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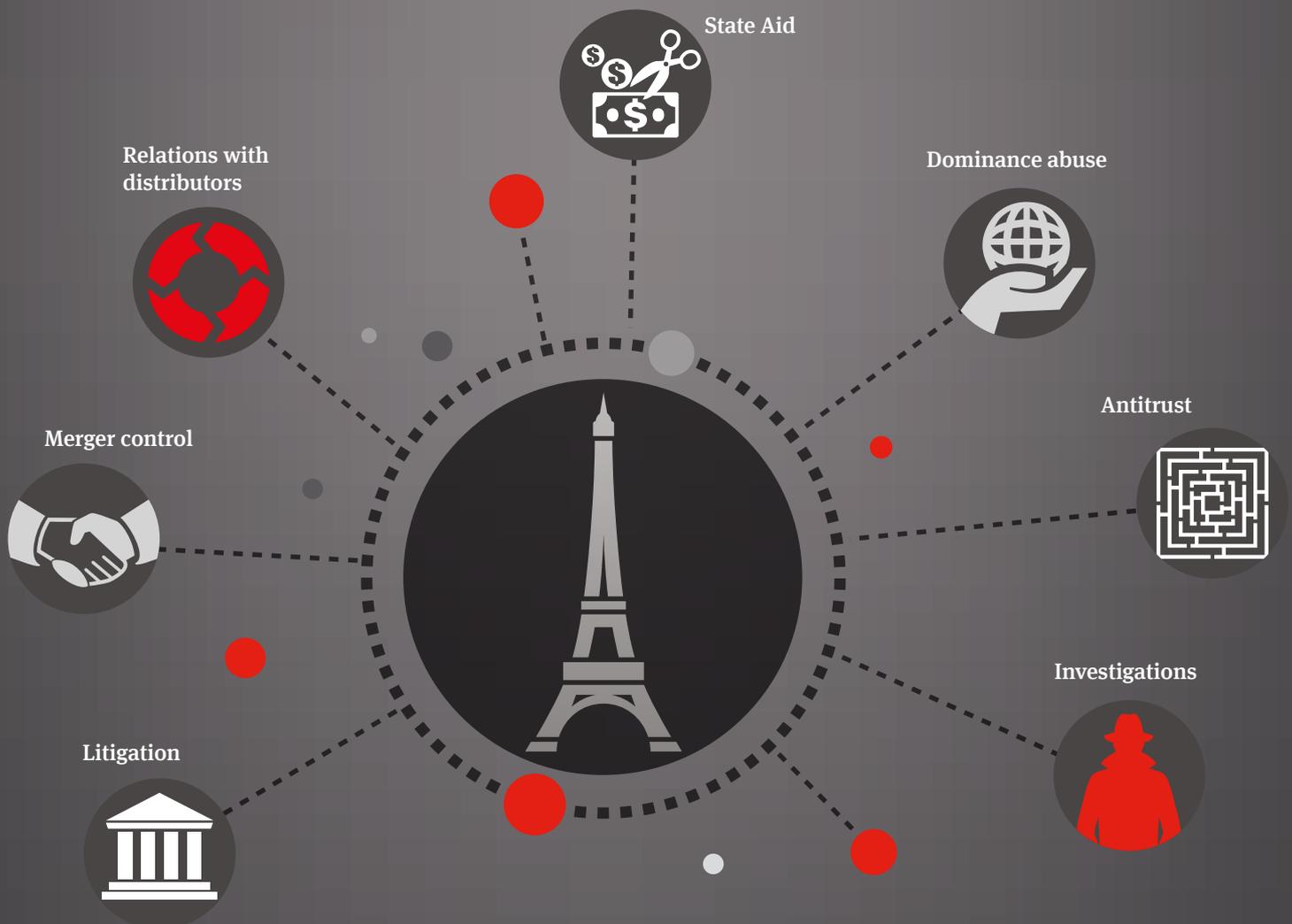
EnJeu

Competition law insight by the Paris team

N°1 – September 2017

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Excessive pricing: much ado about nothing?

Marta Giner Asins and Arnaud Sanz

Rarely the subject of prosecution and conviction by competition authorities, excessive pricing seems to be one of those “buzzwords” that come up in competition law from time to time. The Daraprim scandal in the United States in September 2015 caused a great stir in the pharmaceutical sector, which was further confronted more recently with the record fine imposed by the UK Competition and Market Authority (CMA) in the Pfizer/Flynn Pharma case in December 2016. Investigations on excessive prices keep propagating in the pharmaceutical sector. For instance, the European Commission and the Spanish authority are now investigating the Aspen case, and the French authority has more widely announced a potential sector inquiry into the healthcare sector which might also cover excessive prices. Notwithstanding, as the opinion rendered by Advocate-General Nils Wahl on April 6, 2017 reminded it in a pending case before the Court of Justice, a finding of excessive pricing should require meeting a particularly strict standard of proof.

While excessive pricing cases are generally rare, or even exceptional, competition authorities seem to be showing a sudden interest in these practices in the pharmaceutical sector. Although it may be a sign that the proportionality of pricing by dominant companies is being increasingly scrutinized, it can be questioned whether this trend is not essentially limited to this particular sector, mostly as a temporary effect propelled by the US Daraprim case of September 2015.

In any case, it is for good reasons that, up to the present time, competition authorities have tended to shy away from attacking such practices, which are not only particularly hard to prove, but which should also, in certain cases, fall within the jurisdiction of sector regulators.

In a particularly didactical opinion issued in a case concerning Latvian copyrights (AKKA/LAA), Advocate-General Nils Wahl pointed out such pitfalls and emphasized the fundamental principles. Although it may be too early to draw conclusions out of it until the Court of Justice renders its decision, this opinion is certainly worthy of consideration.

The Aspen and Pfizer/Flynn Pharma cases

At the end of September 2016, the Italian competition authority imposed a fine of EUR5.2 million on Aspen for having forced the national drugs agency to accept a significant increase (between 300 per cent and 1500 per cent depending on the products) in the context of the renegotiation of the

regulated prices of its anticancer drugs (acquired from GSK). To accomplish this, Aspen had exercised various forms of pressure, including threatening the agency to cease marketing its medicines in Italy if it was denied the requested prices.

Two months later, on December 7, 2016, the UK CMA imposed a record fine of £84.2 million on Pfizer, and a fine of £5.2 million on its distributor, Flynn Pharma, for abusing their dominant position by marketing auto-generic antiepileptic drugs (Epanutin) at prices which were deemed excessive. This case was, however, closely linked to gaps in price regulations. In the UK, insofar as the price of unbranded drugs is free (although this could change with the health expenses reform bill), Pfizer and Flynn Pharma had undertaken to

remove the Epanutin brand from their antiepileptic drug in order to market it at higher prices (by 2300 per cent to 2600 per cent). Considering that Epanutin patients would risk losing control of seizures if they switched to a different drug (even to a generic one), which prevented competitors from attracting them by offering better prices, the CMA ruled that Pfizer and its distributor had abused their dominant position by taking advantage of the gaps in regulation to impose excessive prices.

It is clear that there is more to come as excessive pricing cases are being investigated against other pharmaceutical companies. In particular, the Spanish authority (in February 2017) and the European Commission (in May 2017) have both started investigating on Aspen's pricing practices for a number of its anticancer drugs. In addition, in July 2017, in the context of the publication of its annual report, the president of the French competition authority, Isabelle Da Silva, announced the opening of a broad investigation into the healthcare sector, which may also include inquiries on excessive prices.

The AKKA/LAA case

In this context, the recent opinion issued on April 6, 2017 by Advocate-General Nils Wahl is of particular interest. In response to the Latvian Supreme Court's question referred to the Court of Justice for a preliminary ruling, the Advocate-General called for a clarification of the conditions under which excessive prices may be sanctioned as an abuse of dominant position, and advocated for a cautious and restrictive application of the United Brands test.

In this case, the Latvian collective rights management society (the AKKA/LAA), which holds a legal monopoly in Latvia for the issuance

of licenses for public performances of musical works in shops and other customer service locations in Latvia, was sanctioned several times by the Latvian competition authority for having imposed royalty rates for the remuneration of its authors that were deemed excessive. Following an appeal against the first appeal court's ruling, the Latvian Supreme Court decided to refer to the Court of Justice for a preliminary ruling, in particular, in order to clarify the methodology to be followed to identify unfair (or "excessive") prices within the meaning of Article 102 a) paragraph 2 TFEU.

By way of recollection, in this respect, the two-step test defined by the Court of Justice in *United Brands* requires the determination of the following:

1. whether there is an excessive disproportion between, on the one hand, the price actually charged by the dominant firm, and on the other hand, the hypothetical reference price which should have been charged assuming a situation of effective competition. For such purposes, the price charged by the dominant firm must be compared with the economic value of the product, which can be evaluated (i) taking into account its production costs and the reasonable margin that can be expected, but also (ii) the prices charged by other firms, either on the same market, or on different markets, (iii) the prices charged by the dominant firm for the same product but at different periods in time, and/or (iv) on other products or geographical markets;
2. whether this disproportion is inequitable, i.e. cannot be explained by valid justifications, but only results from an abuse of dominant position. In this context, authorities must ascertain whether the price is abusive in itself, or as compared to competing products.

However, this test actually raises many practical difficulties.

The first branch of the test (establishing an excessive gap) requires, on the one hand, to find comparable situations that are sufficiently homogeneous to bear the comparison, and on the other hand, to determine with certainty that the gap is truly excessive, which is far from being easy. On this point, the Advocate-General calls on competition authorities to exercise caution:

- recalling the principle of presumption of innocence, he recommends applying a combination of methods, or if only one method is practicable, to complete it with other indicators (existence of barriers to entry or expansion, presence of a sector regulator in charge of fixing or controlling prices, buyer power, etc.). In other words, a particularly high burden of proof lies on competition authorities, who will have to rely on a series of elements that are sufficiently comprehensive and reliable, and refrain from conducting any "incomplete, superficial or doubtful" analysis;
- he goes even further by stating as a principle that "unfair prices under Article 102 TFEU can only exist in regulated markets, where the public authorities exert some form of control over the forces of supply and, consequently, the scope for free and open competition is reduced" (§ 48). Indeed, on a market in which competition is free and open, a high price should in principle prompt competitors to make better offers. As a matter of fact, most of the cases where companies were sanctioned on this basis (including Aspen and Pfizer/Flynn Pharma) concerned regulated markets and/or markets with high barriers to entry;

- he emphasizes that the control of prices and potential abuses should first and foremost fall within the jurisdiction of sector regulators, since they are much better equipped than competition authorities in this matter. Therefore, the role of a competition authority should be limited to the rare occasions where the sector regulator has made mistakes or failed to perform its regulatory mission.
 - Concerning the excessive nature of the gap, he recommends condemning only the gaps which are “significant and persistent”.
- With respect to the second branch of the test, the Advocate-General also demonstrated a clear and express desire to limit prosecutions on the basis of excessive pricing, considering that:
- in principle, high prices are not, per se, abusive and should – on the contrary – play a key role in the competitive process by intensifying competition;
 - the burden of proof lies on competition authorities, failing which the presumption of innocence should prevail;
- therefore, a price should not be qualified as abusive unless it can be demonstrated that there is no other economic explanation.

In a nutshell, the Advocate-General’s recommendations are full of common sense, but it remains to be seen whether he will be followed by the Court, which is not always the case ...

Key takeaway:

The companies directly involved in pending cases in the pharmaceutical sector will find useful elements in the Advocate-General’s opinion to enrich their defense.

More generally, dominant companies, in particular those active on regulated markets or on markets characterized by high barriers to entry, will limit the risks of sanctions by fixing their prices proportionately to the value of the product or service concerned, and by keeping track of their economic justifications in anticipation of any potential actions.



Antitrust private actions: will France be able to match its European neighbours?

Arnaud Sanz and Michel Pflieger

Three years after the publication of Directive 2014/104/EU of November 26, 2014 (the Directive) creating a common framework for private actions in competition law in Europe, France has just completed its transposition into domestic law by publishing order 2017-303 of March 9, 2017 (the Order) and decree 2017-305 which entered into force on the same day (the Decree) (collectively, the Reform).

In some respects, this new regime appears to be more ambitious than the Directive and seems to reflect a clear desire of France to favour the use of antitrust private actions within its territory. It remains to be seen whether this new toolbox will be sufficient to remedy the hurdles that victims keep facing in this type of actions.

Often considered to be less attractive than its Dutch, English and German neighbours regarding private actions, France now seems determined to offer more attractive tools to catch up on its delay. Although the Reform does not change the fundamental principles of actions for damages – which still continue to be based on the classic triptych “fault/damage/causal link”, it has enhanced its regime with pro-victim measures while maintaining a certain balance with the legitimate interests of defendants.

Among the main innovations adopted from the Directive, the burden of proof on the victims has been clearly alleviated by the creation of a series of presumptions, both on the fault and damage components:

- along the same lines as the provisions introduced by the “Hamon” law on class actions, the Reform creates an irrebuttable presumption of fault in cases in which a competition law

infringement has been established by the French Competition Authority or the European Commission. In this respect, the Reform contains even more ambitious provisions than the Directive by stating that the presumption applies as soon as the decision is final (i.e., not subject to further appeal or upheld on appeal) both with respect to the existence and the imputation of the infringement, while a mere transposition of the Directive would have required the victims (before lodging a damage claim) to wait until the end of all appeal procedures, even if the appeal relates only to the amount of the fines. As a result, in France, victims will be able to file their actions immediately against leniency applicants and parties having settled administrative actions, since their right of appeal is limited to the amount of the fines. However this presumption does not apply to the decisions of foreign national

competition authorities, which only constitute an ordinary evidence of fault;

- damages are presumed to exist in cases of anticompetitive agreements, unless proved otherwise. More importantly, the Reform has put an end to the hesitation of case law on “passing-on”. The rules are now clear:
 - in order to obtain compensation from the defendant, all victims (direct and indirect purchasers) must prove that they have incurred additional costs, or that additional costs have been passed on to them. However, in this respect, an indirect purchaser only needs to prove that the defendant took part in an anticompetitive practice, that he bought a product concerned by or derived from such practice, and that the direct purchaser (i.e. its seller) incurred additional costs

as a result of this practice;

- victims are now presumed not to have passed on to their own customers overcharges deriving from the practices. Therefore, if the defendant wishes to allege a passing-on defence, it will need to provide counterevidence, with all the difficulties that this entails in practice.

Nevertheless, the victim will still have to quantify its damage, which will probably remain the main pitfall for this type of action. Still recently, a consumer had this painful experience by seeing her action rejected by a first degree Tribunal in Lille (Tribunal de Grande Instance) on June 8, 2017, whereas she was seeking compensation from the laundry detergent manufacturers Henkel, Unilever, Procter & Gamble and Colgate Palmolive further to their sanction by the French Competition Authority (FCA) in December 2014. In this case, the Tribunal considered that the claimant had not produced sufficient evidence to demonstrate that she had incurred, as a result of the cartel, an unfair surcharge amounting to 20 per cent of her expenses on laundry detergents from 2003 to 2006.

Even though the Reform has enabled judges to request the opinion of the FCA on this matter, the FCA's added value in this respect is questionable and the quantification of harm will most likely continue to be a debate among experts, in which economists will continue to be pitted against each other.

In this context, access to evidence will play a decisive role, and this is one of the most anticipated contributions of the Reform:

- regarding access to the competition authorities' file, it should be noted that the Reform quite faithfully transposed the "blacklist" of "absolute exclusions" provided for

in the Directive to preserve the attractiveness of leniency programs and settlement procedures. Thus, statements made by a leniency applicant or a settling party are excluded from disclosure, as well as extracts of procedural documents containing a transcript of such statements. Conversely, this leaves open the question as to the potential disclosure of evidence provided by such parties, which appears to be accessible to the victims. However, whether this was done deliberately or is simply the result of a technical error, the Reform appears to be less restrictive than the Directive as regards the "grey list" of "relative exclusions" (which apply until the end of the proceedings before the competition authority). In this list, while the Directive generally excludes the disclosure of all information prepared by the companies "for the purpose of the proceedings", the Reform has limited this exclusion to information prepared "for the purpose of an inquiry or of an investigation carried out by a competition authority". Even though the Minister of Justice's services deny it in their circular of March 23, 2017, whilst stating that this remains subject to the interpretation of judges, the Reform's wording might allow victims to obtain communication of the companies' statements of defence submitted before the FCA's College as from the statement of objections, since the College is the jurisdictional division of the FCA (separate from the investigation services);

- apart from these exclusions, the victims are provided with a particularly extensive right of access which allows them not only to request the defendant or a third party to produce individual documents, but also entire categories of documents having common characteristics. The final version of the Reform should be

welcomed in this respect since it has filled an important gap in the draft Decree, which had omitted to require a precise and narrow identification of categories, while this is the only safeguard available against fishing expeditions. The final Decree has overcome this error by requiring that the categories of documents be precisely and narrowly identified as regards their relevant common characteristics (nature, purpose, content, date of creation, etc.);

- nevertheless, the Reform still leaves a bitter taste as regards the fine that may be incurred in case of failure by a defendant to comply with a disclosure injunction, which continues to be a very limited amount. Although this amount has been increased from €3,000 to €10,000 (as compared to the draft Decree), it may not have a sufficiently deterrent effect considering the importance of the interests at stake. In addition, the plaintiff may nevertheless file an action for damages if it has incurred a harm as a result of a disclosure refusal. Let's hope that this will be sufficient to fill the gap ...

Regarding procedural matters, it should also be noted that the Reform has redefined the scope of private actions, clarified the articulation of liabilities between co-infringers, and completed the rules on statutes of limitations:

- going further than the Directive, the Reform has extended the scope of damages actions not only to anticompetitive practices but also to other practices, such as the granting of exclusive import rights to a company (or group of companies), agreements and practices related to public transport of persons, and abusively low prices;
- the Reform has expressly acknowledged the right for the victim to file an action against any of the co-infringers, by recalling

the principle of joint and several liability (which already existed in French civil law), while adapting it – in alignment with the Directive – towards the leniency first applicant and SMEs, which both benefit from limitations of liability. Thus, the victims can choose their defendant having regard to the most favourable situation to their cause, and claim compensation for the entire amount of harm. It will then be up to the defendant to act against its co-infringers. However, it should be noted that the leniency first applicant is only jointly and severally liable to its direct and indirect purchasers, i.e. to the exclusion of the victims of other infringers, unless such victims are unable to obtain compensation from the such other infringers;

- regarding the statute of limitations, the Reform has opted for the traditional civil law limitation period, which is five years from the day on which the claimant “knew, or ought to have known” that he suffered damage as a result of the practice concerned, it being specified that – in any event – such period does not begin to run until the practice has ceased. Nevertheless, this starting point appears to be a bit more favourable to the victims than that provided for in the Directive, which more vaguely referred to the time by which the claimant “can reasonably be expected to know...” Therefore, it should be more difficult for the defendants to argue that the victim could have filed an action earlier,

for example if there were rumours in the press ...

The Reform contains many other provisions transposing the Directive (incentives to amicable settlement, protection of business secrecy, etc.), which now puts France on the same level as other Member states, or even higher in certain respects.

However, it remains to be seen whether this will be sufficient to reshuffle the cards of forum shopping, or if this new regime will need to be supplemented with additional tools (such as third-party funding, which remains underdeveloped in France).

Key takeaway:

In the world of private actions, the preservation of evidence is crucial for both victims and defendants. Given the particularly lengthy duration of proceedings before competition authorities, companies should adopt an efficient electronic documents management system (enabling the retrieval of contracts, orders, invoices, accounting documents, etc.), and ensure that it is as comprehensive and reliable as possible to stand the test of time and technological developments.



Exchanges of information: when time becomes strategic

Marta Giner Asins and Yann Anselin

Exchanges of information are a complex area of competition law. Analysis of such exchanges, which aims at identifying a risk of tacit coordination between competitors, depends on multiple factors and is difficult to systemize. Among the variety of criteria taken into account for such assessment, the “time factor” plays a decisive role in various respects. First, determining whether the information exchanged is past or current, is key in assessing the degree of risk and the applicable legal framework. Second, market cycles and the frequency of exchanges have varying degrees of impact as to the likelihood that coordination has occurred, as well as with respect to the duration and effects of such coordination. Two recent decisions, one by the General Court (GC) in the powerchips cartel case, and the other by the French competition authority (FCA) in the vehicle rental sector, provide a good illustration of the test followed by the authorities in this respect.

According to constant case law, information exchanges between competitors may restrain competition if they enable or induce the undertakings concerned to coordinate their behaviour. The main risk of coordination arises where the information exchanged is not public and is both individual and strategic.

Although the last criterion is decisive, lawyers are faced with the difficult task of dealing with the concept of “strategic information” which is constantly changing:

- first, with respect to its content, since any confidential piece of information is potentially “strategic”. In addition to prices and quantities, strategic information may also cover production costs, turnover, capacities, customer lists, commercial strategies, risks, investments, technologies,

R&D programs, etc. Moreover, the strategic value of a piece of information is relative and largely depends on how competitively each sector functions;

- second, regarding its likely effects on competition, which may also significantly vary from one sector to another.

The importance of taking time into account when analysing information exchanges has been recalled in two recent decisions, one by the GC dated December 15, 2016 in the powerchips cartel case, the other by the FCA dated February 27, 2017 in the vehicle rental sector. These decisions remind us that the time factor can be decisive in two respects: first, the time by which the data was exchanged will have an impact on the level of risks, which will depend on whether the data concerned is future or past; second, the stage in

the evolution of the market, and the frequency of the exchanges, which will have various levels of impact on the assessment of anticompetitive effects.

The GC’s judgment in the powerchips cartel case: presumption of coordination in presence of future strategic information, and taking account of the market cycle in evaluating the duration of anticompetitive effects

As a reminder, Infineon had been sanctioned by the European Commission in 2014 together with Philips, Renesas and Samsung for having exchanged, between September 2003 and September 2005, views and sensitive information on prices, customers, contractual negotiations, production capacities, or more generally their future behaviour on the market.

On appeal, Infineon had (among other things) disputed the “by object” anticompetitive nature of the exchanges it had participated in, in particular by arguing that these exchanges were too general to be deemed as a “by object” restriction of competition. The GC rejected these arguments and essentially considered that information relating to individual strategic intentions, in particular as regards prices and future capacities inexorably modify, by their very nature, the behaviour of the undertakings taking part in the exchange. The degree of precision of the information exchanged is accessory given that the parties’ behaviour has necessarily been affected.

The GC’s approach has obvious consequences in practice, given the type of exchanges that were deemed as “by object” restrictions in the judgment, e.g.:

- the fact for a competitor to specify that the plants “have reached 90 per cent of their full capacity” and that “there will not be any additional capacity for the following year”;
- the indication by a competitor of its “intention to rise prices” or, on the contrary, the “price stability” for a given product;
- the information given by an undertaking on its inability to align on the prices applied by two of its competitors towards a client.

According to the GC, such information necessarily leads to a distortion of competition, regardless of whether it is imprecise, or even deliberately inaccurate.

This analysis is especially strict since the GC clearly suggests that even a single exchange of this type

may in itself be deemed as a “by object” infringement. In this respect, particularly, the economic context of the exchange of information, specifically the cycle of pricing negotiations, is used in order to demonstrate the existence of prolonged anticompetitive effect. As the price of the powerchips is determined on an annual basis, the GC inferred that it was sufficient to verify whether Infineon had participated in at least one anticompetitive discussion during each of the three years of the infringement alleged against it.

The combination of the presumption linked to the future character of the information exchanged and the taking into account of the characteristics of the markets in order to aggravate the effects thereof result in severe consequences.

The decision of the FCA relating to the vehicle rental sector: analysis by the effect of the exchanges of strategic information having occurred, taking into account the frequency of the exchanges in order to evaluate the probability of a coordination

Contrary to the powerchips case, the decision of the FCA related to the risk of coordination resulting from the exchange of prior strategic information.

The issue related to access given by airports to each lessor to the sale figures and the number of contracts of its competitors realised during the month preceding the communication of the data as well, in most of the airports, as to the level of traffic of passengers arriving at the relevant airport.

The risk of coordination was linked to the fact that the data enabled lessors to calculate the market shares of their competitors but also the average value of their contract, their penetration

rate of arriving passengers, the rate of progression of the number of contracts and the sales figures as compared with the same month in the previous year.

The FCA therefore considered whether the monthly communication of data enabled lessors to understand the pricing and commercial strategy of their competitors with sufficient precision to adapt their own actions in consequence. It decided that this was not the case based in particular on the cycle of pricing and negotiations with respect both to non-professional and professional customers:

- as regards non-professional customers, the FCA excluded the possibility of tacit coordination due, in particular, to the real-time access to prices of competitors permitted by the competition monitoring software. As a significant portion of published prices of lessors change in real time depending on the demand for each lessor, the risk of coordination resulting from the monthly exchange of information is in some degree neutralized by the transparency of the market, since they do not enable the observation on a continual basis of the effectiveness of the pricing policy of each lessor on the clients in question;
- as regards professional customers, the FCA also excluded the possibility of coordination, this time due to the length of the pricing negotiations: the tariffs and commercial strategies between lessors and customers having been determined in advance at the time of negotiation of annual or biannual framework agreements, the obtaining of monthly statistics in the intervening period does not reinforce transparency of the market for lessors.

Key takeaway:

Enterprises should carefully take into account the “time factor” in analyzing exchanges of information as it plays a crucial role on several levels:

- The time (i.e. date) of the information has a substantial impact on the risks incurred and the applicable analysis. When they relate to the future, any exchange relevant to price formation or future commercial strategy is capable of being analysed on a formalistic basis taking account essentially of the nature of the information exchanged. When they relate to the past, the risk is a priori less but is different: the enterprise must evaluate with precision the risk of coordination created by the exchanges, the complexity of such exercise often creating an inevitable legal uncertainty.*
- The time (i.e. cycle) of the market can considerably influence the duration of the anticompetitive effects deriving from the exchange – and thus, impact on the seriousness of the infraction alleged against the enterprise. In the worst case scenario, as explained above, a single meeting can result in an annual infringement if it occurs during the cycle of price determination.*
- The time of the exchange can also, particularly with respect to past data, either avert or, on the contrary, confirm the risk of coordination deriving from the exchange of data. The decision of the FCA shows, however, that one of the precautions which should be taken is to avoid aligning the frequency of exchanges with the cycle of pricing and commercial negotiations with customers.*

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