Read this post online

Exchange of information and prohibited concerted practices: the position of the competition authorities

While exchanges of information are less detrimental to competition and less damageable for the economy than price cartels and allocations of market shares, they can be considered as anticompetitive practices even if the exchanged information does not underpin another prohibited practice and does not directly concern prices.

This is the final position adopted by the Paris Court of Appeals in a judgment dated March 11, 2009 that put an end to the legal saga of "mobile phone operators" that started in 2005: the three operators were fined (41 million Euros for Orange, 35 million Euros for SFR and 16 million Euros for Bouygues Telecom) for having regularly exchanged so-called "strategic" information on an oligopolistic market.

In two judgments dated September 26 and December 12, 2006 the Paris Court of Appeals confirmed two decisions of the *Conseil de la Concurrence* (French Competition Council, now called the *Autorité de la Concurrence*) that had found six Parisian high-end hotels and the three mobile phone operators guilty of anti-competitive concerted information exchange practices. These decisions were quite remarkable because, for the first time, the French courts sanctioned exchanges of information on the basis of Article 81.1 of the EC Treaty (Article L.420-1 of the French commercial Code)[1] whereas said information was not exploited in the framework of another prohibited concerted practice (like price cartels notably).

The reasoning of the two judgments rendered by the Paris Court of Appeals is the same: "If transparency between economic actors in a competitive market is not likely to limit autonomy in decision making and, consequently, to impair competition in the sense of Article L.420-1 of the French Commercial Code[2], it is not the same in a highly concentrated oligopolistic market where the regular exchange of precise and private information between the major actors, is likely to impair considerably the competition insofar as the sharing, on a regular and frequent basis, of information concerning the operation of the market has the effect of periodically revealing to all competitors the market positions and strategies of the various individual

competitors."

In the case at hand, the exchange of information itself is sanctioned, regardless of the existence of any other prohibited concerted practices in the framework of which the exchanged information could be exploited.

Yet, even if the three mobile phone operators had indisputably exchanged precise, confidential and strategic information on a regular basis, the *Cour de Cassation* (French supreme Court), in a judgment dated June 29, 2007, partially reversed the decision of the Paris Court of Appeals, considering that the latter had failed to concretely demonstrate that the regular exchange of information had actually the object or effect of seriously distorting or impairing market competition[3].

The *Cour de Cassation* remanded the case to the Paris Court of Appeals. In a judgment dated March 11, 2009, the Paris Court of Appeals followed the French Supreme Court's recommendations and applied the assessment grid used by the competition authorities to determine whether the exchange of information between competitors was to be considered a prohibited concerted practice.

As a result of the aforementioned decisions, exchanges of information violate Article 81.1 TCE / Article L.420-1 of the French Commercial Code if (i) they occur on a closed oligopolistic market, (ii) the information is sensitive and precise, relates to trade secrets and is exchanged on a regular basis, and (iii) they are likely to reduce the degree of uncertainty regarding the operation of the market and, consequently, undermine the market actors' commercial autonomy.

The pertinent assessment grid focuses, therefore, on the following three criteria:

1- The structure and operation of the market

As set forth by the reasoning of the two 2006 decisions of the Paris Court of Appeals, the relevant market for assessing the "dangerousness", at the competition level, of exchanges of information is a closed oligopolistic market. If the market is shared between a large number of operators (atomized market), the fact that one of the operators has and discloses information to certain of its competitors does not restrict competition. In the mobile phone case, the "oligopolistic" nature of the market was disputed, to no avail. Following in the footsteps of the *Conseil de la Concurrence,* the Paris Court of Appeals, in its decision dated March 11, 2009, held that the mobile phone market was indeed a closed oligopolistic market: there were only three operators on the market, and the barriers to entry on the mobile phone retail were very high (rare frequency, obligation to obtain a license, high fixed costs tied to the deployment of the mobile telephone market).

Further, according to the Paris Court of Appeals, mobile phone services are sufficiently homogenous to be able to be substituted without regard to the subjective differentiations in services as advertised by the operators.

2- The nature of the information exchanged

Information that has the following cumulative characteristics contributes to the restriction on competition:

- information exchanged at *"short intervals and systematically"* for which there is *"sharing, on a regular and frequent basis"*. If the exchanges are merely isolated, they do not impair competition insofar as it is not possible to infer therefrom that the operators have sufficient elements on the basis of this information to know, anticipate and align themselves on their competitors' commercial policies;
- precise and confidential information (in other words, information that cannot be procured through a source other than the operator itself);
- strategic information: information with which the operators are able to monitor the impact of their commercial policy and that of their competitors (in the case of the mobile phones, the information in question concerned the figures on the new subscriptions sold during the previous month as well as the number of clients who cancelled their subscription). However, strategic information does not need to turn on prices to be judged as such.

3-The reduced degree of commercial autonomy

To establish the "harmful" nature of exchanges of information, these exchanges must reduce or remove any uncertainty about the foreseeable nature of the competitors' conduct. Independence is the fundamental characteristic in establishing and maintaining healthy competition: *"Although it is correct to say that this requirement of independence does not deprive traders of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such traders, the object or effect of which is to create conditions of competition which do not correspond to the normal conditions of the market in question"* (John Deere Ltd case).

The practice of exchange of information during tender offers for public or private offers is more often sanctioned on the basis of this last criterion of "reduced degree of commercial autonomy." The *Autorité de la Concurrence* recently affirmed this principle (decision no. 09-D-03 dated January 21, 2009). The *Autorité de la Concurrence* reasons in several of its decisions: "any exchange of information prior to the filing of offers is anti-competitive if it reduces the level of uncertainty, in which all companies must find themselves, on their competitors' conduct. This uncertainty is, in fact, the sole constraint in pushing competitive operators to use their maximum efforts in terms of quality and price to obtain the market. Conversely, any limitation to this uncertainty weakens competition between the offerors and penalizes the buying public, which is obligated to pay a higher price than what would have been if competition had not been distorted"[4].

---

[1] According to established case-law, the exchange of information of any nature whatsoever is already

considered a violation of Article 81.1 of the EC Treaty insofar as said exchange underpins a price cartel or an allocation of market shares (ECJ Aalborg, C-204/00, January 7, 2004).

[2] This reasoning is inspired by that of the "*John Deere Ltd*" judgment rendered by the CFI (27/10/1994, T35/92) and subsequently confirmed by the ECJ (C-7/95)*: "in a truly competitive market, transparency between traders is in principle likely to lead to the intensification of competition between suppliers, since in such a situation, the fact that a trader takes into account information made available to him in order to adjust his conduct on the market is not likely, having regard to the atomized nature of the supply, to reduce or remove for the other traders any uncertainty about the foreseeable nature of its competitors' conduct».*

[3] The *Cour de Cassation's* reasoning for its decision dated June 29, 2007: *"by ruling as such, without concretely verifying, as the courts are invited to do, whether the regular exchange of retrospective information, from 1997 through 2003, between the three companies operating on the market concerning certain data not published by ART or that occurred prior to publication by this authority had had as its purpose or real or potential effect to allow each of the operators to adapt to the foreseeable conduct of their competitors and therefore to distort or largely restrict competition on the market concerned, given the characteristics of the market, its operation, the nature and level of aggregation of the data exchanged that did not distinguish between flat-rate packages and pre-paid cards, and the frequency of the exchanges, the Court of Appeals did not legally justify its decision".*

[4] Decisions no. 89-D-42 relating to concerted practices in the power generation industry; no. 01-D-17 relating to anti-competitive practices in the electrification market in the Havre region.