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# French Competition Law Newsletter

## Highlights

— The French Competition Authority publishes its public consultation interim document on the cloud computing sector

— The French Competition Authority names the first head of its sustainable development network

— TF1 and M6 abandon their merger ambitions over merger control issues

# The French Competition Authority publishes its public consultation interim document on the cloud computing sector

### Background

On July 13, 2022, the French Competition Authority ("FCA") published an interim document for public consultation on the cloud computing sector as part of a sector inquiry launched in January 2022.[1] The FCA's investigation seeks to confirm its preliminary conclusions on the characteristics of the cloud computing sector, as well as to gather additional input on the relevant markets for cloud computing services, on actors that may enjoy "particular positions"[2] in the sector, and on practices that could hinder competition on the merits in an industry projected to expand in France by 14% annually to reach €27 billion by 2025.[3] The consultation closed on September 19, 2022, and the FCA has announced its final conclusions for early 2023.[4]

### The FCA's Areas of Focus

**Relevant antitrust markets.** Cloud computing providers offer, through remote servers, access to (i) infrastructure services such as storage and computing power, (ii) a combination of infrastructure and software services, and/or (iii)

[1] The FCA initiated the proceedings *ex officio* on the basis of article L.462-4 of the French Commercial Code. See FCA press release of January 27, 2022, available at: https://www.autoritedelaconcurrence.fr/en/press-release/autorite-de-la-concurrence-starts-proceedings-ex-officio-analyse-competition.

[2] *See* FCA press release of July 13, 2022, available at: https://www.autoritedelaconcurrence.fr/en/press-release/autorite-de-la-concurrence-opens-public-consultation-until-19-september-2022-part-its.

[3] [Para. 14.]

[4] *See* FCA press release of January 27, 2022, available at: https://www.autoritedelaconcurrence.fr/en/press-release/autorite-de-la-concurrence-starts-proceedings-ex-officio-analyse-competition.

IT applications. The FCA seeks to ascertain the perimeter within which firms compete with one another. The FCA considers narrow markets defined around specific types of services (the FCA identifies over 100 such services), broader ones based on categories of services (with 18 main categories identified) or even subsegments of the overall IT services market.[5] Geographically, the FCA seeks to confirm whether markets are rather national, European, or even broader in scope.[6]

**Players.** The cloud sector is structured around several categories of market participants from the IT and electronic communications sectors, including "hyperscalers" (Amazon Web Services, Google Cloud and Microsoft Azure), actors from the web hosting industry, electronic communications operators, and integrators.[7] The FCA is looking in particular to understand whether hyperscalers could cumulate several advantages (scope of services, investment capabilities, technologies, high costs of entry) that would confer market power and favor their expansion to the detriment of other operators.[8]

**Practices.** The FCA examines whether certain cloud players have engaged in practices that could impede competition on the merits. First, the FCA seeks feedback on the effect a number of technical practices such as a lack of compatibility, common standards, or interoperability between different cloud services that may deter customers from migrating their workloads from one cloud provider to another or from multi-homing.[9] Second, the FCA identifies contractual (*e.g.*, exclusivity clauses) and pricing practices (*e.g.*, exit or so-called "egress" fees charged by cloud service providers for transferring data, for example, to a different cloud provider's data center) and seeks to assess whether they can give rise to entry or expansion barriers or increase a player's market power.[10] Third, the FCA considers whether vertical integration may also give rise to concerns, in particular if the line is blurred between software editors and cloud services providers. The FCA focuses on the capacity of historical software editors to restrict (i) their customers' ability to migrate software licenses used on their on-premise architecture to third-party cloud services other than that of the software editor, and (ii) some cloud providers from accessing their software.[11] Finally, the FCA inquiries about the possibility of competition issues arising from concerted practices, anticompetitive agreements (which may promote interoperability but hinder innovation) or concentrations (in particular killer acquisitions).[12]

## Takeaway

The FCA's market investigation forebodes potential scrutiny of the leading actors in the cloud computing sector. Through its investigation, the FCA is seeking to define a framework of analysis for future antitrust and merger cases and preempt potential competition issues in a fast-growing market dominated by a handful of hyperscalers. Other national regulators have recently launched investigations on the cloud sector, including the Netherlands Authority for Consumers and Markets ("**ACM**") in May 2021,[13] the Korea's Fair Trade Commission ("**KFTC**") in February 2022,[14] and the British communications regulator ("**OFCOM**") in September 2022.[15]

5 [Paras. 49 and following and Annex 1.] Other possible market segmentations include public/private cloud services, secure cloud services, sector based cloud services, bespoke tender based services, and full-service clouds.

6 [Paras. 78 and following.]

7 [Para. 26.]

8 [Paras. 81 and following.]

9 [Paras. 91 and following.]

10 [Paras. 107 and following.]

11 [Paras. 129 and following.]

12 [Paras. 136 and following.]

13 *See* ACM news "ACM launches market study into cloud services" of May 18, 2021, available at: https://www.acm.nl/en/publications/acm-launches-market-study-cloud-services

14 *See* KFTC news "Cloud Market Survey" of February 24, 2022, available at: https://www.ftc.go.kr/www/selectReportUserView.do?key=10&rpttype=1&report_data_no=9495

15 *See* OFCOM report "Digital markets in the communications sector" of September 22, 2022, available at: https://www.ofcom.org.uk/__data/assets/pdf_file/0019/244261/digital-markets-approach-to-consumer-and-competition-issues.pdf.

# The French Competition Authority names the first head of its sustainable development network

## *Appointment of a sustainability expert*

As of September 1, 2022, Elise Provost was appointed first formal head of the French Competition Authority's (the "**FCA**") sustainable development network. Since this network is also responsible for flagging sustainability-related cases to the FCA's General Rapporteur (*i.e.*, the head of the FCA's investigation unit), Elise Provost was also appointed adviser to the General Rapporteur as of September 1, 2022.

Prior to this dual appointment, Elise Provost had joined the FCA in 2014 where she worked as a senior case handler. Elise Provost also previously wrote a PhD in law that mainly focuses on issues related to competition law, sector-specific regulation and sustainability.[16] Elise Provost served as the sustainable development network's informal leader as of 2019.

This network was indeed informally set up in 2019 to increase the FCA's expertise on sustainability matters and better address complaints and queries in this area. This network currently comprises approximately 20 case handlers from the FCA's antitrust, merger and economics units and is tasked with progressing the FCA's oversight of sustainability issues.

## *Increased focus on sustainability factors in competitive assessments*

Elise Provost's appointment is in line with the FCA's goal to make sustainability one of its top priorities, alongside European and international stakeholders.[17] The FCA in particular strives to prevent and/or punish anticompetitive practices that block or delay the entry or expansion of more sustainable products. The FCA also provides guidance to companies that wish to benefit from it.

Already in 2017, the FCA had fined three leading linoleum floor companies €302 million for fixing prices, sharing commercially confidential information and signing a non-compete agreement not to advertise a product's environmental performance.[18] In its decision, the FCA criticized the companies for reducing incentives to innovate and create more sustainable products. In its decision, the FCA considered that anticompetitive practices with a negative impact in terms of sustainable development are considered particularly serious.

In the revised notice on the calculation of fines published on July 30, 2021, the FCA included sustainability in the non-exhaustive list of factors that it may take into account in assessing the gravity of anticompetitive practices.[19]

In September 2021, the FCA imposed a fine of €500,000 on companies active in the road freight transport sector.[20] The FCA found that by hindering the digital transition in this sector, the road freight transport companies may have limited the environmental gains associated with digital platforms.

[16] Elise Provost, *Le coût en droit européen de la concurrence, Essai sur la réception d'une notion économique*, Université de Liège et Université Panthéon-Assas, 2014.

[17] *See* for instance the FCA's Annual Report for 2020, *Sustainable development and competition, A major and strategic concern*, available at: https://media.autoritedelaconcurrence.fr/adlc-bilan-activite-2020/en/a-major-and-strategic-concern/. See also, for 2021, the FCA's annual report available at: https://www.autoritedelaconcurrence.fr/sites/default/files/2022-07/ADLC_RA_2021_SD-2.pdf, pages 24-27.

[18] *See* FCA Decision No. 17-D-20 of October 18, 2017 regarding practices implemented in the linoleum floor sector.

[19] *See* FCA press release of July 30, 2021, *The Autorité de la concurrence revises its procedural notice on fines*, available at : https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/autorite-de-la-concurrence-revises-its-procedural-notice-fines.

[20] *See* FCA Decision No. 21-D-21 of September 9, 2021 regarding practices implemented in the road freight transport sector.

In both its 2021 annual report and 2022-2023 roadmap, the FCA recalled that the impact on sustainable development and environment is now part of its assessment of alleged anticompetitive practices (it refers to the 2017 linoleum floor decision and to the 2021 road freight transport sector decision) and mergers (*e.g.*, the FCA has defined new "green" markets and has acknowledged the potential offsetting gains of an environmental nature).[21]

Elise Provost's appointment also comes after the European Commission released a chapter dedicated to sustainability in its new draft horizontal guidelines, which should also lead to increased scrutiny of considerations relating to sustainability in upcoming cases.

In line with the above, speaking at a round-table discussion relating to "green considerations" in competition law on September 22, 2022,[22] Elise Provost said that sustainable development could soon be considered as an important competitive parameter in some sectors, alongside more traditional competitive factors (such as cost-based, quality or innovation competitive advantages).

# TF1 and M6 abandon their merger ambitions over merger control issues

In a joint statement released on September 16, 2022,[23] TF1 and M6, the two main free-to-air television operators in France, announced their decision to abandon their merger project (the "**Transaction**"). Despite offering several commitments during an in-depth investigation, TF1 and M6 came to the conclusion that the divestitures required by the French Competition Authority (the "**FCA**") would too strongly affect the transaction's rationale. The FCA released on the same day a press release to "*take note of the decision to withdraw* [the] *planned acquisition*"[24] , in order to publicly clarify its position.

## Background

On May 17, 2021, the Bouygues Group (the "**Notifying Party**"), a French conglomerate and parent company of TF1, the main French free-to-air television player, announced its intention to acquire exclusive sole control of the *Métropole Télévision* group ("**M6**"), the second main French free-to-air television player in France (the "**Parties**"), owned by RTL group and ultimately controlled by Bertelsmann. The Transaction aimed at creating a French leader in the sector, gathering 10 television channels and over 40% of the television audience, that would be able to compete with tech giants such as Netflix or Amazon Prime.

Following several months of prenotification discussions, the Notifying Party notified the Transaction to the FCA on February 17, 2022. In addition, TF1 and M6 agreed to divest their channels TFX (TF1) and 6ter (M6) to the Altice Group, in order to comply with the French audiovisual regulation.

The FCA opened an in-depth investigation on March 18, 2022,[25] and during which the FCA conducted several market tests and heard the main stakeholders.

[21] *See* for instance, FCA Decision No. 21-DCC-79 of May 12, 2021 regarding the acquisition of sole control of Société du Pipeline Méditerranée-Rhône by Transport Stockage Énergies, para. 189.

[22] *Competition is the new green*, Competition round-table discussion, Paris, September 22, 2022.

[23] Available on their website, here.

[24] The FCA's press release is available on its website, here.

[25] FCA decision of March 12, 2022 regarding the acquisition of exclusive control of the Métropole Télévision group by the Bouygues Group.

## The relevant markets

The relevant markets in the TV sector were previously defined by the FCA in several decisions, in particular in *Vivendi/Canal +/TPS*[26] *, TF1/AB Group* [27], and more recently the 2019 landmark decision clearing the creation of joint streaming platform Salto between TF1, M6 and France Télévisions.[28]

However, in anticipation of the possible competition concerns, the Parties proposed, during Phase I, to redefine the scope of the relevant markets in order to consider that (i) video on demand ("**VOD**") providers (such as Netflix or Amazon) compete with the Parties and (ii) television advertising competes with online advertising.

The FCA acknowledged that the television markets have encountered several new evolutions, including the rise of VOD. Yet the FCA found that television "*remains a very powerful medium for the French population as a whol*e" focusing on "*simultaneous distribution of advertisements to all users*" whereas VOD providers have a different business model, with paid models based on a "*promise of individualized consumption*". Hence, VOD providers are not set to "*challenge television's power*" and free to air broadcasters are not competitors on the online advertising markets as, according to the FCA, television advertising and online advertising remain largely complementary.

Following an in-depth investigation, the FCA found that the Transaction could raise competition concerns on the following markets: (i) television advertising, (ii) publishing and marketing of television channels; (iii) distribution of television services, and (iv) acquisition of broadcasting rights.

## The competition concerns raised by the Transaction

On the market for television advertising, the FCA found that the Parties, which are each other's closest competitor, would have a combined market share of approx. 70 %. According to Benoit Coeuré,[29] the FCA's President, such market power would give rise to a strong risk of increased prices for advertising spaces at the expense of both advertisers and consumers.[30]

Moreover, due to the essential nature of the channels of the TF1 and M6 groups, the merged entity would have increased its bargaining power vis-à-vis its distributors (such as internet access and pay-TV providers), eventually leading to higher prices or market foreclosure in favor of its parent company, the Bouygues Group, one of the main internet access providers in France.

Finally, on the market for acquisition of broadcasting rights, according to the FCA's President, the merged entity could have (i) used its buyer power to acquire the rights of French films at the expense of competitors, and (ii) internalized stream programs ("*programme de flux*") to the detriment of independent producers of stream contents.[31]

## The proposed remedies

During the in-depth investigation, the Parties offered behavioral commitments addressing the competition concerns. Although the commitments were not made public, the FCA's President reported to the French Senate that, given the merged entity's market share on the television advertising market, only structural remedies would have been able to address the competition concerns raised by the Transaction. As a result, the Parties' commitment to separate

[26] FCA decision of July 23, 2012, n°12-DCC-100.

[27] FCA decision of January 26, 2010, n°10-DCC-11.

[28] FCA decision of August 12, 2019, regarding the creation of a joint venture by France Télévisions, TF1 and Métropole Télévision companies (M6), n°19-DCC-157.

[29] The FCA President was auditioned by a Senate Committee on September 27, 2022, and gave several insights that led to this outcome. The hearing is available on the Senate's website, here.

[30] According to the FCA's President during his hearing before the Senate, the Transaction would, in the end, have been financed by French advertisers and therefore by television viewers (*i.e.*, consumers) without any proof of efficiency gains for the latter.

[31] Stream programs are intended to be broadcast only once before losing their primary value.

the advertising departments of the TF1 and M6 channels was considered insufficient. The FCA found that the incentives for the two advertising departments to compete with each other post-Transaction would have been limited given their common ownership. In other words, based on the information made public by the FCA, it seems that only a divestiture of the TF1 or M6 channels, or at least of one of the two advertising departments, would have been capable of solving the competition concerns raised by the Transaction in the television advertising market.

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