

Paris Competition: Ryanair Judgment, Mondial Relay and La Poste Agreement

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Ryanair Judgment: Complaint Filed with Commission for Anti-competitive Practices Must Be Well Prepared

The Commission's investigations of abuse of a dominant position are often initiated following complaints from people considering that they have been affected by the abuse. Yet most complaints go no further, since the Commission applies a strict filtering system to eliminate claims that are not solidly motivated. The filtering takes place on two levels. The first filter is the admissibility of the complaint. If that is lacking, the Commission has no legal obligation to take action. However, if the Commission does decide, at its discretion, to take a look at a file, an inadmissible complaint does not even merit the start of an investigation. The admissibility filter is accompanied by the filter of the discretionary powers principle. After reviewing the complaint, the Commission can in a reasoned decision dismiss any complaint which does not have sufficient Community interest in view of the priorities, which the Commission has fixed for itself.

It was on the basis of the admissibility filter that the General Court of the European Union (the General Court) in its judgment of May 19, 2011 confirmed the Commission's decision not to go any further with Ryanair's complaint of abuse of a dominant position.

As the General Court recalls, the complainant must present a sufficiently complete file to cross the admissibility threshold. This includes a detailed description of the alleged facts, which is not the same as just presenting suppositions. In this case involving the complaint of illegal State aids, Ryanair had alleged that Munich airport's refusal to allow it to operate out of Terminal 2 was an abuse of a dominant position. However, as the General Court notes, Ryanair should have used the Commission's "form C" for complaints about anti-

competitive practices and supplied all the information requested on it. One of the requirements of this form is to give a detailed presentation of the facts consisting of "all available details" about the practices, the undertakings' respective positions on the market, information about the market structure and its evolution and the communication of all related documents.

Making a succinct presentation of the facts in the hopes that the Commission will use its powers of investigation to shed light on the alleged unlawful conduct has little chance of succeeding since the complainant is supposed to participate actively in putting the file together.

In this case, the General Court observed that the allegations about a supposedly unlawful practice were neither sufficiently specific nor substantiated to identify a possible abuse of a dominant position, since Ryanair did not establish that Munich airport held a dominant position, and it also did not substantiate how the fact of reserving access to Terminal 2 could constitute an abuse. The judgment does not say how detailed the information should be; that will depend on what the Commission can reasonably expect from the complainant. Commission Regulation No. 773/2004 indicates that if it is not possible to supply some of the information requested on the form, the complainant can ask the Commission to be dispensed from this obligation.

Nevertheless, the fact remains that making a succinct presentation of the facts in the hopes that the Commission will use its powers of investigation to shed light on the alleged unlawful conduct has little chance of succeeding since the complainant is supposed to participate actively in putting the file together.

Mondial Relay and La Poste Agreement in Parcel Delivery Sector Suspended

On May 12, 2011, the Competition Authority accepted La Poste's undertaking to suspend the signing of the agreement with Mondial Relay until a decision

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on the merits was issued. Under the non-exclusive agreement with a maximum term of five years, Mondial Relay (a subsidiary of 3 Suisses) agreed that customers of La Poste could use its network of collection points to collect their parcels.

Kiala, another operator in this sector and former business partner of Mondial Relay, filed a complaint asserting anti-competitive practices in connection with the implementation of this agreement. In particular it mentioned predatory pricing, La Poste's refusal to allow access to its delivery infrastructure, the practice of tied sales and La Poste's attempts to incite Mondial Relay and Kiala to terminate their exclusivity agreement.

Without issuing a decision on the alleged practices, the Authority found that the proposed agreement was likely to undermine the development of emerging competition in the parcel delivery sector.

First, La Poste is a dominant operator in home parcel deliveries. If it then concludes an agreement with an operator specializing in parcel deliveries to collection points with an extensive network, it could combine its own collection points with those of Mondial Relay on a market where there are few competitors.

An additional factor is the entry barriers making it difficult to create competing networks of collection points in a reasonable period of time. The volumes to be delivered must be sufficiently substantial to be profitable, and it is not always easy to identify geographically relevant collection points with a suitable storage capacity, not forgetting that a sufficiently dense network is required to be referenced with the on-line sales sites.

Finally, the agreement could lead to a reduction of competition intensity between the signatories by reducing Mondial Relay's incentive to compete with La Poste.

What is less clear on the other hand is understanding why the reason for the suspension of the agreement was urgency, when Kiala's initial request (following a referral by the Minister of the Economy) was not accompanied by any request for an interim measure; the request was only made several months later. The Constitutional Council judges that the proscription of restrictive commercial practices is constitutional. *Système U* had referred an application for a priority preliminary ruling to the Constitutional Council on whether the Minister of the Economy's action against restrictive competition practices, under Article L.442-6 of the Commercial Code, was constitutional on the grounds that this provision allegedly infringed freedom of enterprise, the adversarial principle, the right to take legal action and the right of ownership.

The Council dismissed all *Système U*'s arguments, considering that the Minister of the Economy's power to take action to obtain the nullity of unlawful agreements, the reimbursement of undue payments and compensation for the damage caused by these practices is founded on the objective of upholding economic public order, which justifies a proportionate limitation of freedom of enterprise. As for the principle of the right to a fair hearing and a remedy, the Minister's action does not preclude actions that the victims of unlawful practices can initiate and in any case the undertaking pursued can always bring a third party claim against the other contracting party. Finally, an author of restrictive practices who receives undue payments cannot invoke a right of ownership.

However, the Council did take care to clarify that the parties must be informed in advance of the Minister's intention to take action. □

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