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French Competition Law Newsletter

Highlights

- The French Competition Authority fines 12 cold meat manufacturers €93 million for operating a cartel
- Paris Court of Appeals fully annuls a May 2014 search warrant and subsequent dawn raids carried out at Whirlpool France’s premises
- The French Competition Authority publishes new guidelines on merger control
- First merger control prohibition decision issued by the French Competition Authority
- The French Competition Authority reserves the right to refer to the European Commission transactions that do not reach the national notification threshold

The French Competition Authority fines 12 cold meat manufacturers €93 million for operating a cartel

On July 16, 2020, the French Competition Authority (“**FCA**”) imposed a €93 million fine on 12 manufacturers for their participation in a cartel in the ham and cold meat sector.¹ The FCA started its investigation in 2012, following a complaint from a slaughterhouse and a leniency application by Campofrio, a cold meat manufacturer. The FCA subsequently conducted dawn raids at the 12 cold meat manufacturers’ premises in 2013.

The practices

The FCA found that cold meat manufacturers coordinated their conduct to (i) obtain lower prices for products bought from slaughterhouses and (ii) impose higher prices for cold meat products sold to mass retailers.

First, the FCA found that four of the largest cold meat manufacturers in the sector (*i.e.*, Campofrio, Fleury Michon, Financière Turenne Lafayette, and Les Mousquetaires) coordinated their negotiating strategies for ham purchased

¹ FCA Decision of July 16, 2020, n°20-D-09 (the “**Decision**”), paras. 279-281. The FCA fined the following 12 cold meat manufacturers: Coopel Arc Atlantique (€35.5 million); Les Mousquetaires (€31.7 million); Fleury Michon (€14.7 million); Coop (€6 million); Savencia (€2.2 million); Campofrio (€1 million); Aubret (€750,000); Sonical (€350,000); La Financière du Haut Pays (€330,000); CA Animation (€203,000); Nestlé (€96,000); Salaisons du Mâconnais (€1,000). See FCA, press release of July 16, 2020: <https://www.autoritedelaconcurrence.fr/en/press-release/autorite-hands-out-fines-worth-93-million-euros-cartel-ham-and-cold-meats-charcuterie>

from slaughterhouses. Manufacturers would first reach an agreement on the negotiating framework and, during the bilateral negotiations with the slaughterhouses, they would then inform each other in real-time by telephone about the status of negotiations and the contracts they had concluded with the slaughterhouses. The negotiations directly affected the weekly price index published by the Rungis market, which serves as a benchmark for purchases by the other cold meat manufacturers.

Second, the FCA found that the cold meat manufacturers also coordinated over prices of cold meat products sold to mass retailers for their private labels products. In particular, the cold meat manufacturers held secret multilateral meetings between competitors in hotels in Paris and Lyon during which they would discuss their price positioning for each mass retailer.

Immunity from fines

Interestingly, the FCA refused to award total immunity from sanctions to the first-in leniency applicant, Campofrio.² While Campofrio offered evidence showing that several manufacturers participated in both cartels, the FCA only granted Campofrio partial immunity since Campofrio had failed to disclose the existence of one meeting in which one of its employees had participated. The FCA imposed a fine of €1 million on Campofrio.

The FCA also granted Coop, the second leniency applicant, the benefit of the “leniency plus” procedure for the second time in its decisional practice.³ The “leniency plus” procedure allows the FCA to grant an additional exemption to a leniency applicant which provides evidence enabling the FCA to establish complementary elements of fact which have a direct impact on the determination of the fine amount. In the present case, the FCA granted Coop an additional fine exemption relating to the period of the practices which was revealed thanks to the evidence provided by Coop.

Paris Court of Appeals fully annuls a May 2014 search warrant and subsequent dawn raids carried out at Whirlpool France’s premises

On July 8, 2020, the Paris Court of Appeals (“**Court of Appeals**”) fully annulled a May 2014 search warrant and subsequent dawn raids carried out at Whirlpool France’s premises (“**Whirlpool**”).⁴ The Court of Appeals also ordered the FCA to return all of Whirlpool’s seized documents.

Background

In October 2013, the FCA conducted dawn raids at the premises of Samsung and Fagor Brandt as

part of an antitrust investigation in the sector of domestic appliances in France.⁵ Based on evidence seized during the Samsung and Fagor Brandt 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. Consequently, the FCA conducted dawn raids at Whirlpool France’s premises on May 27 and 28, 2014.

² For another example of a refusal to grant total immunity from fines, see Decision n°15-D-19 of December 15, 2015 regarding practices in the messaging and express messaging sectors.

³ For another example of the use of the “leniency plus” policy, see Decision n°18-D-24 of December 5, 2018 regarding practices in the household appliances sector.

⁴ Judgment of the Court of Appeals of July 8, 2020 - RG 19/16854.

⁵ See also French Competition Newsletter of June 2019, available here: <https://www.clearlygottlieb.com/-/media/files/french-competition-reports/19073001-french-competition-newsletter--june-2019r2-pdf.pdf>

Whirlpool challenged the search warrant authorizing the May 2014 dawn raids, arguing notably that the FCA breached Whirlpool's right to an effective remedy by failing to provide the minutes and inventories of the Samsung and Fagor Brandt dawn raids.

While the Paris Court of Appeals rejected Whirlpool's appeal and confirmed the validity of the search warrant in November 2017, the French Supreme Court annulled the Court of Appeals' decision in June 2019 and remanded the case to the Court of Appeals.⁶ In May 2017, the French Supreme Court also annulled the dawn raids at Samsung's premises and thus the evidence seized during these dawn raids, which included some of the documents that the search warrant authorizing the Whirlpool dawn raids had relied on.

On remand from the French Supreme Court, the Paris Court of Appeals issued on July 8, 2020 a new decision which annulled the dawn raids carried out at Whirlpool's premises and ordered the FCA to return all of Whirlpool's seized documents.

Failure to provide the minutes and inventories of the initial dawn raids

In line with the French Supreme Court's June 2019 decision, the Court of Appeals held that the FCA was required to provide Whirlpool with the minutes and inventories of the 2013 Samsung and Fagor Brandt dawn raids as soon as Whirlpool became implicated in the proceedings. The Court of Appeals held that Whirlpool had become implicated in the proceedings when it was dawn raided in May 2014, which is in line with the French Supreme Court decision.

Since Whirlpool did not receive a copy of the minutes and inventories of the Samsung and Fagor Brandt dawn raids at that time, the Court concluded that the FCA's failure to do so breached Whirlpool's right to an effective remedy and thus required the annulment of the search warrant (and consequently, of the dawn raid).

Consequences of the annulment of the Samsung dawn raid

The Court of Appeals also held that the search warrant authorizing the dawn raids at Whirlpool should be annulled since it was partly based on documents seized during the Samsung dawn raids, which were annulled by the French Supreme Court in May 2017.

The French Competition Authority publishes new guidelines on merger control

On July 23, 2020, the FCA published its new guidelines on merger control⁷ (the "**Guidelines**"), which came into effect on the same day and therefore replaced the previous guidelines issued in 2013.

The Guidelines are more user-friendly and outline the legal and procedural framework for merger notifications in France. They now also include

summaries and extracts of French and European case-law.

Simplified procedure

The simplified procedure is now available for more operations. In particular, the Guidelines clarify the transactions which will be eligible for the simplified notification procedure, such as

⁶ French Supreme Court, June 13, 2019, Decision No. 17-87364, annulling the order of the presiding Judge of the 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.

⁷ Now available here: https://www.autoritedelaconurrence.fr/sites/default/files/Lignes_directrices_concentrations_2020.pdf.

concentrations with a horizontal overlap resulting in combined market shares below 25% in any relevant market; concentrations resulting in a market share increment of less than 2% (provided the combined market shares are below 50%); and concentrations with a vertical or conglomerate relationship with market shares below 30% in any relevant market.⁸

Faster notification procedure

The FCA also took into account the feedback received during its public consultation and the guidelines now also allow companies to (i) warn the FCA ahead of an upcoming notification, (ii) request to be assigned to a case manager, and (iii) receive the case manager's name within 5 working days of the request.⁹ In addition, notifying parties can now expect feedback on the completeness of their notification and confirmation that the notification form is eligible for the simplified procedure within 10 working days of receipt.

Gun-jumping guidance

The Guidelines also provide further guidance on how to comply with gun-jumping rules and address a few situations that must be dealt with carefully. First, while parties may enter into agreements before clearance notably in order to protect the value of the acquired entity, the parties must not give the buyer control over all or part of the acquired entity.¹⁰ Second, parties must also be careful when conducting any exchange of information, in particular with respect to the type of information exchanged, the recipients of such

information and the process used to share this information.¹¹ Third, the Guidelines provide that the acquirer should not interfere in the internal management of the target ahead of clearance, such as by allocating functions to a new manager of the target.¹² Finally, parties should not make any commercial decisions that would not have been made, but for the merger.¹³

Prospective analyses

The FCA also provides further guidance on the scope of prospective analyses and explains that it must take into account ongoing and expected evolutions over a reasonable horizon, although its exact scope will be sector-specific.¹⁴

Additional annexes

Finally, the Guidelines come with additional annexes relating to a detailed analysis of online sales,¹⁵ the internal documents that may be requested by the FCA during its review,¹⁶ a structural commitment template,¹⁷ and an updated mandate agreement template for monitoring trustees.¹⁸

The Guidelines come as the final step of the reform of the FCA's merger control procedures, which started with the simplification of the FCA notification form in a decree published in April 2019¹⁹ and the creation of an online notification platform in October 2019.²⁰

⁸ Para. 230 of the Guidelines – note that these thresholds only apply to markets with well-established market definitions.

⁹ Para. 190 of the Guidelines.

¹⁰ Para.178 of the Guidelines.

¹¹ Para.178 of the Guidelines.

¹² Para. 179 of the Guidelines.

¹³ Para. 180 of the Guidelines.

¹⁴ Para. 518 of the Guidelines.

¹⁵ Annex D to the Guidelines.

¹⁶ Annex E to the Guidelines.

¹⁷ Annex F to the Guidelines.

¹⁸ Annex G to the Guidelines.

¹⁹ Décret n° 2019-339, dated 18 April 2019.

²⁰ See <https://www.autoritedelaconurrence.fr/fr/communiqués-de-presse/lautorite-de-la-concurrence-lance-aujourd'hui-sa-procedure-de-notification-en>

First merger control prohibition decision issued by the French Competition Authority

On August 28, 2020, the FCA prohibited for the first time a proposed transaction following an in-depth Phase 2 review.²¹ The FCA concluded that Soditroy and the E. Leclerc's proposed acquisition of joint control over a Géant Casino hypermarket around the city of Troyes raised serious competition concerns.

Serious competition concerns

The FCA found that the acquisition would create a duopoly between Carrefour and E. Leclerc in the Troyes local area and lead to significant risks of harm to competition in the retail distribution of food products for hypermarkets.

In particular, the FCA found that the proposed acquisition would lead to a significant loss of diversity for consumer since only two E. Leclerc hypermarkets and two Carrefour hypermarkets

would remain in the local area. The FCA also found that the proposed acquisition would increase the risk of higher prices charged to consumers and the risk of coordination between the Carrefour and E. Leclerc hypermarkets.

Finally, the FCA noted that regulatory barriers to entry made the arrival of a new competing hypermarket highly unlikely.

Insufficient remedies

The FCA concluded that the parties' proposed remedy (*i.e.*, the reduction of the Géant Casino store's surface area from 8,210 m² to 6,000 m²) was insufficient to alleviate its serious competition concerns. The FCA also found that this remedy would actually reduce the diversity of products offered to consumers.

The French Competition Authority reserves the right to refer to the European Commission transactions that do not reach the national notification threshold

On September 15, 2020, Margaret Vestager announced that the European Commission would, as of mid-2021, accept referrals from national competition authorities for transactions that do not reach any national notification thresholds under Article 22 of Council Regulation (EC) No 139/2004 ("**Article 22**").²² This provision enables a national competition authority to request that the European Commission examine a transaction that does not meet the European Union notification thresholds,

but would affect trade between Member States and threaten to significantly affect competition.

Until now, the FCA has only made use of Article 22 in cases where the transaction reached the French notification thresholds. Under the new interpretation, a referral will also be possible in respect of transactions that do not reach the thresholds. The FCA welcomed this announcement and explained that this

²¹ FCA, Decision 20-DCC-116 of August 28, 2020 (not yet published). See also FCA's press release of August 28, 2020, available here: <https://www.autoritedelaconurrence.fr/en/press-release/first-time-ever-autorite-de-la-concurrence-blocks-merger>

²² Council Regulation (EC) No 139/2004, available here: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004R0139&from=FR>

possibility will enable regulators to review certain concentrations involving innovative market players, with low revenues and unclear valuations, that would otherwise escape competition authorities' scrutiny.²³

The FCA also noted that it had encouraged this interpretation of Article 22 in its past decisional practice. In this respect, in its decision relating to the takeover of Itas by TDF, the FCA stated that referrals under Article 22 also applied to transactions below the national notification thresholds.²⁴ The FCA's new merger control guidelines also provide that Article 22 should apply even when the Member State requesting the referral is not competent to review a transaction.²⁵

²³ See FCA's press release of September 15, 2020, available here: <https://www.autoritedelaconurrence.fr/fr/communiqués-de-presse/lautorite-se-felicite-de-lannonce-de-la-commission-europeenne-qui-acceptera>

²⁴ Merger Decision 20-D-01 dated 16 January 2020, *TDF/Itas*.

²⁵ Paragraph 340 of the FCA's updated merger guidelines, available here: https://www.autoritedelaconurrence.fr/sites/default/files/Lignes_directrices_concentrations_2020.pdf

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