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Autorité de la concurrence

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The *Autorité de la concurrence* has been entrusted with an advisory role for 26 years, but since 2008 this function has benefitted from the revamping of competition regulation and from the introduction of a constitutional requirement to carry out regulatory impact assessments, which led to the publication in July 2012 of a Guide drafted by the *Autorité*.²

While this advocacy function mainly aims at stimulating domestic competitiveness and democratic accountability—MPs must be in a position to check whether the benefits of regulation exceed their costs—it also constitutes leverage for compliance with EU law, as illustrated by the three following examples.

In the retail distribution area, the *Autorité* triggered³ a 2008 legislative reform of urban commercial zoning,⁴ which was also needed with regard to the principle of free establishment⁵ and the provisions of the Services directive.⁶

In the transport sector, the *Autorité* engaged in a dialog not only with domestic stakeholders but also with European institutions. While it did take strong advocacy⁷ and enforcement⁸ action to advance fair and non-discriminatory access to railway infrastructures, this action eventually helped support the move towards the legal unbundling required by EU sector law.⁹ The *Autorité* even anticipated the need to strengthen EU legislation, stressing that railway stations were essential facilities as the nexus between road and railway transport.¹⁰

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² Guide for competition impact assessment of draft legislation, http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=453

³ Opinion 07-A-12 of 11 October 2007 relative to the legislation on commercial facilities.

⁴ Law n°2004-778 of 4 August 2008 on the modernization of the economy, Articles 100 to 102.

⁵ Notice of DG Markt, 26 June 2008, *Législation sur l'urbanisme commercial*, case 2000/5224 ; CJEC *European Commission v Kingdom of Spain* [2011] case C-400/08, ECR I-01915.

⁶ Directive 2006/123/EC of the European Commission and the Council of 12 December 2006 on services in the internal market, Articles 10 to 15

⁷ Opinion 08-A-17 of 3 September 2008 on the draft bill relative to the organization and regulation of railway and collective transport and to the security of transport; Opinion 09-A-55 of 4 November 2009 relative to terrestrial public passenger transport

⁸ Decision 12-D-25 of 18 December 2012 relative to practices in the freight transport sector: the incumbent operator was fined in December 2012 for an abuse and enjoined to alter its pricing practice

⁹ Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area; Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways, Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification ; a

With respect to ecommerce of non-prescription medicines, the *Autorité* prepared the ground for a legal action.¹¹ It warned the minister of health that the texts, which were supposed to insert into domestic law the provisions of a Directive,¹² should not restrict the liberalization process to the sale of over-the-counter medicines but also ought to include all non-prescription medicines, among which aspirin, pregnancy tests, and cough pills.

The draft texts were also at odds with competition law in many respects. They required prices in online shops to be, at a minimum, equal to those in brick-and-mortar pharmacies and also that delivery costs should reflect actual costs. The combination of those provisions resulted in higher online prices. A legal challenge before the supreme administrative court, the *Conseil d'Etat*, was lodged shortly after the *Autorité* issued its opinions by a concerned pharmacist, who had been heard during the consultation process. Pending its decision on the merits, the court suspended provisionally the impugned provisions¹³ in view of the seriousness of the claim and the emergency of the matter.

This advocacy work of the *Autorité* has been echoed in the European Commission's recommendations of economic policy.¹⁴ It has also been reflected within the International competition network ("ICN"). In Spring 2014, the *Autorité*, as a co-chair of the *Advocacy Working group*, will present its 120 member agencies, together with its Mexican counterpart, a proposal for adopting the *ICN Recommended practices* on assessing the competition impact of legislation.

fourth railway package has just been submitted to the European Parliament and the Council. *See also* EUCJ *European Commission v Hungary* [2013] case C-473/10, to be published; *European Commission v French Republic* [2013] case C-625/10, to be published.

¹⁰ Opinion 09-A-55 aforementioned; opinion 11-A-15 of 29 September 2011 on a draft Decree relative to railway stations and other railway network facilities, Opinion 11-A-16 of 29 September 2011 on a draft project relative to the accounting unbundling of railway stations with the SNCF [publicly-owned incumbent operator].

¹¹ Opinion 13-A-12 of 10 April 2013 on a draft executive order making good practice in the ecommerce of medicines binding; Opinion 12-A-23 of 13 December 2012 relative to an ordinance and a Decree inserting into national law the Directive 2011/62/EU of the European Parliament and the Council 8 June 2011 amending Directive 2001/83/EC on the Community code relating to medicinal products for human use, as regards the prevention of the entry into the legal supply chain of falsified medicinal products.

¹² Aforementioned Directive.

¹³ *Conseil d'Etat*, ord., *Mr L* [2013] Rec 365459.

¹⁴ European Commission, *Recommendation for a Council Recommendation on France's 2013 National Reform Programme and delivering a Council opinion on France's stability programme for 2012-2017* [2013] COM(2013) 360 final, ¶ 13