR 534 million record fines were indeed confirmed by the Supreme Court.

Besides, the whole case has been partially referred back to the Court of Appeal (otherwise composed) which case might well be dealt with in the same way by the Court of Appeal, subject to further motivation on the merits concerning the information exchange practices. Indeed, the Court of Appeal is entitled to decide that the given practices amounted to an illegal cartel subject to a proper motivation upon referral.

Second, this case helps clarify the standard of proof required in respect of exchange of information between competitors and contrasts in some way with the Competition Council's stricter approach towards information exchange on oligopoly markets, as resulting from its past case law [5]. For the Supreme Court, exchanges of confidential and up-to-date market information are not illegal *per se* [6] even between competitors active on an highly concentrated market. Such practices need to be assessed on case-by-case basis as to their actual or potential impact the participants' commercial strategy in the specific market context. Information exchange practices would therefore amount to illegal practices only if they are clearly evinced to reduce or remove the degree of uncertainty as to the competitors' behavior on the market, so that competition is harmed. In the case at stake, it appeared not self-standing to the Supreme Court that the raw sale data exchanged could be used by the cartel's participants to adjust their commercial strategy vis-à-vis each other, even tough on an oligopoly market.

Prima facie the French Supreme's Court approach does not appear to contradict the European Commission's position as described in its seventh report on competition policy : *"there is an important distinction between information arrangements which do not affect competition and arrangements in which the exchange of information has to be regarded as being in restraint of competition"* [7]. However, the Supreme Court may appear to adopt a stricter - although not frontal contradictory - approach in the implementation of the test relating to the standard of proof of illicit exchange of information

in oligopolistic markets, as set up by the Commission and supported by the ECJ case-law [8]. The French Supreme Court actually strengthened the applicable standard of proof, not only taking into account the sensitive or confidential nature of the information exchanged on a transparent and concentrated market, but also considering the potential or actual impact of the information exchanges on the participants' with special regards to the information commercial relevance and use on a case-by-case basis.

On this case, see also :

In English :

Mickael Rivollier, *The French Commercial Supreme Court rules that exchange of information is not prohibited per se and recalls that imposing fine in an oligopolistic market requires to demonstrate a concrete anticompetitive object or effect (Bouygues Telecom, Orange, SFR, "Mobile telephony case")*, e-Competitions, August 2007-I, n° 13983

In French :

Thierry Tuot, *Mobile telephony : The French Supreme Court confirms most of the sanctions imposed by the NCA (Bouygues Telecom a.o.)*, Concurrences, N° 3-2007, Regulatory, p. 159

Valérie Michel Amsellem, *Secret of investigation and of deliberation: The Supreme Court confirms the Court of Appeals decision on absence of violation of the secret of investigation and of deliberation (Mobile telephony)*, Concurrences, n° 3-2007, Procedures, pp. 138-139

[1] French Competition Council (Conseil de la concurrence), 30 November 2005, Decision n° 05-D-65, regarding practices on the mobile telephony market ; see Laura Castex, *The French Competition Council imposes record fines on the mobile telephone operators for market sharing and exchange of information (Orange, SFR, Bouygues)*, e-competitions, December 2005, Volume II, n° 347.

[2] See Jérôme Philippe and Caroline Evrard, *The Paris Court of Appeal confirms the NCA's record fine on three mobile telephony operators for exchanging confidential information and maintaining market shares (Bouygues Télécoms, SFR, Orange France)*, e-Competitions, January 2007-I, n° 12702 ; see also Michel Debroux, *The Paris Court of Appeal upholds France's highest antitrust fine ever and confirms a strict - yet not entirely clear - approach towards exchange of information between competitors in oligopoly markets*, e-competitions, January 2007, Volume II, n° 12728.

[3] Paris Court of Appeal (Cour d'appel de Paris), 12 December 2006, n° RG 2006/00048, Bouygues SA, SFR SA et Orange France SA vs. Ministry of Economy.

[4] Michel Debroux, *The Paris Court of Appeal upholds France's highest antitrust fine ever and confirms a strict - yet not entirely clear - approach towards exchange of information between competitors in oligopoly markets*, e-competitions, January 2007, Volume II, n° 12728.

[5] In particular French Competition Council (Conseil de la concurrence), November 25th 2005, Decision 05-D-64, regarding practices on the Parisian Palaces market ("Relative à des pratiques mises en oeuvre sur le marché des palaces parisiens") and Paris Court of Appeal (*Cour d'appel de Paris, 1ère Ch. Sect. H*), 26 September 2006, Hôtels Le Bristol, Concorde, Crillon, George V, Meurice, Plaza Athénée, Ritz, (Parisian Palaces/"Palaces parisiens"), RG n° 2005/24285. See for comments, Jérôme Philippe and Mathilde Mason, *The Paris Court of Appeal confirms the NCA's decision sanctioning hotels for operating an illegal cartel by exchanging confidential commercial information (Parisian palaces)*, [e-Competitions, December 2006-I, n° 12619.

[6] French Civil Supreme Court press release relating to Judgment n° 1020 of June 29th, 2007
<http://www.courdecassation.fr/juris...>

[7] Seventh report on competition policy (COMP. REP. EC 1977).

[8] See ECJ, May 28th, 1998, Deere v. Commission, Case C-7/95 P, [1998] ECR I-3111, paragraph 90 and ECJ, October 2nd, 2003, Thyssen Stahl v. Commission, Case C-194/99 P, [2003] ECR I-10821, paragraph 81 and ECJ, November 23th, 2006, Asnef-Equifax, Case C-238/05, [2006] ECR I-11125, paragraph 51.

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