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International Competition Law Update:

European Court Reverses the Commission's Refusal to Review Ancillary Restraints in Merger Cases

Last month, the European Court of First Instance ("CFI") reversed a decision by the European Commission in a merger case, *Lagardère/Canal+,* that had refused to assess the legality of certain ancillary restraints (such as non-compete clauses) as part of its decision on the merger. The Commission had refused to evaluate these agreements between the parties because it deemed them insufficiently ancillary to the merger. As background, under current EC law, certain forms of contractual restraints must be notified to the European Commission for review under Article 81. Under the Merger Regulation, certain types of restraints deemed to be ancillary to the merger can be reviewed as part of the merger clearance process and ruled on at the same time as the merger. This process is very helpful for the parties to a merger, particularly acquiring parties, because it creates legal certainty and obviates the need to make an additional Article 81 filing on the ancillary restraints.

As a result of the judgment in *Lagardère/Canal+*, the Commission is now, in the short-run at least, required to rule on ancillary restraints put before it in a merger clearance proceeding, an important procedural issue for parties filing in the EC. In the longer term, the Commission will likely seek to change the provisions in the Merger Regulation relating to ancillary restraints. Parties who are required to make merger filings with the European Commission should be aware of the developments in this area.

The Commission's Decision

The *Lagardère/Canal+* case dates back to June 2000, when the European Commission 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.[1]

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1 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.

In that decision, but not in its operative part related to the merger, the Commission found that two non-compete clauses and another restrictive clause in certain areas of TV production constituted ancillary restraints "*directly related and necessary to the implementation of the concentration*" under Article 6(1)(b) of the Merger Regulation and were thus subject to review.[2] However, the Commission deemed the non-compete obligations to constitute ancillary restraints for a more limited period of time than agreed by the parties and therefore refused to approve them.

Two weeks after its initial decision, the Commission issued a new decision finding that the non-compete clauses were in fact not ancillary at all and the other clause at issue was ancillary to the concentration only for a limited period of two years and also not approved.

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

The Court's Judgment

The case effectively turned on the appealability of the Commission's order as to the ancillary nature of the restraints. The Commission argued that under Art. 230 EC-Treaty an appeal can be brought only against measures having an immediate legal effect; because the findings on the ancillarity of contractual restrictions were not in the operative part of the merger clearance decision, they had no immediate legal effect and thus are not subject to appeal.

While the application was pending, the Commission sought to validate this view by adopting a new Notice on ancillary restrictions directly related and necessary to mergers and other concentrations (the "2001 Ancillary Restraints Notice"). Such Notices are not law, but summarize the Commission's understanding of the law and are meant to be fully consistent with the EC-Treaty and the Community's legislation. The Commission declared that the legal framework of the Merger Regulation "*does not impose any obligation on the Commission to assess and formally address such [ancillary restraints]. Any such assessment is of only declaratory nature, as all restrictions meeting the criteria set by the Merger Regulation are already … 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]

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2 Council Regulation (EEC) No 4064/89; Article 6(1)(b): "The decision declaring the concentration compatible shall also cover restrictions directly related and necessary to the implementation of the concentration."

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

The Court disagreed with the Commission and reversed. The Court found that the Commission's order on ancillary restraints was appealable because any assessment of the ancillary character of restrictions under Article 6(1)(b) is, in fact, a decision having legal effects. The Court emphasized that the Commission has exclusive competence under the Merger Regulation to rule on ancillary restraints. The Court also held that, in 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 to ancillary restraints as well as the underlying merger clearance. The Court thus held that the Commission was obliged to rule upon ancillary restraints in its clearance decision if the parties ask it to do so. The Court also rejected the Commission's attempt to justify retroactively its position by issuing a new Notice, holding that the Notice was based on a mistaken interpretation of the Commission's duties under the Merger Regulation and, in any event, could not be applied retroactively.

Consequences of the Court's Judgment

The Court's judgment is important because, in the short run, it will force the Commission to change its recently adopted practice of not assessing ancillary restraints in conjunction with its merger clearance decisions. The CFI left no doubt that, without an amendment of the Merger Regulation, the Commission cannot escape its obligation to decide whether restraints associated with concentrations are ancillary in nature and, if so, whether they are legal.

However, by holding that the Commission has *exclusive competence* to rule on ancillary restraints, the CFI's judgment creates uncertainty for parties that do not request a ruling from the Commission on ancillary restraints (which not all merging parties have done in the past). Thus, absent a review and pertinent ruling by the Commission on such restraints at the time of the merger proceeding, arguably a national court or an arbitration tribunal could later be barred from finding Article 81 EC (which bars certain types of restrictive agreements) does not reach restrictions such as non-compete clauses by virtue of their ancillarity. This raises the issue of the enforceability of such restrictions. Consequently, companies notifying mergers are well advised to make use of the option of applying for a Commission ruling on any commercially important ancillary restraints, at least in the short run.

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.

If you have any questions, please contact any of the lawyers listed below:

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