French Court Orders French Competition Authority to Disclose Antitrust Investigation Documents

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On 24 August 2011, the Commercial Court in Paris ordered the French competition authority, the Autorité de la concurrence (Autorité), to disclose documents relating to the settlement of an antitrust investigation in the context of a private damages action. This order could significantly strengthen the position of claimants in damages actions in France and potentially in other EU Member States and adds another layer of complexity to cartel cases in the European Union. When agreeing to settle with the Autorité, companies must therefore now consider the potential risk of having to disclose documents in future actions.

Background

The claimant in the damages action, Ma Liste de Courses (MLDC), an online discount coupon processor, initially issued a complaint before the Autorité against two rival companies, HighCo and Sogec, for setting a standard for online coupons without consulting the other companies involved in the field, such as MLDC. The Autorité concluded the investigation on the back of commitments offered by HighCo and Sogec to remove competition concerns. This decision was not appealed. MLDC acknowledged that the commitments brought an end to the alleged anticompetitive behaviour but argued that the commitments did not repair the alleged harm it had suffered. MLDC subsequently introduced an action for damages against its two rival companies (Tribunal de commerce de Paris, 15th chamber, SAS Ma Liste de Courses v. Société HighCo 3.0, Société HighCo Data, Société Sogec Gestion, Société Sogec Marketing, decision of 24 August 2011).

The order issued by the Commercial Court concerns non-confidential versions of all written and oral statements gathered by the Autorité during its investigation. Specifically, MLDC had sought to obtain the parties' and third parties' written observations, minutes of hearings, replies to questionnaires or requests for documents issued by the investigative services of the Autorité and several other documents placed on the file. The Court decided that disclosure was justified mainly because the Claimant was merely asking for redacted versions of the documents in order to have available the information it needed to seek redress.

Procedure

The settlement procedure of the Autorité enables businesses under investigation for potential antitrust violations to present commitments to the Autorité. The hope is that, if the Autorité accepts the commitments, it will close the case and therefore abstain from finding that a violation of competition rules has occurred. For this reason, the French

settlement procedure is increasingly popular among companies: with no formal finding of an infringement, in principle it will be more difficult for a claimant to bring a damages action as the claimant will have to prove the infringement to a court. However, the Commercial Court's order may have an important impact on companies' decision to engage in a settlement procedure and on the position of claimants in private damages actions.

In France, damages can be obtained if the complainant proves that (i) a fault was committed, (ii) a damage was suffered, and (iii) there is a direct link of causality between the fault and the damage (Article 1382 of the French civil code). A formal decision by the Autorité, recognising a violation of antitrust rules and leading to a fine levied on one or several companies makes it easier for the claimant(s) and/or other companies looking for compensation to prove that they were directly affected by the anticompetitive practices. It is naturally much more difficult to prove that a fault was committed when an investigation by the Autorité ends with a settlement procedure and therefore without a formal finding of an infringement. Courts, even commercial courts, do not specialise in competition issues and may therefore be reluctant to find an antitrust infringement.

In this context, obtaining the right to disclose documents in the Autorité's file can enable complainants to get access to and/or show a court crucial information relevant to the behaviour in question. In the present case, MLDC was aware of most of the content of the Autorité's file as it initiated the case. The actual issue here therefore, was not the right for MLDC to gain access to the documents but rather to have the right to disclose them to the Court. Bearing this in mind, MLDC made the smart decision to ask the Commercial Court to order the Autorité to produce the documents instead of disclosing them itself .

This was a clever tactic because legislation in this area is conflicting. On one hand, Article 138 of the French code of civil procedure provides that a judge can order the production of documents if the party wishes to exhibit (i) an official document, (ii) an agreement to which it was not a party or (iii) any document held by a third party. However, on the other hand, Article L 463-6 of the French commercial code prohibits the disclosure of information that is part of an Autorité investigation and therefore confidential. Although a recent French Supreme Court decision authorises parties to disclose documents in the Autorité's file if it is necessary for the concerned parties to be able to exercise their rights (Cour de cassation, Commercial Chamber, Semavem, 19 January 2010), had MLDC relied on this case law and decided to disclose the documents in question, it would have risked being in violation of Article L 436-6.

HighCo and Sogec argued that MLDC's request to the Court should not be accepted. According to them, MLDC had other means of proving its claim and did not establish that a disclosure would be necessary to exercise its rights. Furthermore, they argued that the request was without just cause since the transmission of the Autorité's file would result in the distortion of the commitments procedure before the Autorité. They argued that MLDC already had the option to produce publicly available documents included in the Autorité's file. Finally, HighCo and Sogec stated that several documents concerned third parties to this procedure and, thus, should remain confidential.

The Court accepted MLDC's request for disclosure on the basis that although the commitments made by HighCo and Sogec and accepted by the Autorité ended the alleged anticompetitive practices, they did not repair the alleged harm suffered by MLDC. The Court ruled that the administrative decision by the Autorité could not constitute a bar to the damages action by the Claimant. In conclusion, the Court explained that Article L 463-6 of the French commercial code, prohibiting the disclosure of information covered by the confidentiality of the investigation by the Autorité, could not limit the power of the Court to order the production of documents in application of Article 138 of the French code of civil procedure. The Court therefore ordered the disclosure of (non confidential versions of) all documents requested by MLDC.

Consequences

The Commercial Court's decision is likely to have an impact on whether companies enter into a settlement agreement with the Autorité. Companies will have to bear in mind that, although settlement has the advantage of enabling them to escape a fine and a formal finding of infringement by the Autorité, it does not confer immunity. Private damages actions may still be pursued. A settlement procedure already suggests that the Autorité had legitimate competition concerns—i.e., that a violation of competition rules is likely to have taken place—but the disclosure of the documents in the Autorité's file would probably help claimants in proving a competition infringement before a court.

Moreover, this order will probably strengthen the claimants' position in damages actions. Most private damages actions in the European Union have been "follow-on" actions, based on an infringement decision by the European Commission or the antitrust authority of an EU Member State. Claimants already use the infringement decision as proof of the antitrust violation, but they have to further substantiate and prove the harm suffered as a result of the infringement, which is very difficult without any access to the documents in the competition authority's file. In the view of the Autorité (in its answer to the Commission's public consultation on collective redress), follow-on actions should be privileged against other "abusive" actions.

As a result of this decision, it is strongly recommended that companies wishing to engage in a settlement procedure with the Autorité take advice before doing so, as the settlement may still lead to a private action in which significant damages may be paid.

In addition, it is worth mentioning that, according to the Court of Justice of the European Union judgment in Pfleiderer AG v Bundeskartellamt C-360/09, handed down on 14 June 2011, it is up to the national courts to decide whether claimants may have access to documents submitted to national Member State competition authorities. Other European countries may therefore follow France's lead.

To conclude, it is also worth noting that it is unclear whether this decision will also impact on whether claimants have access to leniency applications and confidential versions of infringement decisions in follow-on actions. Joaquín Almunia, the European Commissioner for Competition, very recently affirmed at the IBA's 15th Annual Competition Conference in Florence on 16 and 17 September 2011 that the European Commission would seek to protect European immunity programs in spite of the Pfeiderer judgment, perhaps by encouraging the adoption of new legislation on the subject. Despite this, it will be worth bearing the MLDC decision in mind when applying for leniency.