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French Competition Law Newsletter

Highlights

- 10th anniversary of the French Competition Authority – results and prospects
- The French Competition Authority issues a notice concerning settlement proceedings
- The first President of the Paris Court of Appeal ordered a stay of execution regarding injunctions pronounced by the French Competition Authority against Stihl

10th anniversary of the French Competition Authority – results and prospects

On March 5, 2019, the French Competition Authority celebrated its 10 years of existence. The President of the Competition Authority listed her priorities for the coming years, which include the retail sector and purchasing alliances, digital economy, “predatory” acquisitions and reflection on ex post control, as well as the labour market and labour collective agreements.

The French Competition Authority (“**FCA**”) in its current form was created by the Law on the Modernization of the Economy of August 4, 2008. In addition to the transfer of powers of the former French Competition Council (*Conseil de la concurrence*), the reform attributed new powers to the FCA, namely the power to authorize mergers, which was previously held by the Minister for Economy and Finance. The FCA also received new consultative powers and can, in particular, take *ex officio* action to provide advice and recommendations with regard to any competition matter. With regard to anti-competitive practices, the FCA now has investigative powers which were previously held by the Minister for Economy and Finance.

The 10th anniversary of the FCA was used as an opportunity to bring together the various actors in competition law in France, on March 5, 2019, to discuss the main challenges that the Authority faces and its priorities for the future.

Participants included Prime Minister, Edouard Philippe, the President of the FCA, Isabelle de Silva, the former President of the FCA and Vice-President of the French Council of State, Bruno Lasserre, the European Commissioner for Competition, Margrethe Vestager, the former European Commissioner for Competition, Mario Monti and the economist Jean Tirole.

Since its creation, the FCA has issued over 2,000 merger control decisions – including structuring decisions in the television (TF1/TMC/NT1, Canal Plus/TPS), distribution (Casino/Monoprix, Fnac/Darty) or telecoms (Numericable/SFR) sectors. The Authority has also adopted 288 decisions regarding anti-competitive practices, including 96 sanction decisions for a total amount of €5 billion (in particular, the Authority recalled its

involvement in cases concerning road signs, interbank commissions on cheques, washing products, railway freight, home care and personal care products, parcel transport, dairy products, floor coverings and household appliances). In addition, the Authority has made extensive use of its advisory role with nearly 255 opinions delivered (in particular in the food distribution, car repair, e-commerce, drug distribution, railway reform, bus transport, regulated legal professions or online advertising sectors).

The FCA priorities

Isabelle de Silva announced in her introductory speech that the priorities of the FCA for the coming years should focus in particular on the retail sector and purchasing alliances. Since the adoption of the law on balanced commercial relationships in the agricultural and food sectors of October 30, 2018, the FCA can conduct a competition review of any transaction aiming to create a purchasing alliance in the retail trade sector, either on its own initiative or at the request of the Minister for Economy and Finance. In addition, the President of the FCA indicated that an investigation was currently underway to measure the pre- and post-transaction impact of purchasing alliance combinations in the food retail sector. In parallel, a study was launched on the elimination of the distinction between physical and online stores.

The detection of infringements in the context of the digitalization of the economy, particularly agreements on prices, will constitute another priority of the FCA. According to Isabelle de Silva, digital technology presents a particular challenge for competition law by allowing greater concealment of infringements, particularly with the use of encrypted messaging systems. Moreover, digital technology may introduce new forms of coordination. In this regard, the FCA has announced that it will publish, before the summer, its joint study with the German *Bundeskartellamt* on algorithms and their impact on the implementation of competition law. In the field of merger control, the FCA President insisted on the necessity of examining “predatory” acquisitions, the aim of which is to eliminate

future competitors, by introducing, if necessary, *ex-post* control on mergers and by taking greater account of potential competition in analyzing mergers.

Isabelle de Silva also indicated that a study was underway concerning the labour market and collective agreements. At the government’s request, an opinion will soon be issued on the impact on competition of the extension of collective agreements.

Finally, it was recalled that 2019 marks the entry into force of the ECN+ Directive at the European level, which aims to provide the competition authorities of Member States with the means to implement competition rules more effectively and to ensure the proper functioning of the internal market. The Pacte Law (*loi Pacte*) initially authorized the Government to transpose this directive by ordinance within nine months of its publication. However, the French Constitutional Council held in its decision of May 16, 2019, that these provisions were unconstitutional since they had no direct or indirect link with the original bill.

These measures include in particular the Authority’s ability to (i) reject certain referrals that do not correspond to its priorities and which can be handled by the Ministry for Economy and Finance, (ii) order structural injunctions in the context of litigation proceedings relating to anti-competitive practices, and (iii) take action *ex officio* in order to impose interim measures. They also provide for the extension of the use of the simplified procedure before the FCA for merger control, clarification of the criteria used to determine sanctions by removing the reference to the damage to the economy, and simplification of the modalities for referring cases to the liberty and custody judge (*juge des libertés et de la détention*) and for the use of judicial police officers during dawn raids. As a result of the French Constitutional Council’s decision, these transposition measures are no longer in the Pacte Law and will have to be included in a new bill to be discussed before the French Parliament.

The French Constitutional Council however validated provisions in the Pacte Law which

create a right for the FCA and DGCCRF agents to obtain the disclosure of detailed “*fadettes*” *i.e.*, the recording of telephone calls provided by mobile telephone operators, for the investigation and detection of anti-competitive practices. This

access will be subject to the prior authorization of a controller of connection data requests following a request made by the General *Rapporteur* of the FCA or by the DGCCRF.

The French Competition Authority issues a notice concerning settlement proceedings

Three years after the introduction of a settlement procedure in its legal arsenal, the FCA has issued guidelines on the conduct of settlement proceedings (the “Settlement Notice”). The Settlement Notice aims at clarifying the framework under which companies may be granted fine reductions in the context of antitrust investigations. However, several questions are still pending, including the determination of the final amount of the fine by the FCA’s Collège and the impact of settlement proceedings on follow-on damages claims.

On December 27, 2018, the FCA published the final version of its procedural notice on the scope of application and conditions for the implementation of settlement proceedings.

The settlement procedure was introduced into the French Commercial Code by the law of August 6, 2015, for economic growth, activity and equal opportunities (the “**Macron Law**”). It replaced the former non-objection procedure (*procédure de non-contestation des griefs*) and allows companies that do not dispute the objections notified against them to benefit from a reduced fine.

Increased legal certainty for companies willing to use the settlement procedure

In contrast to the non-objection procedure, which granted companies a reduction of a certain percentage of the fine that would normally have been imposed, without the amount of this fine being known, the settlement procedure aims to offer more foreseeability. Indeed, the settlement procedure allows the investigation services and the undertaking to agree on minimum and

maximum amounts for the fine. The FCA *Collège* then decides on the final amount of the fine. On this point, the Settlement Notice indicates that the *Collège* must comply with the established fine range – which may, however, be broad.

The Settlement Procedure also provides certain details on the terms of the procedure. Companies wishing to benefit from the settlement procedure must make a request to the *Rapporteur Général* (Lead Case Handler) and reach an agreement within two months of receiving the statement of objections. On the merits, the company must refrain from contesting the reality, the legal qualification and any liability regarding all of the objections brought against it, as well as the proceedings which led to the statement of objections. The terms of the settlement are then formalized in minutes, signed by the undertaking, which contain a declaration that the undertaking does not contest the allegations brought against it, any commitments proposed and the fine range. During the session before the *Collège*, the undertaking retains the right to submit observations relating to the final determination of the fine amount.¹

Finally, the Settlement Notice clearly asserts that the decision as to whether or not to implement the settlement procedure rests with the *Rapporteur Général*, who shall assess this on a case-by-case basis, particularly with regard to the procedural gain for the FCA (reduced length of proceedings, simplified case handling etc.). In particular, when objections are notified to several undertakings, the investigation services favor the settlement procedure when all undertakings so request. The

¹ These observations, which must not, under any circumstances, call into question the facts and qualifications retained by the investigation services, may concern the gravity of the acts in question, the damage caused to the economy or any aspects specific to the concerned undertaking (for example, mitigating circumstances).

Notice also provides that the settlement procedure may be combined with partial fine immunity granted under leniency.

Pending issues

Despite the clarifications it provides on the various stages of the procedure, the Settlement Notice remains silent on certain points. In particular, as opposed to settlement proceedings before the European Commission, the Notice does not provide for any negotiation as to the scope of the alleged practices. Indeed, the settlement procedure is only available after the statement of objections has been issued; therefore, discussions with the investigation services take place after the objections have been established. Thus, the French system is not intended to jointly assess the scope of the objections and therefore does not offer any procedural gain until the statement of objections has been sent.

In addition, with regard to the determination of the fine range, the Settlement Notice only indicates that neither the investigation services nor the FCA *Collège* are required to apply the standard method for calculating fines, as presented in the sanctions notice of May 16, 2011.

Similarly, while the Settlement Notice offers companies the option to propose commitments, which the *Rapporteur Général* may potentially take into account, it does not specify which types of commitments could give rise to a reduced fine. It merely specifies that commitments relating to the implementation of compliance programs generally do not justify a reduced fine. The question of the factors taken into account in determining the final amount of the fine therefore remains open.

Finally, while the Settlement Notice notes that the waiver of the right to contest objections is neither an admission nor an acknowledgment of company liability, it is not entirely explicit on the question of follow-on damages claims that may be initiated as a result of a settlement decision, even though this decision establishes the undertaking's participation in an infringement. The Notice only indicates, in accordance with the provisions of the Damages Directive, that the settlement minutes may not be disclosed to third parties. However, there is no guarantee regarding third-party access to the statement of objections, or to the level of detail in the decision – although, in practice, the arguments concerning the calculation of sanctions have been relatively concise in the 12 settlement decisions adopted, to date, by the FCA.

The first President of the Paris Court of Appeal ordered a stay of execution regarding injunctions pronounced by the French Competition Authority against Stihl

A chainsaw manufacturer cannot force its distributors to hand-deliver its products when the sale was made online, according to the FCA decision 18-D-23 of October 24, 2018. However, the first President of the Paris Court of Appeal ordered a stay of execution regarding the FCA injunctions which required it to modify the manufacturer's distribution agreements.

On January 23, 2019, the first President of the Paris Court of Appeal ordered a stay of execution of all of the injunctions issued by the FCA against Stihl for having restricted the online sales of its authorized distributors by demanding a hand-over

for its power equipment, including products purchased online.

Background

On October 24, 2018, the FCA sanctioned the Stihl group, a manufacturer of power tools for gardening (chainsaws, brushcutters, trimmers), for having restricted online sales by its authorized distributors. More specifically, Stihl required its distributors to hand-deliver its products to clients, including when they were purchased online.

In line with the Pierre Fabre case,² the FCA decided that requiring in-store pick-up or hand-delivery to the home of the purchaser *de facto* prevented online resale and constituted a restriction by object of competition law. Despite Stihl's user-safety justification, the FCA considered that requiring hand-delivery was not necessary since, on the one hand, the law in force only required that a user manual be provided to customers and, on the other hand, other competing manufacturers did not require hand-delivery. In addition to a financial penalty of €7 million, the FCA ordered Stihl to amend its existing distribution agreements to stipulate, in clear terms, that authorized distributors who are members of its selective distribution network have the right to sell all of the manufacturer's products online, without any requirement to hand-deliver them to the purchaser.

For the first time since the ECJ's Coty judgment,³ the FCA also (i) upheld the legality of the application of selective distribution to this type of product, given the necessity of ensuring proper use and (ii) approved the prohibition of resale through third-party online platforms in a sector other than luxury goods, owing in particular to user safety and product quality requirements.

The stay of execution of the injunctions

Following this decision, Stihl filed a request for a stay of execution on the basis of Article L464-8 of the French Commercial Code. This provision allows for a suspension of the obligation to comply with the FCA injunctions if their implementation potentially has manifestly excessive consequences in the event of annulment or alteration of the FCA decision.

The first President of the Paris Court of Appeal, in its order on January 23, 2019, granted Stihl's request and ordered a stay of execution of the injunctions. The order states that the implementation of the injunction measures would require significant investments, including, in particular, new logistics, special packing arrangements for each type of machine and new packaging, as well as the creation of packaging storage areas. If the FCA decision were to be annulled, a return to the initial distribution arrangement would, in practice, be impossible.

Moreover, the first President of the Paris Court of Appeal notes that the implementation of injunctions only in France would lead to a distortion of competition within the distribution network, insofar as distributors in France would not be subject to the hand-delivery requirement, unlike distributors located in other member States.

The Paris Court of Appeal will have to rule on the merits of the case in June 2019.

² ECJ October 13, 2011, case C-439/09, *Pierre Fabre Dermo-Cosmétique (Sté) v. President of the FCA*.

³ ECJ December 6, 2017, case C-230/16, *Coty Germany GmbH v. Parfümerie Akzente GmbH*.

Other developments – Merger control

Ancel/Alsa

On January 29, 2019, the FCA authorized the acquisition of Alsa by Dr. Oetker (Ancel), two manufacturers of dessert mixes, subject to the commitment to conclude a five-year trademark licensing agreement for Ancel dessert mixes, renewable once, with the Sainte-Lucie group, active on the related market for baking auxiliary supplies for supermarkets and hypermarkets.⁴ Without this commitment, the combined entity would have held a 70–80% market share on the manufacturer-brands' market for the manufacture and marketing of dessert mixes for supermarkets and hypermarkets and a 50–60% share on the market including both manufacturer and distributor (private) labels.

Cash Paris Tax Refund/Global Blue/Planet Payment

On December 28, 2018, the FCA authorized, subject to commitments, the creation of the Cash Paris Tax Refund joint-venture by Global Blue and Planet Payment.⁵ The transaction was a continuation of a tender organized by the *Aéroports de Paris* (“ADP”) group for VAT refund services for international travelers flying out of Paris-Orly and Paris-Roissy airports. Global Blue and Planet Payment, the main operators of VAT refund services in France, committed to create a joint-venture dedicated to the activity, which was the subject of a tender (“downstream” business with respect to their own) if their offer was successful. The FCA dismissed the risk of anti-competitive vertical effects, owing to the control and auditing powers of the ADP group, which allow competitors to access Cash Paris Tax Refund services in a fair and non-discriminatory manner. Nevertheless, the parties committed to separate their businesses from those of the joint-venture in

order to avoid any coordination of their behavior, particularly by sharing strategic information.

Vivendi/Editis

On January 2, 2019, the FCA authorized the acquisition by the Vivendi Group of the Editis Group, which owns 13 literary publishing houses operating the brands Fleuve, Julliard, Le Cherche Midi, Plon, Robert Laffont, Bordas and Nathan, among others.⁶ The Vivendi group is active, in particular, on the music, communication and advertising and audiovisual production markets, including audiovisual adaptations of literary works via the Canal Plus Group. The transaction will not lead to any horizontal overlap between the two groups. According to the FCA, the transaction was also not likely to undermine competition through vertical effects, insofar as the Canal Plus Group rarely acquires audiovisual adaptation rights from publishing houses for literary works in French. The decision marks Editis' return to the Vivendi Group approximately 15 years after Lagardère's acquisition of Vivendi Universal Publishing. At the time, Editis had gathered the assets transferred as part of the filing process before the European Commission.⁷

Brizard Wine & Spirits/Cofepp

In a decision issued on February 28, 2019, the FCA authorized, subject to conditions, the acquisition of the Marie Brizard Group by Compagnie Financière Européenne de Prises de Participation (Cofepp).⁸ Marie Brizard and Cofepp's businesses overlap on the wine and spirits market. After having ruled out any risk of harm to competition on the on-trade channel (cafés, hotels, restaurants, etc.), the FCA examined the effects of the transaction on the mass retail channel. On this channel, the FCA considered that the transaction

⁴ FCA, decision n°19-DCC-15 of January 29, 2019, concerning the acquisition of sole control of Alsa France SAS and the intangible assets required for the manufacture and sale of food products under the Alsa and Moench brands by Dr. Oetker (Ancel).

⁵ FCA, decision n°18-DCC-235 of December 28, 2018, concerning the creation of a joint undertaking by Global Blue and Planet Payment.

⁶ FCA, decision n°19-DCC-01 of January 2, 2019, concerning the acquisition of sole control of publishing houses group Editis by Vivendi group.

⁷ European Commission, January 7, 2004, COMP/M.2978, Lagardère / Natexis / VUP.

⁸ FCA, decision n°19-DCC-36 of February 28, 2019, concerning the acquisition of sole control of the group Marie Brizard Wine & Spirits by Compagnie Financière Européenne de Prises de Participation (COFEPP).

was not likely to create a risk of harming competition on the vodka and whisky markets, given that a number of other brands are available to consumers. In contrast, due to the creation of a quasi-monopoly on the port wine and tequila markets, the transaction was only authorized subject to the sale of the port wine brand Pitters and the tequila brand Tiscaz to one or several independent operators.

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