

# Kluwer Competition Law Blog

## Bully beef

Max Findlay (Max Findlay Associates, United Kingdom) · Tuesday, February 21st, 2012

Sometimes competition law looks as if it's on the side of the bullies. Take, for example, the French Autorité de la concurrence's recent decision in the Paris food retail sector case. The Autorité came up with the idea of using a new tool – a structural injunction – to tackle retail concentration. This would let the regulator order the sale of assets to competitors without first deciding that their owner had broken any competition rules.

In the present case, the Casino group has a 60% share of the Parisian food retail market. This is over three times more than its main competitor, the Carrefour group. However, no-one has suggested that Casino has done anything wrong in being so successful. While other stores have abandoned the streets of the French capital and rushed off to build hypermarkets in the city outskirts, Casino has spent a lot of money opening small inner city shops and adapting itself to meet consumer demand. Now the Parisian municipality has panicked about how powerful Casino has become and asked the national regulator to find a solution. According to the Autorité, the structural injunction would be the best the way of improving competition – for the benefit of consumers naturally – in a food market that is worth €3.7bn a year. Not surprisingly, the injunction would apply most particularly to those areas where poor old Casino has most outlets.

But why on earth should it have to put up with this kind of bullying expropriation? Because its competitors weren't as adroit as Casino and the Paris municipality was too dim to see the likely commercial consequences of their short-sightedness? As a reason for confiscating someone else's property, that doesn't sound too good. You have to hope that before anyone actually tries to wield this injunction, they come up with a better reason than “please sir, it's not fair, sir, I shouldn't have to lose business just because I'm an idiot, sir”.

Other times, the boot's on the other foot and it's competition law itself that looks as if it might be given a good kicking by the bigger kids in the playground. Take the recently announced \$90bn merger between the mining giant Xstrata and Glencore, the world's biggest commodity trader, or the seemingly never-ending intellectual property wars round the globe between Apple and other mobile device makers. These deals and rows are so massive that you can't help wondering if regulatory authorities can actually police them effectively.

Put another way, as with the NewsCorp / BSkyB bid, it is likely that it will be political, news or commercial developments that really determine what happens – not the lawyers. Already, manufacturers in China who buy a lot from Glencore/ Xstrata are said to be worried that the prices they pay may go up, which will ultimately impact on what the rest of us have to fork out for things.

The European Commission may therefore well want to take a closer look at the competition law aspects of this deal. But if the Chinese manufacturers persuade their government to weigh in here, then it will be the politicians not the regulators who will be sorting things out, even if they have to borrow legal fancy dress to do it.

The same goes for the continuing row between Apple and Proview Technology based at Shenzhen in China. Proview claims to own the iPad trademark in the PRC and has apparently asked Chinese customs officials to block all exports of iPads. If that actually happened, it would be a devastating blow for Apple as all their iPads come from China. However, Proview are reported as having financial difficulties and may well simply be looking for a way of extracting more money out of Apple. Either way, it's going to be a matter of politics plus cash that resolve this dispute, not law, even if legal rules are the PR tools used to describe the final resolution.

But perhaps the saddest moment comes when competition law is duped into thinking it is liberalising something when in fact it is opening the door to lower standards. Last autumn, the Legal Services Act (LSA) came into force in the UK, allowing external investment in law firms for the first time. Hardly a day goes by without news of non-lawyers buying up (or threatening to acquire) second-tier British law firms (especially those handling high-volume claims). LSA supporters say it will lead to a cheaper legal service. However, the punters will eventually discover that when business people say "cheaper", they often mean "worse" because the bottom line is more important than some airy-fairy notion of doing a thorough professional job. That's not exactly what competition law was meant to achieve.

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*Source: OECD* "Consumer welfare, France

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