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European Court Reverses the Commission's Recent Practice Regarding Ancillary Restraints in Merger Cases

On 20 November 2002, the European Court of First Instance ("CFI") annulled a decision by the European Commission in the merger case *Lagardère/Canal+*. The judgment rejects the Commission's recent practice of refusing to assess ancillary restraints (*e.g.*, non-compete clauses) in merger decisions. The qualification of contractual clauses as ancillary restraints under the Merger Regulation is important as it enables companies to obtain legal certainty regarding such clauses with the clearance of the merger itself, without the need for a separate consideration under Article 81 EC. The practical consequences of the judgment are considerable:

- **Where the notifying parties now request an assessment of ancillary restraints by the Commission, the latter *must* issue a decision as to whether they are indeed "directly related and necessary to the implementation of the concentration". Where the parties disagree with the Commission's assessment, they can appeal the finding to the CFI.**

- **Conversely, by stating that the Commission has *exclusive competence* to rule on ancillary restraints, the CFI's judgment creates a situation of uncertainty for those parties who do not request a ruling on ancillary restraints. As it is unclear whether the parties could still enforce non-compete clauses and similar restrictions before national courts or arbitration tribunals, it would appear prudent to request a Commission decision on commercially important ancillary restrictions.**

As a result of the judgment, it can be expected that the Commission will seek to change the provisions in the Merger Regulation relating to ancillary restraints.

The judgment further suggests that the Commission could revoke clearance decisions in cases other than those provided for in Articles 6(3) and 8(5) of the Merger Regulation (incorrect or deceitful information by the parties or breach of obligations). The judgment does suggest that those cases would remain rare.

The Commission's Decision

The *Lagardère/Canal+* case dates back to June 2000, when the European Commission, on the last day of the period provided for in Article 10(1) Merger Regulation[1], approved a deal under which Lagardère, Canal+, and Liberty Media would share control of joint ventures running a French satellite broadcast service and French sports, news and special-interest TV channels.[2] In the reasoning of this decision, but not in its operative part, the Commission accepted that a priority clause and two non-compete clauses in certain areas of TV production constituted ancillary restraints "*directly related and necessary to the implementation of the concentration*" under Article 6(1)(b) Merger Regulation. The non-

[1] Council Regulation (EEC) No 4064/89.

[2] Case COMP/JV.47 - Canal+/Lagardère/Liberty Media/Multimathematique, OJ C 2/2 of 5 January 2001; Press release IP/00/655, 23 June 2000.

compete obligations were however deemed to constitute ancillary restraints for a more limited period of time than agreed by the parties.

Two weeks after the decision, the Commission issued a second decision correcting its initial findings as to the ancillarity of the non-competition clauses and the priority clause. The Commission found that the non-compete clauses were not ancillary at all and the priority clause could be deemed to be ancillary to the concentration only for a limited period of two years.

Lagardère and Canal+ appealed this second decision to the CFI.

The Court's Judgment

Admissibility. The Commission argued that the application was inadmissible, because its findings on the ancillarity of contractual restrictions generally and in this particular case were not contained in the operative part of its clearance decision and could not be regarded as having legal effects. Rather, they could be regarded as an additional "service" rendered by the Commission to the parties, without being binding on a national judge in deciding whether an agreement linked to the concentration constituted an ancillary restraint and was thus valid under Article 6(1)(b) or whether it constituted an unrelated agreement to be assessed under Article 81 EC.

While the application was pending, the Commission sought to validate this view by adopting a new Notice (the "2001 Ancillary Restraints Notice") on restrictions directly related and necessary to concentrations in which it declared that the legal framework of the Merger Regulation "*does not impose any obligation on the Commission to assess and formally address such restrictions. Any such assessment is of only declaratory nature, as all restrictions meeting the criteria set by the Merger Regulation are already covered by Article 6(1)(b), second subparagraph, and Article 8(2), second subparagraph, second sentence, and are therefore, cleared by operation of law, whether or not explicitly addressed in the Commission's decision. The Commission does not intend to make such an assessment in its merger decisions any more*."[3]

The Court disagreed with the Commission and found that the appeal was admissible, since any assessment of the ancillary character of restrictions under Article 6(1)(b) is to be regarded as a decision having legal effects. The Court emphasizes that the Commission has exclusive competence under the Merger regulation to adjudicate on ancillary restraints. The Court also held that, as a consideration for the burdens imposed on the parties by the strict *ex ante* control mechanism instituted by the Merger Regulation, the Community legislator had intended to grant legal certainty to the parties. Such legal certainty extends beyond the clearance of the concentration itself to ancillary restraints. The Court thus held that the Commission was obliged to rule upon ancillary restraints in its clearance decision if asked to do so by the parties.

In the event, the Commission's attempt to retroactively justify its position by issuing a new Notice proved futile as the Court held that the Notice had no retroactive effect and, beyond that, was based on a mistaken interpretation of the Commission's duties under the Merger Regulation.

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[3] Commission Notice on restrictions directly related and necessary to concentrations; Official Journal C 188/32 of 4 July 2001.

Substance. The Court also found that the application was well founded. It determined that the second decision was not a new decision on the substance, but a partial revocation of the first one. The second decision was therefore not illegal by virtue of having been adopted outside the strict deadline of Article 10(1) Merger Regulation. Implicitly rejecting the notion that the limited conditions for revocation set out in Article 6(3) and 8(5) of the Merger are exhaustive, the Court stated that the second decision had to be assessed under the "general principles of Community law" on the revocation of Commission decisions.

According to the Community Courts' case law, the Commission can revoke a decision only if it is illegal, and if the Commission takes due account of the legitimate expectations of the addressee. Since the second decision did not even attempt to establish the illegality of the first decision, the Court found the revocation to be illegal for that reason alone, and, beyond that, lacking the necessary reasoning.

Although this would have been sufficient to annul the second decision, the CFI also indicated that, even if the first decision had been proved to be illegal, the parties could have derived legitimate expectations from this first decision since it lacked any indication that it might have been based on an error or a mistaken interpretation of the law. Therefore, the Commission would in any event have been barred from revoking the first decision.

Consequences of the Court's judgment

The judgment is important as it will, in the short run, force the Commission to change its recently adopted practice of not assessing ancillary restraints within the merger clearance procedure. The CFI left no doubt that, without an amendment of the Merger Regulation, the Commission cannot escape its obligation to formally decide on the ancillary character of restraints linked to concentrations and, thus, on the legality and validity of such restraints.

Conversely, by stating that the Commission has *exclusive competence* to rule on ancillary restraints, the CFI's judgment creates a situation of uncertainty for those parties who do not request a ruling on ancillary restraints, as has often been the case even predating the Commission's revision of the Ancillary Restraints Notice in 2001. Absent any pertinent finding by the Commission, a national court or an arbitration tribunal could arguably be barred from a finding that restrictions such as non-compete clauses are not caught by Article 81 EC by virtue of their ancillarity. This raises the issue of the enforceability of such restrictions. Consequently, companies notifying mergers would be well advised to make use of the option of applying for a Commission ruling on any commercially important ancillary restraints from now on.

The quasi-compulsory "notification system" for ancillary restraints mandated by the CFI may be short-lived, however. The Commission is likely to use the impending revision of the Merger Regulation to propose legislative amendments that would reaffirm the self-assessment system that it had hoped to introduce with its 2001 Ancillary Restraints Notice. Such a change would be fully in line with the imminent modernization of the rules of procedure under Article 81 EC that aims to do away with the possibility of notifying restrictive agreements to obtain an exemption under Article 81(3) EC.

As regards the CFI's statements on the possibility of revoking clearance decisions under the Merger Regulation, it is surprising that the Court has found that the grounds for revocation, that are explicitly mentioned in Articles 6(3) and 8(5) of the Merger Regulation, are not exhaustive. The Court's emphasis on the need for legal certainty in merger control would have suggested a different result. Nevertheless, the Court's analysis implies that the

Commission has only limited scope for revoking clearance decisions that it later recognizes as illegal.

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