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# French Competition Law Newsletter

## Highlights

— The French Competition Authority applies the "failing firm" defense for the first time

— The French Competition Authority fines COFEPP for failure to notify and gun-jumping

— The *Conseil constitutionnel* holds that multiple sanctions imposed on the same person for several infringements regarding restrictive competition practices complies with the French Constitution

## The French Competition Authority applies the "failing firm" defense for the first time[1]

On April 28, 2022, the French Competition Authority ("**FCA**") unconditionally cleared the acquisition of home furnishing retailer Conforama by Mobilux, the parent company of competitor But Group. The FCA applied the failing firm defense for the first time.

### Background

On July 8, 2019, Mobilux Group announced its intention to acquire Conforama, a retailer of furniture, household appliances, home decoration, and general merchandise products in France and the French overseas territories. Mobilux competes with Conforama through its subsidiary BUT. The transaction would lead to the combination of Conforama's 170 sales outlets and BUT's 322 sales outlets.

The transaction was initially notified to the European Commission; however, Mobilux requested that it be referred back to the FCA, arguing that it was best placed to assess the impact of the transaction locally and had experience in the home retail distribution sector. The Commission referred the case to the FCA on June 26, 2020.[2]

Despite the fact that the transaction involved significant overlaps, as evidenced by the subsequent opening of an in-depth investigation, the FCA granted Mobilux a derogation to the standstill obligation on July 23, 2020, in light of the financial difficulties faced by Conforama, allowing it to close the transaction prior to obtaining merger control clearance – a prerogative that the FCA has used only in a few instances in the past.[3]

[1] FCA Decision no.22-DCC-78 of April 28, 2022 (publication pending). *See also* FCA's press release of April 28, 2022 available at: https://www.autoritedelaconcurrence.fr/en/press-release/takeover-conforama-group-autorite-identifies-competitive-risks-clears-transaction.

[2] Commission decision of June 26, 2020, case M.9894.

[3] *See, e.g.*, FCA Decision in Bio c' Bon and Carrefour as reported in the FCLN Newsletter of September 2021, available at: https://www.clearygottlieb.com/-/media/files/french-competition-reports/french-competition-law-newsletter--september-2021-pdf.pdf.

On April 28, 2022, after a review period of almost two years, the FCA ultimately cleared the transaction unconditionally based on the failing firm defense. It is the first time that the FCA applies the failing firm defense since it gained merger control powers in 2009.[4]

## The FCA's concerns

The competition concerns raised by the FCA were threefold. First, the transaction could result in significantly strengthening the merging parties' purchasing power in relation to bedding products. The parties represented more than 50% of bedding products suppliers' route to market. Bedding products suppliers could therefore risk finding themselves in a state of economic dependence vis-à-vis the merged entity.

Second, the FCA was concerned that the transaction would reduce the number of franchisors in the furniture sector in the French overseas territories from two to one, thereby potentially leading to the deterioration of the franchisees' contractual conditions in the French overseas territories, and in particular an increase in franchisees' fees.

Third, the FCA identified competition concerns in various downstream markets for the retail distribution of furniture products in various local catchment areas, where the combined entity would have a strong market position.

Mobilux failed to alleviate the FCA's concerns by showing that efficiency gains would have mitigated the competition concerns. However, Mobilux successfully argued that Conforama was it's a failing firm and therefore the transaction would have no detrimental impact on competition.

## Application of the failing firm defense

The parties pointed out the significant financial difficulties encountered by Conforama that would have led Conforama to exit the market in the short term.

The FCA applied the three-limb test established by the *Conseil d'Etat* (the French administrative supreme court) in 2004 in the Seb/Moulinex decision,[5] namely that: (i) absent a takeover, the target would exit the market; (ii) no alternative offer would lead to a less adverse outcome on competition; and (iii) the target exiting the market would be no less harmful to consumers than the proposed merger.

In the case at hand, the FCA considered that the first two criteria were met based on Conforama's significant financial difficulties and the absence of an alternative offer. In relation to the third criterion, the FCA found that the transaction would ensure that product choice and diversity would be maintained which would not be the case if Conforama exited the market. Therefore, the FCA concluded that Conforama exiting the market would not be less harmful than the transaction.

The full decision, which has yet to be published, will likely contain some interesting and useful details on how the failing firm defense was assessed by the FCA in the specific circumstances of the case.

[4] Before 2009, mergers were investigated by the Minister for Economy. The failing firm defense was successfully used only in a handful of cases investigated by the Minister for Economy – *see* letter from the Minister for Economy of April 25, 2003 addressed to EBSCO Industries Inc. in relation to a merger in the sector for subscription agencies; and *see* letter from the Minister for Economy of January 20, 2003 addressed to Alliance Santé Distribution in relation to a merger in the sector for wholesale distribution of pharmaceuticals.

[5] *Conseil d'Etat*, ruling of February 6, 2004, No.249267.

# The French Competition Authority fines COFEPP for failure to notify and gun-jumping

On April 12, 2022, the French Competition Authority ("**FCA**") fined Compagnie Financière Européenne de Prises de Participation ("**COFEPP**") 7 million euros for two distinct but related infringements, namely failing to notify a merger transaction (failure to notify) and implementing said transaction before merger control approval had been obtained (so-called "gun-jumping").[6] This is the first time that the FCA fines both infringements in the same decision,[7] following in the footsteps of the Commission in the *Altice Portugal* and *Marine Harvest* decisions.[8]

## Background

On January 3, 2019, COFEPP notified to the FCA its contemplated acquisition of Marie Brizard Wine & Spirits ("**MBWS**"). Both companies are active in the production and distribution of spirits, wines and syrups. The transaction was subsequently cleared by the FCA in February 2019, subject to conditions[9].

Less than two months later, the FCA opened a gun-jumping investigation and conducted dawn raids at COFEPP and MBWS's headquarters. The FCA found that COFEPP had committed two distinct infringements : first, it failed to notify the acquisition of MBWS before it had been implemented, and second, it implemented the transaction prior to receiving FCA approval. COFEPP did not challenge the FCA's findings and entered into a settlement agreement in December 2021.[10]

## The FCA ruling

The FCA decision found that COFEPP exercised *de facto* control over MBWS on April 13, 2018, about seven months before the transaction was notified to the FCA.

Pursuant to FCA case law,[11] an acquisition is deemed effective either (i) upon effective transfer of the ownership of all or part of the acquired company's assets, as well as the rights attached to them, to the acquirer (*de jure control*) or (ii) when the acquirer acquires decisive influence over all or part of the target's activities based on all legal and factual circumstances (*de facto control*).

The FCA found that COFEPP progressively became the main MBWS shareholder between 2015 and 2017 (holding from around 5% in June 2015 to more than 29% in September 2017) and that, as a result, COFEPP's weight as a shareholder had become increasingly important at MBWS shareholders' meetings and on the board of directors. The FCA also found that COFEPP had obtained access to commercially sensitive information related to MBWS, despite indications to the contrary in MBWS's protocols and in the clean team agreement entered into between the parties.

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[6] FCA Decision No. 22-D-10 of April 12, 2022 relating to Compagnie Financière Européenne de Prises de Participation with respect to article L.430-8 of the French Commercial Code.

[7] In previous decisions, the FCA sanctioned only one of the two obligations. *See* FCA Decision No. 16-D-24 of November 8, 2016 relating to the Altice group with respect to article L.430-8, II of the French Commercial Code (gun-jumping); FCA Decision No. 13-D-22 of December 20, 2013 relating to the group Castel with respect to article L.430-8, I of the French Commercial Code (failure to notify); FCA Decision No. 13-D-01 of January 31, 2013 relating to the Réunia and Arpège groups with respect to article L.430-8, I of the French Commercial Code (failure to notify); and FCA Decision No. 12-D-12 of May 12, 2012 relating to the Colruyt group with respect to article L.430-8, I of the Commercial Code (failure to notify).

[8] *See* Commission Decision of April 24, 2018, Case COMP/M.7993, *Altice/PT Portugal*, recently confirmed by the General Court (*see* General Court Judgment of September 22, 2021, Case T-425/18 *Altice Europe NV v European Commission*) and Commission Decision of July 23, 2014, Case No. COMP/M.7184, *Marine Harvest/Morpol*, also recently confirmed by the European Court of Justice (*see* European Court of Justice Decision of March 4, 2020, *Mowi ASA v European Commission*).

[9] FCA Decision No. 19-DCC-36 of February 28, 2019 relating to the acquisition of sole control of Marie Brizard Wine & Spirits by Compagnie Financière Européenne de Prises de Participation. The FCA requested the divestiture of the Pitters and Tiscaz brands on the market for port and tequila alcoholic beverages as a remedy.

[10] The French settlement procedure enables undertakings to benefit from a fine reduction in exchange for agreeing not to challenge the statement of objections and admit liability. The fine range is negotiated between the FCA and the undertaking.

[11] FCA Decision No. 16-D-24 of November 8, 2016 relating to the Altice group pursuant to Article L. 430-8, II of the French Commercial Code, paras. 193-195.

The FCA also found that COFEPP and MBWS had tightened their commercial and financial ties over the same period. COFEPP had become an important supplier of port and whisky beverages for MBWS, and COFEPP had granted an advance payment to MBWS on its shareholder's account after MBWS experienced cash flow difficulties. The FCA found that such financial support enabled COFEPP to strongly influence MBWS's choice in selecting one of COFEPP's subsidiaries as a distributor for MBWS products in Spain. Finally, the FCA considered that COFEPP had intervened in various MBWS strategic and operational decisions from 2018 onwards, such as the choice of the new MBWS CEO, MBWS's commercial policy and budget, its relations with investors, and its day-to-day management.

The FCA therefore concluded that COFEPP has exercised decisive influence over MBWS from April 13, 2018 (*i.e.*, the date of the appointment of MBWS's CEO) which led to the implementation of the transaction despite it not having been notified to, nor cleared by, the FCA.

When setting the amount of the fine, the FCA noted the deliberate nature of the infringements and explained that the transaction had been cleared subject to remedies, which meant that the infringements potentially negatively impacted competition.

# The *Conseil constitutionnel* holds that multiple sanctions imposed on the same person for several infringements regarding restrictive competition practices complies with the French Constitution

On March 25, 2022, the French *Conseil constitutionnel*[12] held that the provisions of Article L.470-2, paragraph VII of the French Commercial Code, which provide for the cumulative enforcement of penalties imposed on the same person for multiple breaches regarding restrictive trade practices, are in compliance with the French Constitution.

## Background

In 2020, the French Directorate General for Competition Policy, Consumer Affairs and Fraud Control ("**DGCCRF**") imposed several fines on Eurelec Trading, the European central purchasing agency jointly owned by French company E.Leclerc and German group Rewe, for a total amount of 6.34 million euros for failing to comply with the statutory deadline for concluding commercial negotiations in respect of 21 supplier contracts. Separately, ITM Alimentaire International was also fined for the same practices for a total amount of 19.20 million euros.

Eurelec Trading decided to challenge the constitutionality of Article L.470-2, paragraph VII of the French Commercial Code. ITM Alimentaire International subsequently intervened in support of the claim.

First, the parties argued that the provisions of Article L.470-2, paragraph VII of the French Commercial Code breached the principle of proportionality in that they failed to provide for any cap on the maximum penalty that can be imposed on the same person who accumulates several administrative penalties imposed for "concurrent breaches".[13] Second, they argued that

[12] *Conseil constitutionnel*, no.2021-984, March 25, 2022.

[13] Law no.2016-1691 of December 9, 2016 on transparency, the fight against corruption, and the modernization of economy (known as the "Sapin 2 Act") enshrines the cumulative enforcement of administrative penalties imposed on the same author of multiple infringements and removes the cap formerly laid down in Article L. 465-2, paragraph VII of the French Commercial Code.

such provisions infringed the principle of legality of criminal offenses and penalties by failing to define what constitutes "concurrent breaches". Finally, the parties argued that the provisions resulted in double jeopardy.

## The *Conseil constitutionnel*'s ruling

In its ruling, the *Conseil constitutionnel* held that Article L.470-2, paragraph VII of the French Commercial Code complies with the French Constitution and dismissed Eurelec Trading's claims.

It ruled that (i) there is no constitutional provision prohibiting the accumulation of penalties for distinct infringements, (ii) Article L.470-2, paragraph VII of the French Commercial Code is not intended to determine the amount of the penalties incurred for each anticompetitive practice, and (iii) the provisions do not prevent the administrative authority from taking into account the nature of the infringements, their seriousness and their repetition in order to determine the appropriate penalty amount, in particular when they apply cumulatively. Finally, the *Conseil constitutionnel* dismissed the claim that the provision constituted double jeopardy because the various penalties related to different infringements.

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