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Joint and several liability of a parent company and its subsidiary for competition law infringements committed by the latter

According to an established French and Community case-law, a parent company that owns all or substantially all of the shares of its subsidiary is presumed jointly and severally liable for the anticompetitive practices implemented by the latter.

This presumption can, however, be rebutted if the parent company is able to demonstrate that its subsidiary has acted autonomously.

In a decision rendered on January 6, 2015, the *Cour de Cassation* (French Supreme Court) provided a few examples of the criteria that can be used in order to assess whether a subsidiary has acted autonomously on its market.

In addition, the *Cour de Cassation* ruled on the conditions in which the concept of "repetition" of competition law infringements should be applied.

A parent company is presumed liable for the anticompetitive conduct of its subsidiary insofar as it holds all or substantially all of its shares, unless it can prove that its subsidiary has acted autonomously on its market.

This presumption, even though rebuttable, is quite hard to fight, in particular before the European Commission and Community courts. Indeed, for the latter, the mere fact that a parent company holds 100% of the shares of its subsidiary is sufficient to give rise to the presumption that the parent company exercises a decisive influence over its subsidiary's commercial policy[(1)].

This presumption is, however, applied less rigorously by the French Competition Authority and French judges who are more focused on searching first for pieces of evidence – other than the mere existence of capitalistic links – likely to establish that the subsidiary was deprived of legal autonomy before imputing the subsidiary's competition law infringements to the parent company.

The challenge that consists in demonstrating that the subsidiary has acted autonomously is considerable: escaping the characterization as a single economic unit, or single undertaking within the meaning of competition law, and thus escaping a higher penalty that can reach up to 10% of the total/global turnover of the company(ies) that participated in the infringement[(2)].

The commented decision concerns facts that were constitutive of an abuse of dominant position committed by Orange Caraïbe, a subsidiary of France Télécom, on the fixed and mobile phone market in the West Indies / French Guyana zone. Orange Caraïbe, the incumbent operator in the West Indies / French Guyana zone that held, at the material time, more than 75% of the mobile phone market, was notably blamed for having *(i)* imposed exclusivity agreements on independent distributors and on the only approved repair center for handsets in the Caribbean, *(ii)* implemented a loyalty-building program by which customers were obligated to renew their commitment with Orange Caraïbe, and *(iii)* applied abusive rate differentiation practices between "on net" calls (i.e. calls to its network) and "off net" calls (i.e. calls to a competing network). The complaints lodged and charges brought against Orange Caraïbe to characterize the abuse of dominant position shall not be further discussed in this article. For additional information in this respect, reference is made to the terms of the commented decision.

In its decision of January 6, 2015, the *Cour de Cassation* not only confirmed the existence of an abuse of dominant position and upheld the judgment of the Court of Appeals that had found France Télécom and Orange Caraïbes jointly and severally liable for the payment of the fine. It also provided an interesting illustration of the circumstantial pieces of evidence (other than ownership) that can be relied upon to demonstrate the existence of a single economic unit between the parent company and its subsidiary[(3)] *(1)*.

Additionally, the *Cour de Cassation* further clarified the concept of "repetition" of infringements, a concept taken into account when determining the applicable penalty *(2)*.

1/ The circumstantial pieces of evidence relied upon by the *Cour de Cassation* to establish the subsidiary's lack of autonomy

France Télécom argued that its subsidiary elaborated its commercial strategy by taking into account the specificities of the local market, which allegedly demonstrated that the parent company and its subsidiary did not form a single economic unit.

This argument was considered as insufficient by the *Cour de Cassation*.

Judges first recalled *"the rebuttable presumption according to which a subsidiary, whose shares are wholly or*

almost wholly owned by its parent company, does not determine its conduct on the market autonomously and forms with its parent company an undertaking, within the meaning of EU competition law, that justifies the fact that the parent company be held jointly and severally liable for the payment of the fine imposed on the subsidiary, unless the parent company produces elements pertaining to economic, organizational and legal links existing between them that prove that they do not form a single economic unit".

- They subsequently noted that, in the case under examination:
- The management team of the subsidiary consisted of personal staff from the parent company,
- Almost all the members of the subsidiary's board of directors held, or had formerly held, strategic positions within the parent company,
- In certain business offers, the subsidiary presented itself and its parent company as a group to potential clients,
- The two companies framed their services together,
- The parent company was actively involved in the promotion and dissemination of the subsidiary's products,
- The subsidiary's policy leeway did not exceed what was induced by the geographical distance between it and its parent company.

As such, the *Cour de Cassation* held that the subsidiary's alleged autonomy was belied by the facts and confirmed the existence of a single economic unit between France Télécom and Orange Caraïbe.

The parent company's interest to demonstrate that its subsidiary acts autonomously on its market should, however, be put into perspective by taking into account the two following insights:

- firstly, when a single economic unit exists between the parent company and its subsidiary, their intra-group agreements escape the reach of the legal provisions governing anticompetitive agreements since such provisions imply the conclusion of an agreement between two independent undertakings,
- secondly, even if it is established that the subsidiary has acted autonomously, courts and competition authorities may, when determining the amount of the fine, consider the actual influence of group membership, and, in particular, whether such membership can help the subsidiary mobilize the funds necessary to pay such fine[(4)].

2/ Clarification of the concept of "repetition" of competition law infringements by the *Cour de Cassation*

The other interesting aspect of the commented decision concerns the concept of "repetition" of competition law infringements.

The parties objected that the trial judges had increased the amount of the fine because France Télécom had previously committed similar competition law infringements.

Indeed, between July 1997 and November 2005, five rulings had been entered into against France Télécom for

behaviors that tended to prevent, hinder or hamper the entry of new competitors on a market, which artificially made it more difficult to put a competitive pressure on markets that were directly or indirectly dominated by France Telecom.

The *Cour de Cassation* held that the trial judges had properly and rightfully applied the rules governing repetition of infringements, insofar as one of the legal entities comprised in the involved undertaking had already been sanctioned for a competition law infringement similar to that at the origin of the commented case[(5)].

The *Cour de Cassation* specified that, for repetition to be established, there was no need that the infringements be identical as to the anticompetitive practice in question or the relevant market (whether product /service market or geographical market). It specified that repetition could be established if the new infringements were similar or identical, by their object or by their effect, to those previously sanctioned, as was the case in the commented decision.

1. CJEC, September 10, 2009, C-97/08 P Akzo Nobel / Commission

2. Article L. 464-2 I §4 of the French Commercial Code and Article 23§2 of Council Regulation (EC) No 1/2003 of December 16, 2002

3. Commercial Chamber of the *Cour de Cassation*, January 6, 2015, n°13-21305 and 13-22477

4. Commercial Chamber of the *Cour de Cassation,* February 18, 2014, n°12-27.643

5. Conversely, repetition is not established against the parent company and its subsidiaries involved in a competition law infringement if none of them has been found liable and sanctioned for a previous competition law infringement and if the previously ordered penalties were imposed on other companies of the same group (TEU, March 27, 2014, C-56/09 and C-73/09, Saint-Gobain Glass France et a. c. Commission)