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French Competition Law Newsletter

Highlights

— The *Inspection Générale des Finances* and the *Conseil général de l'économie* publishes a report on EU competition policy and industrial strategy

— The French Supreme Court annuls an order of the Paris Court of Appeals regarding dawn raids conducted at Whirlpool France

— The French Competition Authority fines the Akka Group €0.9 million for obstructing its investigations during a dawn raid

— The *Conseil Constitutionnel* validates provisions enabling the French Competition Authority to request access to telephone data from companies' employees

The *Inspection Générale des Finances* and the *Conseil général de l'économie* publishes a report on EU competition policy and industrial strategy

On June 2, 2019, the *Inspection générale des finances* and the *Conseil général de l'économie* published a report on the EU competition policy and industrial strategy (the "**Report**"). The Report was commissioned by the Ministry of Economy and Finance in December 2018 and aimed at assessing EU competition policy in the context of the 2019 European elections. The Report highlights the necessity to reshape the procedures and legal instruments used by the European Commission, in particular in merger control, to answer a number of criticisms raised by the French and German governments following the decision of the European Commission to prohibit the Alstom-Siemens merger on February 6, 2019.[1] The Report states that competition policy seems to be applied more strictly in Europe than elsewhere, including China, and that the European Union's strategic and industrial interests should be given more consideration in competition decisions.

The Report does not challenge the overall functioning of the European merger control system but makes several recommendations as to (i) the threshold for review of mergers in the digital sector (ii) the assessment of merger remedies and market entry from Chinese competitors, and (iii) the decision-making process of the Commission.

[1] The Franco-German Manifesto for a European industrial policy fit for the 21st Century, published on February 19, 2019.

Further regulation of digital actors

The Report first advances several propositions directed at the global players of the digital economy. The recent string of so-called "killer acquisitions", *i.e.*, acquisitions of innovative actors by dominant companies while their products are still under development or have not been monetized yet, has increased scrutiny of the potential failures of competition authorities. A leading example is the acquisition of WhatsApp by Facebook, which initially was not reportable to the Commission, although authorities realized that it raised serious competition concerns. Against the backdrop premise that current turnover thresholds for merger control fail to capture these killer acquisitions at the EU level, the Report introduces the three options that are generally mentioned among commentators: (i) lowering turnover thresholds to capture more transactions, (ii) introducing a transaction value threshold (as is already the case in Germany) or (iii) introducing an *ex-post* control power. Going further, the Report supports the creation of a supervisory committee of these "systemic digital actors" at the European level, with increased investigation powers. Targeted companies could potentially be subject to specific obligations, *e.g.*, transparency and portability of their data, or a general obligation to notify whenever an acquisition is made. Their transactions could also be reviewed *ex post* within a short time frame, in the event that the ratio between their value and the turnover of the acquired company suggests a potential competition issue.

The Report further notes that the Commission rarely resorts to interim measures, although timely intervention could prevent the market exit of new companies, especially in fast-changing markets like the digital sector. Therefore, it proposes to facilitate the use of interim measures by amending the conditions for granting such measures.

Amendments to the Horizontal Mergers Guidelines

As part of the merger review process, the Commission currently assesses the likelihood of market entry within a two-year period. The Report claims that this approach fails to account for major developments, such as the impact of a digital revolution or the market entry of heavily subsidized companies. They recommend that the Commission focus its analysis on long-term considerations. In addition, they advocate for the revision of the Horizontal Mergers Guidelines,[2] through the removal of the two-year timeframe when examining potential entry to the market.[3] They further advise the regulator to use benchmarks to determine whether significant and long-term changes occurring in comparable sectors may guide its assessment of the competitive conditions of the relevant market in a particular transaction.

The Report further explains that the rise of online platforms — and their resulting dominant positions — particularly in China, combined with China's aggressive industrial policy, require the EU to level the global playing field. Central to this fundamental evolution is the assessment of new market entries. Chinese competitors benefit from important subsidies and partly avoid the enforcement of EU legislation while still receiving full access to the internal market. The Report stresses that the award of subsidies should form an integral part of the Commission's analysis and serve as an indication of the competitive pressure that new entrants exert on European companies. Although there is no set list of criteria to be considered in this assessment, the Report still recommends amending the existing Horizontal Mergers Guidelines to ensure that subsidies are given proper weight.

[2] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 2004 C 31/03.

[3] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 2004 C 31/03, para. 74.

Towards more behavioral remedies

According to the Report, the rapid evolution of markets also warrants a change of the remedies used by the Commission. The EU regulator overwhelmingly favors structural remedies, which not only more significantly burden the parties but also lead to irreversible consequences. These remedies cannot be adapted in the event of unexpected circumstances. Due to this fact and the risk that such a result entails, the Report aims to promote a shift to behavioral remedies to align the European practice with that of its extra-European rivals. These behavioral remedies would include a revision clause to allow for a review in the course of their implementation, rather than review limited to exceptional circumstances, as is the case today.

More collegiality in the Directorate-General for Competition

The principle of collegiality between directorates is enshrined in the Commission's Rules of Procedure but has proven difficult to apply. The Report notes that during consultations, the directorates may not have enough information to fully weigh against the opinions of the Directorate-General for Competition. The Report seeks to promote more collegiality by encouraging the Directorate-General to involve the other sectorial directorates more efficiently, in particular during the review of mergers, and to show more transparency when the college of commissioners is called upon to make a decision. The Report also found that the Commission does not rely on experts to design adequate remedies, and thus encourage the Commission to recruit experts on industrial or sectorial strategy that could adequately support competition case teams. Their know-how would be particularly helpful in identifying the feasibility of remedies from an industrial, financial, and commercial perspective, and in conducting *ex post* reviews.

The French Supreme Court annuls an order of the Paris Court of Appeals regarding dawn raids conducted at Whirlpool France

In a ruling of June 13, 2019, the French Supreme Court annulled the November 8, 2017 order of the Paris Court of Appeals that confirmed the validity of the search warrants authorizing the French Competition Authority (the "FCA") to carry out dawn raids at Whirlpool France's premises.[4]

In October 2013, the FCA conducted dawn raids at the premises of Samsung and Fagor Brandt as part of an investigation into potentially anticompetitive agreements in the sector of domestic appliances. Based on evidence seized during these dawn raids, the FCA requested an authorization to carry out further dawn raids at Whirlpool France's premises, which was granted by the competent judges on May 21 and 22, 2014. Consequently, the FCA conducted dawn raids at Whirlpool France's premises on May 27 and 28, 2014.

Whirlpool France challenged the search warrant authorizing the May 2014 dawn raids before the Paris Court of Appeals, arguing notably that the FCA had violated Article L. 450-4 of the French Commercial Code. Pursuant to this article, companies implicated in antitrust proceedings based on evidence seized during third party dawn raids may challenge such dawn raids within ten days from the notification of the corresponding search warrant and dawn raids minutes and at the latest, at the statement of objections. Whirlpool France contended that the FCA breached its right to an effective remedy against the October 2013

[4] French Supreme Court, June 13, 2019, Decision No. 17-87.364, annulling the order of the presiding Judge of the Paris Court of Appeals, November 8, 2017, No. 14/13378, which confirmed the order of May 21, 2014 of the Paris Liberty and Custody Judge and the order of May 22, 2014 of the Nanterre Liberty and Custody Judge.

dawn raids and violated Article L. 450-4 of the French Commercial Code by failing to attach the Samsung and Fagor Brandt's search order and dawn raid minutes to the search warrant authorizing the subsequent May 2014 dawn raids at Whirlpool's premises. In an order issued on November 8, 2017, the Paris Court of Appeals dismissed Whirlpool France's appeal and held that it was sufficient to give notification at the time of the statement of objections.

Breach of Whirlpool France's right to an effective remedy against the October 2013 dawn raids

The French Supreme Court followed Whirlpool France's argument and held that, in order to preserve its right to an effective remedy, the Samsung and Fagor Brandt's search order and dawn raid minutes should have been presented to Whirlpool France at the time of the May 2014 dawn raids and should have been attached to the FCA's request for authorization from the judge and to the order granting the authorization for the May 2014 dawn raids.

Clarifying rights of defense under Article L. 450-4 of the French Commercial Code

The French Supreme Court clarified the notion of a company "implicated in the proceedings" under Article L. 450-4 of the French Commercial Code. It is now clear that a company targeted by a FCA request for an authorization to carry out dawn raids at its premises on the basis of evidence seized during previous dawn raids at the premises of third party companies is considered "implicated in the proceedings" from the date of that request, and not only after being notified of the FCA's statement of objections.

The French Supreme Court thus annulled the order of November 8, 2017 of the Paris Court of Appeals, and referred the case to a renewed Court of Appeals. This ruling therefore clarifies the rights of companies subject to investigations, in particular when implicated in proceedings on the basis of evidence seized during dawn raids in which they were not involved.

The French Competition Authority fines the Akka Group €0.9 million for obstructing its investigations during a dawn raid

On May 22, 2019, the French Competition Authority ("FCA") fined the Akka Group €0.9 million for obstructing its investigations into a suspected cartel in France.[5] This decision is only the second such sanction by the FCA,[6] and the first for breaking seals.

On November 8, 2018 the FCA raided two sites of the Akka Group located in Boulogne-Billancourt and Mérignac, France. The Akka Group provides engineering services and technical consulting services to small, medium, and large enterprises globally. During the raid of the Mérignac site, in order to avoid attracting the attention of the agents of the FCA, an employee intentionally removed from an internal email chain another employee, whose computer was being searched by the FCA agents. The employee also admitted to deleting several emails from his computer. Separately, at the Boulogne-Billancourt site, the FCA found that an affixed seal on an office door had been broken by an allegedly negligent employee. The FCA subsequently seized only one paper document from the office in question.

The FCA found that these initiatives taken by Akka's employees constituted unlawful obstruction of its investigative powers.

[5] FCA Decision n°19-D-09 of May 22, 2019 and press release of November 9, 2018. Under Article L. 464-2(5), 2° of the French Commercial Code, the FCA may impose a fine on an undertaking subject to an investigation that "obstructed the investigation or inquiry, including by providing incomplete or inaccurate information, or by providing incomplete or distorted documents" (courtesy translation).

[6] *See* FCA, Decision n°17-D-27 in relation to obstruction practices of Brenntag of December 21, 2017 ("Decision n°17-D-27").

The Akka Group's defense

First, the Akka Group contended that the obstruction prohibition of Article L. 464-2(5), 2° of the French Commercial Code does not cover the breaking of seals and the refusal to cooperate with the FCA during a raid, as they are not listed in the provision. In line with its previous decisional practice,[7] the FCA rejected this argument by explaining that the listed practices are not exhaustive.[8] According to the FCA, any behavior, whether intentional or not, which obstructs or delays the conduct of the investigation, may constitute an obstruction. The FCA also noted that the French prohibition should be interpreted in light of its EU equivalent–which expressly mentions refusal to cooperate and the breaking of seals among the prohibited practices.[9]

Second, the Akka Group claimed that it did not intentionally obstruct the FCA's investigations because the employee who broke the seal was allegedly looking for sweets and was therefore only negligent. The FCA considered, however, that obstruction need not be intentional, absent any precisions on the requisite element in French law.

Third, the Akka Group also argued that obstruction is already punishable under criminal law and that the FCA could not sanction the same practices under competition law. The FCA, however, noted that in line with French Constitutional Court case law, the offence may be sanctioned under both criminal and competition law.[10]

Rejecting all arguments put forward by the Akka Group, the FCA thus concluded that both practices constituted obstruction.

Sanctions

The FCA fined the Akka Group €0.9 million. In determining the fine, the FCA underlined the gravity of the infringements and concluded that the Akka Group's subsequent cooperation to retrieve the deleted emails did not mitigate the risk that such emails could have been permanently deleted. However, the FCA did take into account the Akka Group's instructions to its employees not to break the seals and their internal investigation report on the infringements, which Akka provided to the FCA.

Implications

The decision confirms the increasing scrutiny by French competition authority of the complete and truthful nature of the information provided in competition law procedures. On December 21, 2017, the FCA fined Brenntag €30 million for obstructing its antitrust investigations by providing incomplete, imprecise, and delayed information, refusal to provide information, and delaying strategies.[11] Unlike Brenntag's, the Akka Group's infringements do not seem to have deprived the FCA of information, and were also not sustained over time. In comparison, despite the gravity of the infringements, the Akka Group's collaboration with the FCA appears to have been taken into account.

[7] Decision n°17-D-27, *op. cit.*, paras. 187.

[8] Article L. 464-2(5), 2° of the French Commercial Code only mentions two practices: (i) providing incomplete or inaccurate information and (ii) providing incomplete or distorted documents.

[9] *See* Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ("Regulation 1/2003"), Article 23(1) (d) and (e). Article 23 sanctions the following behaviors, whether intentional or negligent: (i) the supply of incorrect, incomplete, or misleading information, (ii) the supply of information outside of the required time-limit, (iii) the supply of books or other records related to the business in incomplete form, (iv) the failure or refusal to provide a complete answer on facts during an investigation, and (v) the breaking of seals.

[10] *See* French Constitutional Court, Decision n°2016-552 QPC of July 8, 2016, para. 7.

[11] Decision n°17-D-27, *op. cit.*

The *Conseil Constitutionnel* validates provisions enabling the French Competition Authority to request access to telephone data from companies' employees

On May 16, 2019, the *Conseil Constitutionnel* issued a decision on the conformity with the French Constitution of various provisions of the Law on the growth and the transformation of companies ("**Loi Pacte**").[12] The *Conseil* censured several provisions of that law for the lack of connection with the initial bill. These included in particular Article 211, which provided the Government with the power to transpose the directive ECN+ into French law, and adopt various measures meant to strengthen the efficiency of procedures implemented by the FCA.

However, the *Conseil* upheld the conformity with the Constitution of Article 212 of the Loi Pacte, which enables the FCA to request access to telephone data of companies' employees in order to detect or investigate potential violations of competition law. These data include detailed bills that list calls made by the telephone owner. The FCA agents, however, cannot get access to the content of these phone calls.

The *Conseil* had initially annulled similar provisions in the Law Macron[13] in 2015 in order to preserve the right to privacy. The Loi Pacte instituted a new procedure, which subjects all requests for data access to the prior approval of a controlling officer.[14] This position will be assumed by a judge from the *Conseil d'État* or the *Cour de Cassation*, appointed for a period of four years.

[12] Law n°2019-486 of May 22, 2019 regarding the growth and transformation of companies.

[13] Law n°2015-990 of August 6, 2015 for the growth, the activity and equality of economic chances.

[14] Article L.450-3-3 of the Commerce Code.

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