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Dawn raids vs. the freedom of the press

Eric Barbier de la Serre (Jones Day) · Friday, July 9th, 2010

Paris Court of Appeals, Order of 17 June 2010, Amaury and Others

Relying on what seems to be unprecedented reasoning, the President of the Paris Court of Appeals has quashed a judicial order authorizing a dawn raid against several companies belonging to Amaury, a French news group that publishes mainly sports newspapers. The most interesting aspect of this Order is that the President of the Paris Court of Appeals has defined and applied an especially demanding standard of proof for the justification of dawn raids targeting press groups.

The whole Order is based on the premise that the ECHR "tip[s] the balance of competing interests in favour of the interest of democratic society in securing a free press" (ECHR, 16 March 1996, Goodwin v United Kingdom, paragraph 45). In the light of this principle and of several concurring general provisions of French law , a dawn raid against press companies can be justified only if there are "particularly troubling indicia" for suspecting infringements of competition law by these undertakings.

The concrete examination carried out by the President of the Court in the case at hand, confirms that these strict standards are not just wishful thinking: the President led a very close examination of each piece of evidence on which the Authority had relied and found that – evaluated both individually and as a whole – they did not satisfy the demanding test that he had just defined. By way of example, he found that the documents emanating from the complainant were self-serving and should have been corroborated by third parties. Also, an e-mail in which Fedex explained that it had decided to buy advertising space in Amaury's publications and not the complainant's, could not justify a presumption that Amaury had tied its offers for advertising in its newspapers even though the said e-mail apparently referred to such tied offers. In the President's view, the Authority should have examined the substance of Amaury's offer more closely and analyzed whether it remained isolated. Finally, the price offered by Amaury was not particularly attractive, which diminished the probability that there was illegal tying.

In short, it seems that any plausible alternative explanation is sufficient to exclude specific pieces of evidence. This is in stark contrast with the standard applied to companies that are not active in the press industry. By way of example, in a judgment delivered two days before the Amaury Order, the Paris Court of Appeals found that in that case "the companies' parallel behaviour constituted a serious presumption of market allocation" which could justify a dawn raid (Paris Court of Appeals, 15 June 2010, Veolia Transport).

Interestingly, in the Amaury Order the President did not find it necessary to examine whether there was a concrete risk of a breach of the protection of journalistic sources: what mattered was that in themselves the dawn raids were targeted against press companies. What mattered was therefore that journalistic sources may incidentally have been disclosed to public officials, irrespective of the risk – or the absence of risk – that the information would later be used against the press companies or the sources. The French Authority has officially announced that it will lodge an appeal against this Order before the French Supreme Court. If the order stands, one may think of other applications of the rationale on which the President relied. In particular, in view of the risk of disclosure of privileged information, which is essential for the protection of the rights of the defense, it can be reasonably concluded that any dawn raid carried out at a lawyer's office could be justified only on the basis of extremely serious indicia.
