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French Competition Law Newsletter

Highlights

- The French Competition Authority prohibits proposed acquisition of oil pipeline by private equity firm Ardian
- The Paris Court of Appeals rejects Roche’s challenge against the French Competition Authority communication campaign following its decision to impose a fine on Roche, Novartis and Genentech for abuse of collective dominance in the market of AMD treatment
- The French Competition Authority unconditionally clears Vivendi’s acquisition of Prisma Media

The French Competition Authority prohibits proposed acquisition of oil pipeline by private equity firm Ardian

On May 12, 2021, following an in-depth “Phase 2” review, the French Competition Authority (“**FCA**”) issued its second ever merger control prohibition decision, as it considered that Ardian’s proposed acquisition of sole control over pipeline company Société du Pipeline Méditerranée-Rhône (“**SPRM**”) raised serious competition concerns.¹

Background

SPRM is a French company active in hydrocarbon transportation, who owns and operates the Mediterranean-Rhône Pipeline (the “**PMR**”), a 760 km long pipeline network which supplies the depots in the south-east of France with refined

products: diesel, gasoline, domestic fuel oil and jet fuel. Since its creation in 1968, and despite the withdrawal of historical shareholders such as BP, Shell or Total, the infrastructure has never been controlled by a single operator.

On September 14, 2020, Ardian, a French private equity and asset management company active in the transport, telecommunications and renewable energies sectors, notified its plan to acquire sole control over SPRM with the FCA. At the time, Ardian already owned 42.2% of SPRM’s shares and was planning on acquiring ENI’s 5% participation.

¹ FCA Decision no. 21-DCC-79 of May 12, 2021 (to be published). See also FCA’s press release of May 12, 2021, available here: www.autoritedelaconurrence.fr/en/press-release/hydrocarbon-transport-pipeline-autorite-blocks-takeover-societe-du-pipeline.

On December 8, 2020, the FCA opened a Phase 2 investigation. Although the FCA acknowledged that Ardian had provided a number of useful elements during Phase 1, it considered that further review was needed to determine whether the pipeline constituted an “essential facility”.

The FCA’s competition concerns

On May 12, 2021, the FCA blocked the transaction after having identified the following issues.

First, the FCA considered that the PMR constitutes an essential facility given that it has a *de facto* monopoly position in the market for the pipeline transportation of refined petroleum products in the south of France. According to the FCA, other transportation methods of refined petroleum products (rail, road and river) are not a credible alternative to the transport services offered by the PMR. In addition, the FCA noted that given the high amount of investment required for the creation of an oil pipeline and the regulatory constraints of the licensing regime, the PMR is infrastructure that cannot be easily replicated by competitors.

Second, post-transaction, Ardian would have been in a position to unilaterally determine SPMR’s commercial policy and, given that it is not a user of the infrastructure, would have been incentivized to set SPMR’s prices at a level that would take full advantage of SPMR’s monopoly situation. By contrast, prior to the transaction, none of SPMR’s shareholders could make strategic decisions relating to the PMR on their own, and shareholders such as Esso or ENI, who are users of the PMR, had no interest in raising prices as much as possible.

The FCA also noted that alternatively, in order to maximize its profits, Ardian could have decided to reduce the quality of services offered by the PMR or limit investments.

Third, the FCA took the view that the French State’s countervailing powers were insufficient to rule out the risk of harm to competition. Specifically, although the French government is able to exercise a power of supervision over companies operating oil pipelines,² this power mostly relates to general energy policy the continuity of supply of petroleum products in France (for example, the Minister for Ecology is in charge of appointing a representative entitled to “*oppose any decision of the company that may be contrary to the government’s general energy policy*”). Hence, the State’s supervision would not have prevented Ardian from exploiting the market power derived from its control over SPMR.

Insufficient remedies

Eventually, the FCA concluded that Ardian had neither demonstrated that the efficiency gains generated by the transaction would offset its anticompetitive effects, nor offered sufficient remedies.³ The FCA also considered that imposing remedies on Ardian was inadequate in the present case.⁴ In particular, the FCA noted that the risks identified by the FCA were directly related to the main purpose of the notified transaction, *i.e.*, the takeover of the PMR by Ardian, which ruled out the possibility of issuing structural injunctions.

Conclusion

For the second time since its creation and in the absence of suitable remedies, the FCA decided to formally block a merger. The decision follows the withdrawal of the *Pisto / Trapil* transaction in July 2020, in which the FCA had also identified competition concerns in the refined petroleum product transport and storage markets following a Phase 2 review.⁵

The Parties may appeal the decision before the French Administrative Supreme Court (*Conseil d’Etat*) within two months.

² See article 6 of decree n° 2012-615 of May 2, 2012, adopted on the basis of article L. 632-2 of the French Energy Code.

³ The FCA’s press release does not describe the commitments offered by Ardian. More details will be provided when the decision is published.

⁴ Pursuant to Article L. 430-7, III, of the French Commercial Code, in “Phase 2” procedures only, in the event that the parties to a merger fail to offer sufficient remedies, the FCA may impose remedies that it considers adequate (following an adversarial debate).

⁵ Under this transaction, Pisto, a company specialised in petroleum product storage, intended to acquire sole control over Trapil, the leading company for refined product (petrol, diesel, heating oil, jet fuel) pipeline transport in France. See the FCA’s press release of July 24, 2020, available at www.autoritedelaconcurrence.fr/en/press-release/oil-pipeline-autorite-takes-note-sole-control-acquisition-projects-withdrawal-trapil.

The Paris Court of Appeals rejects Roche's challenge against the FCA's communication campaign following its decision to impose a fine on Roche, Novartis and Genentech for abuse of collective dominance in the market of AMD treatment

In an order dated May 12, 2021, the Paris Court of Appeals ruled that it did not have jurisdiction to rule on Roche's request for injunctive relief against the French Competition Authority ("FCA"), who had shared videos related to the case on social media and sent a letter to a pharmaceutical trade association in the aftermath of the publication of its prohibition decision.⁶

Background

On September 9, 2020, following a five year-investigation, the FCA imposed a total fine of €444 million on Novartis, Roche and Genentech for abusing their collective dominant position in the market for the treatment of age-related macular degeneration or "AMD" (the "**Decision**").⁷ First, the FCA found that Novartis had unduly disparaged Avastin, a cancer treatment drug marketed by Roche which was administered "off label" by a number of doctors to treat AMD, in order to favor the use of its own drug Lucentis. Second, the FCA held that Novartis and Roche had spread alarmist claims in order to delay the public authorities' initiatives to regulate the use of Avastin for AMD treatment. The Decision is currently under appeal.

Following the publication of the Decision and of the corresponding press release, the FCA shared two short videos (one in French and one in English) summarizing the key features of the case on various social media. On September 17, 2020, Roche required the FCA to take down the videos, to no avail. On January 5, 2021, the FCA contacted

a pharmaceutical trade association by letter to draw its attention to the Decision.

Roche's application for a summary procedure

On February 5, 2021, Roche filed an application for interim measures before the Paris Court of Appeals by which it asked the Court to order the FCA to stop all Decision-related publications. Alternatively, Roche sought to have the FCA mention the appeal pending against the Decision in all relevant publications, and to be prohibited from engaging in any kind of targeted communication with third parties regarding the Decision.

Roche's request was based both on articles L. 464-8 and R. 464-22 of the French Commercial Code, which allow the addressees of an FCA decision to submit an application requesting a stay of enforcement, and on articles 834 to 837 of the French Civil procedure Code, which confer a general power on civil courts to take remedial actions in order to halt manifestly unlawful actions or to prevent imminent harm.

According to Roche, the FCA's communication campaign amounted to an additional sanction devoid of any legal basis. In accordance with article L. 464-2 of the French Commercial Code, the FCA could have ordered that (part of) the Decision be published, *e.g.*, in national newspapers. Instead, the FCA took the initiative to advertise the Decision by itself – even though this was not provided for by the Decision and had not been debated during the adversarial proceedings before the FCA.

⁶ Paris Court of Appeals, order of May 12, 2021, no. 21/02163, available at https://www.autoritedelaconurrence.fr/sites/default/files/appealsd/2021-05/dmla_ordo_12mai21_o.pdf.

⁷ Decision 20-D-11 of September 9, 2020 regarding practices implemented in the treatment of Age related macular degeneration (AMD) sector.

Roche further argued that the FCA's communication campaign was disproportionate, thus causing serious and irreparable harm to its interests and violating its right to the presumption of innocence. According to Roche, the campaign was particularly far-reaching as it was conducted on several social media (Twitter, LinkedIn, YouTube) and continued for over four months after the issuance of the Decision. Moreover, the presentation made in the videos was likely to jeopardize the general public's ability to gain a proper understanding of the Decision. In particular, the FCA communications did not mention the appeal pending against the Decision.

Finally, Roche claimed that by engaging in this communication campaign, the FCA had breached its duties of discretion and restraint.

The Paris Court of Appeals' order

The Paris Court of Appeals rejected Roche's application on the grounds that (i) Roche was in fact not asking for a stay of enforcement of the Decision, and that (ii) the Court had no jurisdiction to grant interim relief. Specifically, the Court considered that the FCA's communication

campaign did not seek to "enforce" the Decision, and could not be considered as an additional sanction either. The Court stated that the FCA's communication campaign was "severable" from the Decision, and that consequently any legal action against it should have been filed before the administrative courts.

Conclusion

The case raises the question of whether companies targeted by prohibition decisions in high profile cases have an effective judicial remedy to challenge the breadth and language of FCA communication campaigns going beyond the usual press release. While injunctions to publish a decision imposed pursuant to article L. 464-2 of the French Commercial Code constitute the outcome of an appealable adversarial process, it appears that no adversarial debate is required when the FCA takes the matter of publicity into its own hands.

It remains to be seen whether this question will be clarified in the future.

The French Competition Authority unconditionally clears Vivendi's acquisition of Prisma Media

On April 29, 2021, the French Competition Authority ("FCA") unconditionally cleared Vivendi's acquisition of Prisma Media, a French press publishing group.⁸ The FCA found that the proposed transaction did not create any significant impediment to effective competition, despite the existence of conglomerate relationships between the Parties' activities.

Prisma Media is France's number one press publishing group, in print and digital, with a portfolio including magazine brands such as *Ça m'intéresse*, *Capital*, *Cuisine Actuelle*, *Femme Actuelle*, *Gala*, *Geo*, *National Geographic*, *Télé*

2 Semaines, *Télé-Loisirs*, *TV Grandes Chaînes*, and *Voici*. Although it was hardly present in the press sector prior to the merger,⁹ Vivendi is active in related sectors such as advertising and communication (through the Havas Group), pay-tv (through the Canal+ Group) and distribution of video content (through Dailymotion), as well as music recording, book publishing and video games.

During its Phase 1 examination, the FCA excluded any risk of vertical effects in the concerned markets, including in the advertising markets where Prisma is one of Havas's customers. The

⁸ FCA Decision 21-DCC-70 of April 29, 2021.

⁹ Prior to the merger, Vivendi only had limited activities in the press sector through CNews, a free French daily newspaper.

FCA considered that the merged entity would only hold significant positions in a limited number of markets for advertising in magazines (*e.g.*, travel magazines), and would not constitute an essential customer in these markets, which ruled out risks of output foreclosure.

The FCA also examined a range of possible conglomerate effects that could result from the merger due to the Parties' positions in the advertising, pay-tv, and magazine markets, but ultimately concluded that anticompetitive effects were unlikely.

First, the FCA assessed whether the merged entity would be in a position to bundle the various advertising spaces marketed by the Parties. The FCA however ruled out any risk of harm to competition as it took into account the significant buying-power of advertisers and other integrated players (such as TF1, M6 or NRJ Group).

Second, the FCA also assessed whether the merged entity would have the ability to bundle the pay-tv channels owned by Canal+ group and the magazines published by Prisma Media in its offers to consumers. Although the FCA seemingly did not rule out this outcome, it nevertheless noted that when such bundled offers are in fact marketed, magazines have a marginal impact on the attractiveness of the pay-tv offer.

Third, the FCA also considered that the merger would not have any negative impact on digital newsstands. Specifically, the FCA noted that digital newsstands – even though they constitute a marginal distribution channel for press publication to date – would still be able to offer an attractive range of downloadable content even if they were denied access to Prisma Media's magazines.

Lastly, the FCA assessed whether the merged entity would have the ability to market an integrated offer covering a large range of cultural products (video games, music, newspapers, television channels). However, the FCA took the view that (i) the merger would have a limited impact on Vivendi's ability to market a bundle of cultural products, as the only merger-specific addition would consist of magazines, and (ii) in any event, such an offer would be of limited interest to consumers.

Following this detailed assessment and a market test, the FCA unconditionally cleared the transaction.

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