July – August 2021

French Competition Law Newsletter

Highlights

— The French Competition Authority publishes its revised fining guidelines

— The French *Cour de cassation* rejects the French Competition Authority's appeal in *Sanicorse*

— The French Competition Authority dismisses a retail price maintenance case against Kärcher, closing a ten-year-long investigation

— The French Competition Authority fines Google for allegedly not complying with interim measures in the press publishers case

The French Competition Authority publishes its revised fining guidelines

On July 30, 2021, the French Competition Authority ("**FCA**") published its revised Fining Guidelines, which repealed and replaced the 2011 guidelines.[1] In June, the FCA had opened a public consultation on a draft, which provided for different changes of the method of calculation of fines. While the Guidelines as published have retained those changes, they also include several more minor ones resulting from the public consultation.

Background

As previously reported,[2] last June, the FCA published a draft of the revised Fining Guidelines. The FCA revised the Guidelines to reflect the goals of Directive (EU) 2019/1 of December 11, 2018 ("**ECN+ Directive**").[3] The draft modified the method for calculating fines in order to increase the level of fines that can be imposed by the FCA. In particular, the draft (i) provided for an increased duration multiplier, (ii) introduced the possibility of increasing the fine for "serious" infringements by 15-25% of the turnover taken into account for the basic amount, (iii) added criteria to assess the gravity of the practice (*e.g.*, impact on the environment), and (iv) removed the benefit of the €3 million sanction ceiling for trade associations, replacing it by a maximum of 10% of the association's turnover or of its members' total turnover. A public consultation on this draft took place between June 11 and 25, 2021.

[1] French Competition Authority, *Communiqué de l'Autorité de la concurrence relatif à la méthode de détermination des sanctions pécuniaires*, July 30, 2021 ("**revised Fining Guidelines**").

[2] See the June 2021 edition of our French Competition Law Newsletter available at https://www.clearygottlieb.com/-/media/files/french-competition-reports/french-competition-law-newsletter--june-2021-pdf.pdf

[3] Directive (EU) 2019/1 of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, December 11, 2018, OJ L 11. This Directive was transposed into French law by Ordinance No.2021-649 of May 26, 2021. The Directive notably provides that national competition authorities should have the means to impose "*effective, proportionate and dissuasive fines*".

Changes Implemented Further To The Public Consultation

While the revised Fining Guidelines contain all the changes proposed in the FCA's draft, they also include several more minor ones implemented after the public consultation. Below is an overview of those additional changes.

First, for infringement periods of less than a year, the FCA will calculate the amount of the fine on a *prorata temporis* basis.[4] The FCA adopted a more lenient calculation method than the one proposed in the draft, which provided that periods of less than six months would count as half a year and periods of more than six months would count as a full year for fining purposes. This in line with the European Commission's Fining Guidelines.[5]

Second, the revised Fining Guidelines specify that the FCA may take into account the undertaking's value of sales achieved in "*upstream, downstream and related markets*" when the infringement takes place in a multi-sided market.[6] The FCA's draft already introduced the idea that the FCA might rely on sales achieved in "*directly or indirectly*" related markets,[7] but this addition specifies what is meant by "indirectly" related markets. This notion is also in the Commission's fining guidelines.[8]

Third, the revised Fining Guidelines add two mitigating circumstances which were not in the FCA's draft. They allow the FCA to reduce the fine when the undertaking proves that (i) it put an end to the infringement as soon as the FCA intervened (except in the case of cartels) or (ii) it effectively cooperated with the FCA, going beyond the obligations to which it is legally subject and outside the scope of the leniency procedure.[9] This addition aligns the FCA's Fining Guidelines with the Commission's ones.[10]

Fourth, the revised Fining Guidelines allow the parties to present observations on the factors taken into account for the fine calculation *after* the hearing.[11] Previously, the parties could submit observations on those factors only in their reply to the case-handlers' *rapport*.[12] The revised Fining Guidelines offer an additional opportunity for the parties to present their views, which will be particularly useful in cases where the hearing highlights new considerations on the merits of the case or on the factors to be taken into account for the fine.

Finally, the revised Fining Guidelines reintroduce the obligation for the FCA to motivate its choice to depart from its methodology.[13] While the 2011 Guidelines already provided for such an obligation,[14] the FCA had removed it from its draft. At EU level, the case-law has also recently reinforced the Commission's obligation to motivate its choice when departing from its guidelines.[15]

Implications

The revised Fining Guidelines entered into force the day after publication (*i.e.*, July 31, 2021). They do not indicate to what extent they will apply to current investigations. However, in light

[4] Revised Fining Guidelines, para. 34.

[5] European Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, OJ C 210 ("**Commission Fining Guidelines**").

[6] Revised Fining Guidelines, para. 26.

[7] Draft Fining Guidelines, para. 22.

[8] Commission's Fining Guidelines, para. 13.

[9] Revised Fining Guidelines, para. 37.

[10] Commission's Fining Guidelines, para. 29.

[11] *Ibid.*, para. 16.

[12] Fining Guidelines of May 16, 2011, para 18.

[13] Revised Fining Guidelines, para. 6.

[14] Fining Guidelines of 16 May 2011, para. 7.

[15] *See e.g.*, General Court of the European Union ("**GCEU**"), judgement of November 10 2017, *Icap v. The Commission*, case T-180/15, ECLI:EU:T:2017:795, para. 289; upheld by the Court of Justice of the European Union, ("**CJEU**"), in judgement of July 10, 2019, *Commission v. Icap*, case C-39/18 P.

of French and European case-law,[16] they will likely be considered to apply to all infringements committed prior to its publication, including all current investigations as long as the parties are given the possibility of submitting observations on the method applied by the FCA to set the fine.

The French *Cour de cassation* rejects the FCA's appeal in *Sanicorse*

In a July 7, 2021 ruling, the *Cour de cassation* dismissed the appeal of the French Competition Authority ("**FCA**") in the *Sanicorse* case, confirming the Paris Court of Appeals' holding on excessive prices and, more generally, unfair terms (also called "exploitative abuses").[17] This is a major setback for the FCA, which intended to use the legal reasoning developed in the *Sanicorse* decision in other (pricing or non-pricing) unfair terms cases.

Background

As reported in a previous newsletter,[18] in September 2018, the FCA fined Sanicorse, a company that collects and processes healthcare waste in Corsica, for "*increasingly abruptly, significantly, durably and in an unjustified manner*" the waste disposal prices it charged hospitals and clinics in Corsica.[19] *Sanicorse* was one of the rare cases qualifying an abuse of dominant position resulting from excessive prices. The FCA had used the notion of unfair terms (or "exploitative abuse"), relying on the landmark *United Brands* case.[20]

In November 2019, the Paris Court of Appeals quashed the FCA decision.[21] From a literal reading of *United Brands* ruling, the Court held that to establish an exploitative abuse, two conditions must be met: (i) the allegedly infringing company must have obtained the advantages in question *as a result of its dominant position*; and (ii) these advantages must be *unfair*. Importantly, concerning the second condition, the Court held that it is not for the FCA to substitute itself to an undertaking's management bodies and determine what its commercial policy, including on pricing, should be. Thus, it is *only* if the terms of the transactions between that undertaking and its trading partners can, in the light of all the circumstances of the case, be objectively described as unfair, that the FCA is entitled to intervene. The Court found that the second condition was not met in *Sanicorse* because the FCA had not proven, and had not sought to prove, that the price increases were "*not reasonably related to the economic value*" of the service provided. Therefore, given the burden of proof lies on the FCA, the prices should be presumed to be fair. The FCA appealed.

Cour de Cassation Ruling

In its July 7, 2021 ruling, the *Cour de Cassation* dismissed the FCA's claims, and confirmed the legal test for unfair terms laid out in the Paris Court of Appeal's decision.

The FCA argued that unfair prices can be qualified either (i) by demonstrating that the prices as charged bore no relation with the economic value of the service provided or (ii) by comparing those prices with reference prices, showing there is

[16] *See e.g.*, on the FCA's 2011 fining guidelines, Paris Court of Appeal, October 13, 2013, *Nestlé Purina Petcare France & others, RG* No. 2012/07909, upheld by Cour de cassation, Commercial Chamber, March 17, 2015, *Nestlé Purina Petcare France & others*, No. 13-26.083. *See* also on the European Commission's 2006 Fining Guidelines, *e.g.*, CJEU, May 18, 2006, *Archer Daniels Midland Co. & others v. European Commission*, case C-397/03 P, paras. 20-25.

[17] Judgment of the *Cour de Cassation* of July 7, 2021, No. D 19-25.586 and W 19-25.602.

[18] Cleary Gottlieb, European Competition Law newsletter, November 2019, available at: https://www.clearygottlieb.com/-/media/files/french-competition-reports/french-competition-newsletter-november-2019.pdf.

[19] Decision of the French Competition Authority of September 20, 2018, No.18-D-17.

[20] As explained in our previous newsletter, abuses of dominance are commonly divided into (i) exclusionary abuses, where the dominant firm's practice has the object or effect of excluding competitors from the market, and (ii) exploitative abuses, where the dominant company uses its dominant position to extract unfair advantages from its customers or trading partners. Exploitative abuses include unfair pricing terms (*i.e.*, excessive prices) and other unfair commercial conditions (*e.g.*, contractual terms).

[21] Judgment of the Paris Court of Appeals of November 14, 2019, No. 18/23992. *See "The Paris Court Of Appeals Quashes A Landmark FCA Decision On Excessive Pricing"*.

a significant gap between those prices and the reference prices which is not justified by the undertaking.

The *Cour de Cassation* rejected this argument. It held, first, that the argument is not admissible because the FCA did not put it forward before the appeal judges. Instead, before the Paris Court of Appeals, the FCA argued that an increase in price can, *in itself*, qualify as an abuse.

Second, the *Cour de Cassation* confirmed the Paris Court of Appeals' legal reasoning, finding that absent a demonstration by the FCA that the prices charged by Sanicorse "*bore no reasonable relation with the economic value of the service provided*", the prices had to be presumed to be fair, and it was not for the Paris Court of Appeals to assess whether the prices charged by Sanicorse bore a reasonable relation with the economic value of the service provided to its clients. Therefore, the Paris Court of Appeals rightly found that the alleged abuse had not been established.

Take-away

It is the first time since the FCA's 2011 Fining Guidelines that an FCA infringement decision is entirely quashed by the Paris Court of Appeals and the *Cour de Cassation*. The FCA's President was hoping to use the *Sanicorse* precedent on exploitation as a legal framework for assessing and fining unfair condition types of issue across all economic sectors, particularly the platform industry.[22] However, the Paris Court of Appeals' and the *Cour de Cassation*'s rulings will likely make it more difficult for the FCA to use the exploitative abuse theory beyond the boundaries of the established case-law.

The French Competition Authority dismisses a retail price maintenance case against Kärcher, closing a ten-year-long investigation

On June 24, 2021,[23] the French Competition Authority ("**FCA**") issued a decision closing ten years of investigation for alleged retail price maintenance ("**RPM**") practices by Kärcher and dismissed the case. This is one of the rare instances where the *Collège* has dismissed a case for lack of evidence after objections were notified to the party.

Proceedings

Following a complaint by a local retailer in 2010, French local competition authorities carried out dawn raids at the premises of Kärcher and of several retailers in 2012. They then sent their investigation report to the FCA, which opened a formal investigation in May 2015. In June 2018, the FCA sent a statement of objections to Kärcher alleging it had engaged in RPM practices concerning high pressure cleaners between 2009 and 2011. A hearing took place on February 2021. More than ten years after the initial complaint, and almost ten years after the end of the conduct alleged by the investigation services, the FCA concluded on June 24, 2021 that no infringement had taken place.

The alleged practices

The FCA's investigation services alleged that Kärcher had imposed resale prices on retailers in violation of Article 101(1) TFUE. Under this provision, suppliers are prohibited from imposing resale prices (or a minimum resale price) on their distributors. However, recommended resale prices are permissible as long as they do not effectively amount to imposed resale prices. The FCA's

[22] "France may apply excessive pricing law to non-price conditions", GCR, Pallavi Guniganti, September 12, 2019. The FCA President declared in an interview with GCR: "*We'll be looking closely at what the Court of Appeal has to say on our [Sanicorse] decision to see if we can continue using that type of framework for other cases. I think for the platform industry, it is quite interesting we have this tool in our toolbox.*" (free translation)

[23] See Decision No. 21-D-14 dated June 24, 2021 (the "**FCA Decision**").

investigation services found that Kärcher had applied recommended sales prices, but also that (i) most retailers (c. 80%) were complying with those recommended resale prices, (ii) Kärcher had engaged in different marketing outreach to retailers and commercial conduct targeted to monitor retailers' prices, and (iii) two documents allegedly showed Kärcher's intention that the recommended sales prices be applied by retailers. The investigation services considered that these elements were sufficient to establish an RPM infringement. They however acknowledged that they could not find any evidence of coercive measures applied by Kärcher to ensure retailers' compliance with its recommended prices.

The FCA Decision

In line with its recent *Apple* decision, the FCA considered that it is not mandatory to go through the three-prong test the FCA generally applies to establish RPM (*i.e.*, (i) existence of recommended prices, (ii) monitoring of compliance with these recommended prices, and (iii) actual compliance with the recommended prices). Instead, in line with EU precedent,[24] the FCA held that "*as the existence of an agreement can be established by any means, the demonstration of a vertical agreement can be established by means of documentary or behavioural evidence establishing the invitation from the supplier and the acceptance of its distributors*".[25]

Applying this legal test, the FCA found that Kärcher routinely communicated recommended resale prices to its retailers. However, contrary to the investigation services' allegations, it found that there was no evidence of Kärcher's intention that these recommended prices be effectively applied by its retailers.

In particular, it found that the two key documents on which the investigation services had mainly relied to show Kärcher's invitation to comply with recommended price were not sufficient to evidence Kärcher's intention that the recommended sales prices be applied by retailers.

In addition, the FCA noted that the investigation services had mistakenly found that Kärcher was collecting retail prices from retailers, when the information collected by Kärcher did not contain individual prices[26], and Kärcher's commercial and promotional conditions did not constrain retailers' promotional policy[27].

The absence of pressure exercised by Kärcher on retailers has been key in the FCA's finding that Kärcher did not invite retailers to apply its recommended prices. The FCA concluded that there was no evidence of an invitation to comply with recommended prices, and therefore no infringement, without even discussing whether it could be argued that retailers had accepted an invitation from Kärcher.

Take-Away

This case shows that, to establish a vertical agreement on resale prices, there must be evidence of an invitation from the supplier to apply certain resale prices and an acceptation from the distributor to apply these prices. Crucially, there must be proof of some form of coercion – implicit or explicit – exercised by the supplier on the distributor. This case is one of the rare cases where the FCA's *Collège* dismissed a case entirely contrary to the investigation services' findings. Since the May 2011 Fining Guidelines, the FCA dismissed only four other cases of anticompetitive agreements after objections were notified.[28]

[24] See judgement of the Court of Justice dated January 6, 2004, Bayer, C-02/01 P, EU:C:2004:2, para. 84.

[25] See FCA Decision, para. 152 (emphasis added), free translation.

[26] See para. 166.

[27] See para. 167.

[28] See Decision No. 15-D-18 dated December 2, 2015, *Video-games;* decision No. 17-D-03 dated February 27, 2017, *Car rental*; decision No. 19-D-10 dated May 27, 2019, *Broadcasting rights for catalogue French films*; and Decision No. 21-D-01 dated January 14, 2021, *Thermal insulation*.

The French Competition Authority fines Google for allegedly not complying with the FCA interim measures in the press publishers case

On July 12, 2021,[29] the French Competition Authority (the "**FCA**") imposed a €500 million fine on Google for having allegedly not complied with four of the seven injunctions imposed on the company in its April 2020 interim measures' decision.[30] This is the highest fine ever imposed by the FCA for non-compliance with injunctions. The investigation on the merits is still ongoing.

Background

In April 2020, following a complaint lodged by several unions representing press publishers (*Syndicat des éditeurs de la presse magazine, the Alliance de la presse d'information générale*, and *Agence France-Presse*, together, the "**Press Unions**"), the FCA ordered several interim measures on Google. For the record, the Press Unions had alleged that Google had engaged into abusive conduct following the transposition of the copyright directive under French law, by announcing it would no longer continue to display publishers' article excerpts in its search results pages unless the publisher granted it a free license to do so. The Press Unions had requested that Google be enjoined to engage in negotiations to remunerate publishers for displaying such article excerpts, which they consider to be protected by the copyright-related right (the "neighboring right") introduced in 2019. At the interim measure stage, the FCA ordered a series of injunctions pending an investigation on the merits.

The interim measures required Google to engage in negotiations in good faith with any news publisher that would request remuneration for any use of its protected content within three months of the publisher's request ("**injunction one**"). Google was also ordered to provide publishers with certain information so that they could assess Google's financial offer and Google's use of their content ("**injunction two**"). Google was also ordered to maintain as is the display of the excerpts during the negotiations and ensure that the negotiations do not impact other economic relations existing between Google and the publishers ("**injunctions five and six**"). The FCA's decision, including the interim measures, was confirmed on appeal.[31]

In September 2020, the Press Unions lodged another complaint to the FCA, alleging that Google had breached several of these injunctions.

The FCA's 2021 Fining Decision

In July 2021, while the investigation on the merits was (and remains) still pending, the FCA found that Google had allegedly breached several interim measures, in particular the injunction to negotiate with publishers in good faith. It fined Google 500 million euros and ordered it to comply with the allegedly breached injunctions.

In particular, regarding injunction one, the FCA considered that Google allegedly failed to negotiate "*in good faith*" with the Press publishers for a number of reasons. First, it found that Google held the negotiations within the framework of a new partnership, which included a new program called the *Showcase* service[32]. According to the FCA,

[29] FCA Decision No. 21-D-17 of 12 July 12, 2021 regarding the compliance with injunctions issued against Google in Decision No. 20-MC-01 of April 9, 2020.

[30] FCA Decision 20-MC-01 of April 9, 2020 regarding requests for interim measures filed by the *Syndicat des éditeurs de la presse magazine,* the *Alliance de la presse d'information générale* and others and *Agence France-Presse*, see French Competition Law Review of April 2020, *The FCA ordered interim measures on Google to negotiate with publishers and news agencies for displaying their contents in search results*

[31] Paris Court of Appeals, October 8, 2020, Google, No. 20/08071. For completeness, the Court of Appeals slightly amended the wording of the injunction requiring Google to ensure that the opening and outcome of negotiations with publishers do not alter the display of those publishers' article excerpts in the search results pages.

[32] *Showcase* is a new service in which Google remunerates selected press publishers in order to display their *premium* contents for free in a dedicated space. *Showcase* has so far been launched in several countries, including Germany, Italy, the United-Kingdom, Argentina, Australia, Brazil, and India.

Google thereby imposed negotiations on a more global package, rather than only on the use and display of the protected content on Google's current services.[33] Second, the FCA considered that Google had wrongfully excluded indirect revenues from the publishers' remuneration whereas the French legislation allegedly provides for a remuneration based on both direct and indirect revenues.[34] Third, according to the FCA, Google granted a remuneration only to certain specific press contents,[35] and therefore acted in bad faith. Fourth, the FCA considered that Google allegedly lacked of good faith by denying the press agencies a remuneration on their neighboring right, whereas the French legislation allegedly grants such right to both press publishers and press agencies.

Furthermore, the FCA considered that Google did not provide the press publishers with the information provided for by the Intellectual Property Code, and therefore allegedly breaching injunction two.

Finally, the FCA found that Google has allegedly breached injunctions five and six by linking the negotiations to the Showcase service, which could have, according to the FCA, affected the exposure of publishers not displayed in *Showcase*.

As a result, the FCA imposed a €500 million fine on Google and ordered it to comply with the injunctions of the April 2020 decision. In addition, the FCA ordered two new injunctions to Google (*i*) to present a financial offer to the Press Unions for the current use of their protected content regardless of the future displays on *Showcase*; and (*ii*) to provide them with the necessary information for evaluating such an offer. The FCA also imposed a periodic daily penalty payment of up to 300,000 euros per publisher per day of delay.

Google has filed an appeals before the Paris Court of Appeals.

According to the FCA's website, an appeal was filed against the Decision before the Paris Court of Appeals.

[33] Decision, §319 and following.

[34] Decision, §353 and following.

[35] According to the FCA, Google may have lacked of good faith by reducing the scope the remuneration only to press contents with a political and general information certification, i.e. a regulated certification for online press services including at least one professional journalist "*whose main purpose is to provide, on a permanent and continuous basis, information, analysis and commentary on local, national or international political and general news likely to enlighten the judgment of citizens, with an interest that goes significantly beyond the concerns of one category of readers*" according to Decree No. 2009-1340 of October 29, 2019 (free translation).

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