

September 2021

French Competition Law Newsletter

Highlights

- The French Competition Authority sanctions boycotting practices against digital intermediation platforms in the road freight sector
- The Paris Court of Appeals overturns French Competition Authority decision sanctioning betting operator for non-compliance with unbundling commitments
- The French Competition Authority recognizes for the first time the existence of a market for “organic” or biological products

The French Competition Authority sanctions boycotting practices against digital intermediation platforms in the road freight sector

In a decision dated September 9, 2021, the French Competition Authority (the “FCA”) imposed a total fine of €500,000 on several players in the road freight sector for participating in a single, complex and continuous infringement aimed at organizing a collective boycott of new digital intermediation platforms and geolocation software applications (the “Decision”).¹

Background

Road freight is the most frequently used mode of transport for conveying goods in France, as it accounted for over 85% of ton-kilometers transported in 2015. Until recently, players in the road freight industry fell into three categories, namely (i) freight forwarders, who organize the

shipping of goods on behalf of customers; (ii) road transport operators; and (iii) freight exchanges, which are two-sided platforms enabling customers or freight forwarders to connect with road transport operators via online marketplaces.

In 2016, digital intermediation platforms started to enter the French road freight sector, which had the consequence of challenging the market position of traditional players. Specifically, intermediation platforms made it possible for customers to directly contact and negotiate with road transport operators. By contrast, before intermediation platforms entered the market, customers needed to resort to the services of freight forwarders, who in turn would contact road transport operators, sometimes through freight exchanges.

¹ FCA Decision no. 21-D-21 of September 9, 2021 regarding practices implemented in the road freight sector.

At the same time, road transport operators began to have access to improved geolocation software, enabling them to follow their fleets in real time and to optimize their pick-up and delivery rounds, without resorting to freight exchanges. In particular, a software called “Shippeo” was considered as directly competing with the solutions offered by B2PWeb, one of the main French freight exchanges.

In reaction, B2PWeb and its parent company H2P, followed by a number of groups of road operators and trade associations, agreed to refrain from working with digital intermediation platforms and from using Shippeo. This strategy was then conveyed to the groups’ and associations’ members through various means, such as emails, letters, or the publication of memoranda on some of the groups’ websites.

The FCA’s investigation and Decision

On April 5, 2018, following a referral from the French Directorate General for Competition, Policy, Consumer Affairs and Fraud Control, the FCA “dawn raided” the premises of several players in the road freight sector, including B2PWeb and H2P. Following an eighteen-month investigation, the FCA’s investigation services sent a statement of objections to B2PWeb and H2P, as well as seven trade associations and groups of road operators, accusing them of participating in a single, complex and continuous infringement implemented through boycotting actions, between the second half of 2016 until October 2019.

Even though the facts of the Decision appear to distinguish between the infringing companies’ behavior *vis-à-vis* digital intermediation platforms and their behavior regarding the use of Shippeo, the FCA’s *Collège* considered that

the practices indeed amounted to a single and continuous infringement. In doing so, the *Collège* took into account the facts that (i) traditional players shared the common objective of limiting the economic development of digital players and preserving the current market structure (in which non-digital intermediaries play a pivotal role), and (ii) the various calls for boycott were made following the same *modus operandi* and by the same participants.

The FCA’s Decision further recalled that collective boycotts, which are deliberate actions aimed at evicting operators from a market, are anticompetitive regardless of their effects, *i.e.*, whether or not they are actually implemented.

Consequently, despite acknowledging that the practices had caused a limited harm to the economy, the FCA imposed fines ranging from €1,000 to €350,000 on the infringing companies. The highest fine was imposed on B2PWeb jointly with its parent company H2P, as both entities were considered as ringleaders.

Conclusion

Over the past few years, the FCA has substantially contributed to the debate on the challenges posed by the emergence of digital gatekeepers for competition policy, for instance by pushing for the adoption of new provisions allowing the FCA to issue injunctions against “quasi-dominant” structuring digital platforms. The Decision offers an alternative insight into digitalization, as the FCA sanctions traditional players for hindering the development of digital platforms and slowing down the efficiency gains and increased competitive pressure associated with the rise of new digital players.

The Paris Court of Appeals overturns French Competition Authority decision sanctioning betting operator for non-compliance with unbundling commitments.

On September 2, 2021,² the Paris Court of Appeals annulled in its entirety a decision issued by the FCA in April 2020, which fined betting operator Pari Mutuel Urbain (“PMU”) for non-compliance with unbundling commitments that had been made mandatory in 2014.³ The Court held that, contrary to the FCA’s findings, PMU had been consistently complying with its commitments. The 900 million euros fine imposed on PMU was consequently annulled.

Background

PMU is a French betting operator which, until 2010, enjoyed a legal monopoly on both online and offline horse race betting. In 2010, French law opened the markets for horse race and sports betting to competition, but only with respect to bets placed online. Consequently, while companies such as Betclac emerged to offer online betting services in sports and horse racing, PMU kept a legal monopoly on offline horse race betting.

In 2012, Betclac filed a complaint with the FCA, alleging that PMU was taking advantage of its legal monopoly on offline bets by pooling these bets together with online bets, which allowed it to offer more attractive rewards to its winning customers. Following a two-year investigation, the FCA found that PMU’s behavior indeed raised competition concerns, as PMU was relying on an advantage that its competitors could not replicate, and had the ability to use that advantage to capture demand, hinder new market entries and more generally exclude existing competitors.

To address these competition concerns, PMU offered commitments, which the FCA accepted and made mandatory. In particular, PMU offered to hold separate its online and offline bets (the “**First Commitment**”).

In April 2020, following a complaint lodged in December 2017 by two online betting companies (Betclac and Zeturf France), the FCA imposed a 900 million euros fine on PMU for non-compliance with the First Commitment on the grounds that as far as foreign horse races were concerned, PMU still pooled online and offline bets. According to the FCA, the First Commitment was phrased in general terms and consequently applied to all the races for which PMU collected bets, whether these races took place in France or abroad. As a result, the FCA took the view that PMU had knowingly breached the First Commitment.

Assessment of the Paris Court of Appeals

In a ruling issued on September 2, 2021, the Paris Court of Appeal annulled the FCA’s decision in its entirety on the main grounds that the First Commitment was designed to achieve a determined outcome and that, similar to any binding obligation, it must be interpreted strictly and in favor of the company offering the commitment. The Court added that commitment decisions must define the scope of the competition concerns at stake in a sufficiently precise and unambiguous manner so as to enable the monitoring of the proper implementation of these commitments.

² Paris commercial court, ruling of September 2, 2021, no. 2009358.

³ FCA Decision no. 20-D-17 of April 7, 2020 relating to compliance with the commitments contained in FCA Decision no. 14-D-04 of February 25, 2014 relating to practices implemented in the online horse race betting sector.

Having recalled these principles, the Court acknowledged that the First Commitment was phrased in general terms. However, the Court also stressed that the Commitment compelled PMU to “effectively separate **its** single pool of stakes” between online and offline bets. In light of such wording and taking into account other parts of the FCA’s 2014 decision, the Court construed the First Commitment as applying to bets that PMU was collecting, managing and distributing **itself**. Conversely, when bets are collected by PMU pursuant to an agreement with a foreign operator, it is the latter who is in charge of distributing the winnings between successful bettors and of splitting the profits between itself and all of its partners.

Furthermore, the Paris Court of Appeals found that the competition concerns raised and analyzed by the FCA in the 2014 decision did not cover PMU’s international activities. First, the geographic scope of the market defined by the FCA was national and limited to France. Second, the decision did not contain any competitive analysis of the importance of bets on foreign horse races in the French market, and no foreign operator was actually involved in the FCA’s investigation. Third, the FCA’s findings relied on the non-replicable nature of the advantages that PMU drew from its legal monopoly on offline

bets. However, when it came to foreign races and foreign betting operators, PMU’s competitors could enter into agreements similar to those concluded by PMU (in fact, one of the plaintiffs had done so).

Based on these observations, the Court of Appeals held that the First Commitment could not be interpreted as covering foreign races since their impact on the market had not been assessed. The Court moreover noted that between April 2014 and January 2016, the FCA had received eight reports from the Trustee describing the implementation of the commitments, yet had not raised any concerns. The Court thus concluded that the FCA could “not rely on its own shortcomings to deplore the fact that the issue [of pooling bets placed on foreign races] has never been raised”.

While the FCA’s decision fining PMU for non-compliance with antitrust commitments was only the fourth since 2015,⁴ the Court of Appeals’ decision is more unusual still, as FCA sanction decisions are very rarely quashed. The Court thus appears to be sending a strong signal, reminding the FCA that while commitments do not amount to a sanction, they should nevertheless remain precise and proportionate to the competition concerns at stake.

⁴ Over the same period, the FCA issued 16 antitrust commitments decisions.

The French Competition Authority recognizes for the first time the existence of a market for “organic” or biological products⁵

On September 10, 2021, the FCA authorized the acquisition of 100 stores belonging to Bio c' Bon, a French chain of organic grocery stores, by hypermarket chain Carrefour, subject to divestiture remedies.

Background

The Bio c' Bon group (“**Bio c' Bon**”) is specialized in the retail distribution of organic products and operates a network of grocery stores throughout France. Following the opening of bankruptcy proceedings against the group on September 2, 2020, French mass-market retailer Carrefour (“**Carrefour**”) filed its proposed acquisition of 100 of Bio c' Bon's stores with the FCA on September 21, 2020.

Following a nearly one-year investigation, the FCA cleared the transaction on September 10, 2021. Unusually, Carrefour had nevertheless been able to close the transaction prior to the issuance of the clearance decision, as the FCA granted a waiver to the standstill obligation on October 13, 2020 in light of Bio c' Bon's financial difficulties.

The FCA's analysis

In its decision, the FCA acknowledged for the first time the existence of specific markets for organic products, identifying both a market for the supply and a market for the distribution of food products originating mainly from organic farming.

— **As regards the upstream supply markets**, the FCA considered that the existence of dedicated supply chains, specific product methods, and formal certification processes

pointed to a specific market for the supply of organic products.

— **As regards the downstream distribution markets**, the FCA noted that 83% of sales of organic products are carried out by specialized stores, and that such stores present a number of characteristics that distinguish them from mass-market retail stores, in particular in terms of prices and product ranges. The FCA further took into account the results of a consumer survey carried out during the merger investigation, which showed that customers would not shift their purchases of organic products from specialized stores to mass-market retail stores in the event of a price increase implemented by specialized stores.

Following its market definition analysis, and despite the parties' moderate market shares, the FCA considered that the transaction raised competition concerns in ten catchment areas, four of which were located in Paris. Specifically, the FCA was concerned that the intensity of competition would be lower in the catchment areas at stake, thereby leading to price increases or to a reduction in the diversity of supply to the detriment of consumers.

To solve these competition concerns, Carrefour offered to sell eight Bio c' Bon or Carrefour stores located in the problematic catchment areas to competing retail chains. These commitments were deemed adequate by the FCA, who will nevertheless need to approve the potential purchasers presented by Carrefour in the coming months.

⁵ FCA Decision no. 21-DCC-161 of September 10, 2021 (to be published). See also FCA's press release of May 12, 2021, available at: www.autoritedelaconcurrence.fr/fr/communiqués-de-presse/autorisation-sous-conditions-au-rachat-de-100-magasins-bio-c-bon-par

CONTACTS



Antoine Winckler
+32 2 287 2018
awinckler@cgsh.com



François-Charles Laprèvote
+32 2 287 2184
fclaprevote@cgsh.com



Frédéric de Bure
+33 1 40 74 68 00
fdebure@cgsh.com



Séverine Schrameck
+33 1 40 74 68 00
sschrameck@cgsh.com



Ségolène Allègre
+32 2 287 2171
sallegre@cgsh.com



Clarisse Ouakrat
+33 1 40 74 69 93
couakrat@cgsh.com



Maud Lesaffre
+32 2 287 2025
mlesaffre@cgsh.com



Gabrielle Rostand
+33 1 40 74 68 32
grostand@cgsh.com



Manon Oiknine
+33 1 40 74 68 13
moiknine@cgsh.com



Sophie Troussard-Fauré
+33 1 40 74 68 54
stroussard@cgsh.com

