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THE NATIONAL JUDGE
AND THE PRACTICE OF COMPETITION LAW
WITH ITS RECENT DEVELOPMENTS
IN THE AREA OF FINANCIAL SERVICES

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Introduction

The financial services area, which comprises insurance, banking and investment services and plays a key role in the UE economy, representing 6 % of its GDP, has quite recently come within the scope of competition control, not only on the basis of european law, but even from the national point of view.

There are two reasons for this.

First, the fact that, in each european country, this area was traditionally placed under strong government supervision, and regulated, inside each main regime (insurance, bank and investment industries), with an interdiction to be involved in more than one of them -for example for a banker through participation in the capital of an insurance company or for a broker through participation in portfolio management, and, inside each regime, with a principle of separate specialities, and interdiction against dealing with matters differing from one's speciality. One must add to these restrictions a strict regulation over prices inherited from the Post-War period, set in place in France with the Ordinances dated 1945.

Such an institutional framework was not conducive to creating favourable conditions for effective and strong competition, even on a national level. This situation was to be continued until the adoption in the eighties of the reforms which were labelled the « Big Bang » of our financial systems and occurred successively in the US, then in each west european country and notably in France, abolishing these restrictions in the exercise of financial activities and creating the new concepts of « universal bank » (banque universelle », « insurancebanking » (bancassurance), or « multiple capacity » (capacité multiple). In parallel, the 1945 Ordinances were abolished on December, 1st, 1986, by the Ordinance establishing the Competition Council.

Second, the fact that although the Rome treaty, in establishing the principles of freedom of establishment and freedom to provide services throughout the Community, had suppressed discrimination on the grounds of nationality, these principles were impossible to achieve in these matters, without resolving on a common basis the necessities of national regulations, namely the conditions for access to the professions and the supervision exercised over the financial auxiliaries in each european country, at the stage of their agreement and later during the course of their activities. Government supervision was a general principle, but the rules and requirements varied much from one country to another, -and to some extent, still do, as mentioned below.

The European Single Act, signed in Luxembourg and La Hague on February 17th and 24th, 1986, led to the adoption of a series of directives in these three domains : insurance, banking, investments services in the securities field, which enshrined the principle of a « single market » on which financial services could be freely provided throughout the European Union. In accordance with the Porto treaty signed on May 2nd, 1992, the single market was instituted not only in the Community countries but also in those of the European Economical Space « EEE » (UE area to which are added Norway, Liechtenstein and Island). Furthermore, article 54 of the Porto treaty states that articles 81 and 82 TUE are applicable in the EEE space, and can be enforced by European Authorities.

The framework of financial integration in the European Community

The single market's philosophy stands on *a common definition* of financial instruments and services and of the conditions for access to the professions, and on *a mutual recognition* of the agreements given by national authorities, and of the controls carried out by the country of origin : all the undertakings involved in such activities, must be granted an agreement in the home Member State, and these agreements are considered as « european passports » enabling them to exercise the same activities in all the EEE countries. The modalities of exercise of the european passport are twofold : freedom of establishment, e.g. the possibility to install branches with permanent presence in the host Member State, and freedom in providing services without any settlement in that country. The regulation of these activities, also organised by these directives is shared between the authorities of the home Member State and those of the host Member State : the former grant agreement, issue and/or enforce prudential rules and accountancy, whereas the latter have power to issue and enforce the rules of fair conduct and more generally those which protect the customers, relating to precontractual information and periodic accounts, transparency, conflicts of interest. Cooperation provisions enable all these authorities to carry on inquiries and investigations throughout the EEE territory, for their own purposes or at the request of one of their european counterparts.

Last, but not least, is the principle that which is under regulation is not only the professionals and financial auxiliaries, but mainly the services themselves : the requirements to which the professionals have to comply, especially for financial resources, equipment, qualifications and reporting, depend on each service they want to provide, and the agreement is granted for this one only. One can say that this statutory regulation is no longer based on status or profession, but on the activity itself (it is a scheme « de métier », not « de filière »).

But for what kind of activities ? Enumerated in the annex below, they are similar to those defined in the WTO Annex on financial services, dated 1999, March, 1st, implementing the General Agreement on services signed in December 1997. The field they cover is very broad, regarding financial products as well as financial services.

After such a deep evolution and extensive liberalisation of financial industry throughout the European Union, the stage was ready for the anticipated single market and accordingly, for a staged entry of the competition authorities next to the regulation ones. So did they. Without pretending to be exhaustive, let's have a look at the following examples, which will be considered at three levels :

- first, the regulation and sanction of usual anti-competitive practices committed by financial agents, the only uniqueness of these cases resulting from the financial nature of the relevant market,
- second, the new highlights given by european law and case-law to some exclusive rights detained by State bodies and organisations,
- third, the nuances and obstacles brought to the development of a single market of financial services, due to general interest and consumers protection reasons considered on a national point of view, enabling State members to issue protective regulations.

Anti-competitive practices detected and sanctioned in the area of financial services

****mortgage credits distribution : non-agression agreement***

The Cour of Appeal of Paris approved on November, 27th, 2001, the decision of sanction taken by the Competition Council against several major french banks, for anti-competitive practices on the relevant market of mortgage credits distribution for individuals, in 1993 and 1994.

The banks were reproached to have participated in setting up a clandestine cartel to eliminate for customers having contracted earlier mortgage credits with some banking group, any possibility to renegotiate their loans with a competitor, during that period of strong decrease of interests' rates, limiting accordingly the losses which should have resulted from these renegotiations.

The Council had considered the practices sufficiently proved by the similarities of behaviour of the professionals involved, in that case the similarity of their marketing policy, to which were added a series of other elements, such as written or oral referencies from local agents to a national agreement, instructions prohibiting agents to canvass clients belonging to competing networks whose names were given, organization of an accurate supervision on the behaviour of competitors, with systematical reporting to the headquarters of the companies.

Considering the significant restrictions brought to the competition in that financial area on a national level, the importance and reputation of the banking groups involved, the amounts of potentially renegotiable credits, the Cour of Appeal of Paris approves at last the fines inflicted to the members of the cartel, which amount to 174.000.000 euros.

****car insurance distribution : boycott practices***

Similar practices were reproached to the National Federation of Insurance Brookers' Trade-Unions and to its regional affiliate trade-unions in Normandy, in order to discourage car professionals (car repair garages et exclusive distributors) from proposing to their clients alternative insurance products, threatening them to suppress their agreements with the insurer taking responsibility for the repair costs by means of an accelerated and simplified procedure.

The Competition Council rejects on November 3rd, 1993, the arguments opposed by the defendants, upon which their action was nothing but a trade-union one, aimed at the protection of the collective interests of the profession, and pronounces fines amounting 45.000 euros to the National Federation, 7.000 euros to the regional and local organisations.

****ski insurance distribution : abuse of a dominant position***

In a decision dated June 28th, 1994, the Competition Council sanctions the French Ski Federation (FFS) for abuse of its dominant position on the relevant market of the distribution in resorts of ski insurance products, these products being sold with a licence issued by the FFS, surnamed « Snow-card », the combination of the two enabling the FFS to claim a number of adherents amounting one million. The anti-competitive practices relate to the cancellation of national or regional competitions the organization of which belongs to the mission of service public given to the FFS by the Ministry of Sports, or the threat of such cancellations to force the resorts to stop proposing other ski insurance products and maintain the turnover brought to the FFS by the sales of these « snow-cards ».

In that case, the Competition Council applied article 53 of the Ordinance date December 1st, 1986 (now article L. 410-1 of the Code de commerce) : the FFS, instituted by the law dated July 16th, 1984, ensures a mission of public service on education through sport and physical activities, development of these activities, training and perfection of its management, and grants licences and federal titles, the Competition Authority having no jurisdiction to control the functioning of these missions which exclude any commercial, financial or speculative activity.

On the contrary, the diffusion by the FFS of insurance products to cover ski risks does not enter that definition, such an activity, namely the supply of services, being placed under the provisions of article L. 410-1 of the Code. The solution, a classical one, enabled the Competition Council to sanction the said anti-competitive practices.

Highlights given by european law to some exclusive rights granted to State institutions and organisations in the distribution of banking and insurance products

Regarding the general frame of the french financial system, interesting opinions and decisions refer, in that area, to the application of competition rules on public or semi-public

organisations and institutions enjoying exclusive rights in the distribution of financial and investment products and in the reception of deposits.

The Competition Council was questioned in 1996 on the one hand, by private banks, on the other by the Senate, about the credit distribution system's compliance to competition rules, and especially the restrictions of concurrence under European competition law, resulting from exclusive rights given

- in the distribution of Savings Account Books administered by Savings Institutions, to the Postal Administration services and to the Caisse des Dépôts et Consignations,
- in the receiving of deposits by notaries, to the Credit Agricole and Postal Administration services (if short term e.g. for less than three months) and to the « Caisse des Dépôts et Consignations » (CDC), a State financial body (if long term e.g. for more than three months).

Referring to article 86 TUE and Züchner case, ECJ July 14th, 1981, the Competition Council summarizes first that restrictions to competition resulting from exclusive rights are authorised provided that they prove to be necessary to achieve objectives of general interest justifying their exercise.

But the Council adds that a strict separation must be organised between activities open to competition (e.g. financial services) and others subject to legal monopoly (e.g. mail distribution for Postal administration), in order to prevent any risk of violation of competition rule, namely a possible abuse of a dominant position if such a position was established. And the Competition Authority enlarges the scope of its decision, noticing that « similar institutions » must separate their market activities from those of public service, accordingly.

Concerning deposits by notaries, which are funds they receive in the course of their activities (successions, companies creations, real estate purchases, and more generally every contract passed with their assistance), the Council notes that the justification given so far for CDC, Credit Agricole and Postal monopolies, e.g. State protection and guarantee granted to customers, is now less admissible, since the European Directive 94-19 incorporated in France by the law dated August, 8, 1994, has set in place a general system of guarantee of deposits, providing a similar degree of protection. Moreover, the Competition Authority notices that there is no reason for letting the Credit Agricole enjoy such exclusive rights, since it is no longer a public organisation but a private company, exercising a general financial activity.

French Conseil d'Etat had also the opportunity to state upon exclusive rights' compliance to competition rules in the administrative area, in a decision dated March, 28, 2001. The National Federation of Insurance Brokers' Trade-Unions pursued the annulment of the Ministry's refusal to put to an end the distribution of public insurance products (issued by the Caisse Nationale de Prévoyance, State body in charge of insurance missions) through Taxation Administration agencies, adding that in practice, the conditions required in the criticised decision were infringed.

The administrative Supreme Court dismisses the case, stating that the decision cannot be criticised, since it authorises the relations between the Insurance Public organisations and the Taxation Administration services provided they comply with competition rules, namely the payment of this service and the absence of use of advantages linked to the service public missions undertaken by the Taxation Administration, adding that the offering by the Insurance institution of its products through this administrative network does not constitute in itself an illegal support. In the Supreme Administrative Court opinion, the attacked decision is in itself

regular, the fact that the conditions it requires are not observed in practice being irrelevant to support the annulment.

However, there were other possible grounds to criticise the authorisation. On the European point of view, functions' non-separation was sanctioned by the ECJ (see ECJ 13 décembre 1991, GB-Inno-BN aff. C 18-88, Rec. p. 5941, in a case where the Belgian RTT was granted agreement powers on telephones of its competitors). Under national competition law, the solution adopted by the Conseil d'Etat is moving away from its traditional doctrine (see *City of Nevers*, CE May, 30th, 1930), according to which a State body's intervention on the market, in competition with private economic agents, is illegal if not justified by valuable reasons, namely the lack of private initiative in front of population's needs, the seek of public interest or the circumstance that the said intervention prolongs a current public service, only such reasons being recognised as sufficient. But in the cited case, no one of them could be invoked, as noticed by the Government Commissary, himself favourable to an annulment of the Ministry's authorisation.

Nuances brought to the development of a single market of financial services, on the grounds of general interest and consumer protection considered from a national point of view

****co-insurance and direct insurance services, ECJ 1986***

By a series of decisions taken in the co-insurance sector on December, 4th, 1986 (EC v. France, n° 220/83, EC v. Denmark n° 252/83, EC v. Germany, n° 205/84, EC v. Ireland n° 206/84, rec. 1986-11 p. 3663), the ECJ admitted, on the grounds of articles 59 and 60 of the Treaty, that imperative reasons linked with consumer protection and general interest may justify restrictions to freedom in supplying services throughout the Community although it constitutes a fundamental principle of the Union. The tolerance expressed by the European Court was nevertheless subject to strict conditions: the restrictions imposed by national authorities had to be justified by general interest and apply to all natural persons or legal entities exercising similar activities on the territory of the host Member State without any discrimination. Moreover, the interests involved had to be not protected in that country, and the restrictions, objectively necessary as well as proportionate to these necessities.

These decisions occurred at a time when harmonization was still not completed in the insurance sector, a first series of Directives taken in the seventies having set in place only partially coordinated regulations. The Member States brought to the ECJ at the request of the European Commission had imposed on insurance companies agreed in their own home Member States and willing to supply co-insurance services in other territories, to receive another preliminary agreement from the national competent authorities of the host Member State, and/or to settle in the host Member State with permanent presence, Germany having imposed such requirements (preliminary agreement *and* obligation of permanent settlement) also for direct insurance activities.

The ECJ stated that due to this situation of incomplete harmonization, the restrictions set in place by the four Member States could be justified, unless they appeared to be disproportionate. But the European Court did not admit the requirement of a permanent presence in the host Member State, as being the negation of the principle of freedom in providing financial services enshrined in the Treaty, nor the prohibition of European co-

insurance services over defined thresholds, no provision in the European Directive enabling Member States to create such thresholds.

****investment services : ECJ 1995***

The Alpine Investment case, C-384/93, May 10th, 1995, rec. 1995 p. I-1141, brought more recently new highlights on the ECJ doctrine, this time in the investment sector and after the harmonization in financial services had been completed.

The Netherlands Court « College Van Beroep » had asked the ECJ for a prejudicial question concerning the legality of an interdiction imposed by Netherlands Financial Authorities on any professional entity exercising its activities on Netherland territory or from it, to call customers settled in other Member State territories without their preliminary consent (« cold calling » practices) in order to propose speculative operations on commodities.

The ECJ summarizes the principles already defined in these matters : the restrictions issued by a Member State may be approved if justified by imperative necessities, such as the preservation of the national financial system's reputation which constitutes a general interest ground, the establishment of professional regulations leading to investors' trust and market efficiency.

It notes the numerous complaints sent by customers to the Netherland Investment Authorities and adds that the Member State from which are exercised such « cold callings » is the best placed to regulate these practices and can't be criticised to do so directly. At last, the ECJ observes that the principle of proportionality is fully respected, since the interdiction is limited to the specific market where abuses were noticed, and to only one of the means to approach the customers.

Conclusion

There is no doubt that the european and national competition authorities have more and more applied competition rules in the financial sectors newly placed under their scrutiny, despite various constraints and restrictions due to the specificity of these markets.

But is this enough to ensure the establishment of the single financial market sought after by the European Union ? The Commission Program for financial services adopted in October 1998, and the current projects of reform of the Directives show that the approach of the European Authorities has also evolved : it is no longer a unification scheme with a top-down philosophy, but on the contrary the differences in national regulations are considered helpful to stimulate competition throughout the Union, and the necessities of cooperation between and by the Member States' Authorities are taken into account.

ANNEX

The European Directives's definition of financial services in insurance, banking and investment sectors

I - Insurance et insurance-related services including co-insurance, (Council Directives dated June 22th, 1988, November 8th, 1990, June 18th, 1992 and November 10th, 1992, incorporated in France in the Laws n° 89-1014 dated December 31st, 1989, July 16th, 1992, January 4th, 1994 and August 8th, 1994, comprise :

1. Direct insurance (life and non-life),
2. Reinsurance and retrocession,
3. Insurance intermediation, such as brokerage and agency.

II - Banking sector covers, according to First Council Directive 77.780/EEC, and Second Council Directive 89/646/EEC dated December 15th, 1989, incorporated in France in the Laws n° 84-46 dated January 24th, 1984, n° 92-665 dated July 16th, 1992 and July 2nd, 1996, the latter surnamed « Modernisation of Financial Activities M.A.F. » having deeply transformed the supervision system in banking activities as well as in exchange and securities markets :

1. Acceptance of deposits and other repayable funds from the public,
2. Lending,
3. Financial leasing,
4. Money transmission services,
5. Issuing and administering means of payments (e.g. credit cards, travellers' cheques and bankers' drafts,
6. Guarantees and commitments,
7. Trading for own account or for account of customers, in :
 - a) money market instruments (cheques, bills, CDs, etc..),
 - b) foreign exchange,
 - c) financial futures and options,
 - d) exchange and interest rate instruments,
 - e) transferable securities,
8. Participation in share issues and the provision of services related to such issues,
9. Advice to undertakings on capital structure, industrial strategy and related questions and advice and services relating to mergers and the purchase of undertakings,
10. Money broking,
11. Portfolio management and advice,
12. Safe keeping and administration of securities,
13. Credit reference services,
14. Safe custody services, including inter alia consumer credit, mortgage credit, factoring with or without recourse, financing of commercial transactions (including forfaiting)

III - Investment services defined in the securities field in the Council Directive 93/22/EEC dated May 10th, 1993, incorporated in France in the said MAF reform dated July 2nd, 1996, which are twofold, principal or non-core, refer only to the instruments subject to the Directive's provisions which are enumerated in the Directive.

These instruments are

- 1-transferable securities and units in collective instruments undertakings,
- 2.Money market instruments,
- 3.Financial-future contracts, including equivalent cash-settled instruments,
- 4.Forward interest-rate agreements (Fras),
- 5.Interest-rate, currency and equity-swaps,
- 6.Options to acquire or dispose of any of these instruments, including options on currency and on interest rates.

Principal services relate to :

- 1.Reception and transmission, on behalf of investors, of orders in relation to one or more of the listed instruments, and execution of such orders other than for own account,
- 2.Dealing in any of the instruments listed above for own account,
- 3.Managing portfolios of investment in accordance with mandates given by investors on a discriminatory, client-by-client basis when such portfolios include one or more of the listed instruments,
- 4.Underwriting in respect of issues of any of the listed instruments or the placing of such issues.

Non-core services –which do not require a specific agreement if supplied by an undertaking authorised to provide any of the principal services, comprise :

- 1.Safekeeping and administration in relation to one or more of the listed instruments,
 - 2.Safe custody services,
 - 3.Granting credits or loans to an investor to allow him to carry out a transaction in one or more of the listed instruments, where the firm granting the credit or loan is involved in the transaction,
 - 4.Advice to undertakings on capital structure, industrial strategy and related matters and advice and service relating to mergers and the purchase of undertakings,
 - 5.Services related to underwriting,
 - 6.Investment advice concerning one or more of the listed instruments,
 - 7.Foreign-exchange service where these are connected with the provision of investment services.
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