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Eric Morgan de Rivery & Fabien Sanfourche
Jones Day

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EU Competition Law in 2010: Change or Continuity

Eric Morgan de Rivery & Fabien Sanfourche[1]

It has become customary, at the beginning of each year, to take a look at the previous year, to draw lessons for the future, and to attempt to anticipate trends to come. Such second-guessing is all the more interesting this year with the entry into force of the Lisbon Treaty and the arrival of the so-called Barroso II Commission.

The entry into force of the Lisbon Treaty should not lead to in-depth changes to the European competition policy. In particular, save for a change in numbering of the Treaty articles, the wording of Article 81 of the EC Treaty prohibiting cartels (now Article 101 of the Treaty on the Functioning of European Union or TFEU), of Article 82 of the EC Treaty prohibiting the abuse of a dominant position (now Article 102 of the TFEU) or of Articles 87 to 89 of the EC Treaty dealing with State Aids (now Articles 107 to 109 of the TFEU) remains the same in substance.

Besides, the changes made to the principles that constitute the very basis of the European Union with respect to competition are unlikely to radically impact the competition policy as implemented up to now. Indeed, the wording "the Community shall have as its task […] a high degree of competitiveness" provided for in Article 2 of the EC Treaty has now been replaced by "[the Union] shall work for […] a highly competitive social market" (new Article 3 of the EU Treaty). In the same way, former Article 3, g) of the EC Treaty which provided that the activities of the Community shall include "a system ensuring that competition in the internal market is not distorted" has not disappeared but has simply been annexed in a protocol (protocol n°27) to the Treaty according to which the Internal market "includes a system ensuring that competition is not distorted." Said Protocol has the same binding force as the Treaty itself.

Consequently, the traditional purpose of competition law, namely to be implemented as a tool used to protect the Common Market has been maintained, and no fundamental change in the competition policy itself should be expected in 2010 with the Lisbon Treaty. As regards services of general interest, one may nonetheless welcome the protocol n°26 which, in addition to article 14 of the TFEU, reasserts the importance of such services and the "essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organizing services of general economic interest as closely as possible to the needs of the users."

Against that theoretical background, let's now take a closer look at the implementation of competition law. Without any doubt, 2009 is to be considered as a *grand cru* in terms of fines imposed on undertakings for violation of competition law. A few figures will illustrate this point: In May 2009 the European Commission imposed a record fine of EUR 1.1 billion against Intel Corp for allegedly abusing its dominant position in the market for computer processors. This is the

[1] Eric Morgan de Rivery is Partner in the Paris and Brussels offices of Jones Day, Paris and Brussels. Fabien Sanfourche is Associate in the Paris office of Jones Day.

largest fine ever imposed on a single firm by the European Commission. In July, the European Commission imposed on E.ON and GDF Suez a fine of EUR 553 million each for allegedly agreeing not to compete against each other.

Obviously, such colossal fines raise quite a few questions. Are they a satisfactory tool, especially in the context of an economic crisis? Shouldn't there be alternative sanctions to deter violations of competition law? At least, shouldn't the amount of fines be reconsidered?

In this respect, the former president of the Court of First Instance (now the "General Court"), Bo Vesterdorf, took the opportunity of a conference in Lisbon to warn the authorities against imposing such heavy fines, in particular for abuses of dominant position, on account of the imprecise wording of Article 102 of the TFEU prohibiting such abuses.

Interestingly, in France, the Paris Court of Appeal recently divided the total amount of the fine imposed in a cartel case in the steel industry by 8, reducing it from EUR 575 million to EUR 73 million (CA Paris, *AMD Sud-Ouest SAS and others*, January 19, 2010). This case may be interpreted as a signal to end the "fine race" which has taken place over the past few years.

However, Competition Commissioner Mr. Joaquim Almunia, when questioned on this issue during his hearing before the European Parliament in January 2010, considered that the level of fines is generally appropriate, and insisted on the necessity for fines to have a deterrent effect. He also insisted that such fines rarely reach the maximum legal threshold, *i.e.* 10 percent of the worldwide turnover achieved by the undertaking at stake in the preceding business year. In other words, it is unlikely that the high level of fine ends under his mandate.

Yet, even if the fines imposed never meet the 10 percent threshold, their level is nevertheless considerable. In this regard, during his hearing, Mr. Joaquim Almunia acknowledged the need for further discussion on the impact of fines on small- and medium-sized undertakings or mono-product undertakings.

Another issue to look at in 2010, which bears a direct impact on the level of fines, is the DG Competition's approach of presuming that, within a group, parent companies are systematically responsible for violations of competition law by their fully-owned subsidiaries. Indeed, for the DG Competition, the sole fact that the subsidiary is fully-owned by its parent company is sufficient to "presume" the responsibility of the parent company.

Aside from being very simple to apply (in practice, the Commission merely looks at the share capital of the subsidiary), such a "capitalistic presumption" enables the DG Competition, when determining the amount of fine to be imposed, to take into account not only the turnover achieved by the subsidiary but also the turnover achieved by its parent company which drastically boosts the level of the fine imposed.

The way in which the Commission applies this "presumption" makes it virtually impossible for companies to rebut it. This, however, is in contradiction with key principles such as the principle of autonomy of subsidiaries within a group (which is the basis of company law in most EU Member States) or other fundamental principles such as the presumption of innocence.

By upholding such an irrebuttable presumption, the DG Competition takes a position which isolates European law from national company laws or criminal laws. Unfortunately, it is very likely that the new Commission will not change its policy in this respect. Thus, one can only hope that European judges, who have assented to such "capitalistic presumption" in some cases in 2009,

will overrule such precedent which not only runs counter fundamental principles, but also violates the rights of the defense of the undertaking concerned.

Aside from the fines imposed in 2009, the Commission has also been very proactive as regards State aids. Indeed, in the context of the economic crisis a more flexible framework has been set up for examining state aids, in particular in the banking and finance sector. The European Commission was under great pressure to handle state aids cases within a very tight schedule, sometimes within 24 hours.

In other words, the economic crisis revealed the limits of the state aids system and highlighted the crucial need for decisions to be adopted within extremely short deadlines. At the same time, the economic crisis also proved that such goals could be achieved.

Hence, it is for the Commission to draw procedural lessons from the economic crisis and shorten its review periods even where a formal investigation is required. Currently, the Commission has 18 months, from the opening of the procedure. Moreover, such review period can be extended. Clearly, such long review periods may have substantial consequences for those waiting for the aid.

Another novel aspect of State and control concerns the power to review State aids in the transport sector which used to lie with the DG Energy and Transport and has now been transferred to the DG Competition. This administrative transfer might lead, in practice, to a tougher implementation of the state aids rules in the transport sector. Indeed, one may fear that DG Competition might be inclined to give priority to the state aid aspects over the need to guarantee a consistent European transport policy.

Finally, 2010 will, of course, have its share of legislative reforms with respect to competition law. In particular, Regulation 2790/1999 on vertical restraints and its supporting guidelines, which provide a framework for distribution issues, will expire on May 31, 2010. A glance at the amended draft that was submitted to public consultation in 2009 does not seem to reveal any revolution to come such as abolishing the prohibition of resale price maintenance (as opposed to the *Leegin* case in 2007 in which the U.S. Supreme Court agreed to apply a rule of reason to uphold minimum resale prices).

A novel aspect may, however, be highlighted in the form of the new developments in the draft guidelines (not in the Regulation itself) regarding Internet distribution. Distribution on the Internet is barely mentioned in the current guidelines, in spite of the ever-growing economic importance of sales over the Internet. In particular, the draft guidelines provide solutions on issues which have been at the heart of quite a few disputes. For instance, the draft guidelines provide for the possibility for a supplier to request its distributors to have a brick and mortar shop or showroom before engaging in online distribution, *i.e.* pure players may be prohibited. Assuming that this draft Regulation and guidelines are not substantially modified in their final version, it will be interesting to see the practical impact on sales over the Internet.

To conclude, the Lisbon Treaty and the new Commission should not lead to major changes in the implementation of EU competition law, unless what has been regarded on the part of certain governments as an attempt to use the crisis to promote an intergovernmental approach instead of an integrated Commission leadership prevails. All we can do is wait and see!