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French Competition Law Newsletter

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The French Competition Authority recommends ending regulated electricity tariffs

On November 19, 2024, the French Competition Authority ("**FCA**") submitted a Report ("**FCA Report**") to the Ministers for Energy and the Economy, on the national regulated tariffs for electricity (*tarifs réglementés de vente d'électricité* – "**TRVs**").1 The FCA recommended to take practical measures to prepare the termination of the TRV mechanism, anticipating regulatory changes at the national and European levels in favor of market-based pricing.

Background

TRVs are regulated tariffs set by the French government to ensure stable and affordable electricity prices for consumers. *Electricité de*

[1] FCA's evaluation report of November 12, 2024, on the regulated electricity sales tariff system (*Rapport d'évaluation du 12 novembre 2024 sur le dispositif des tarifs réglementés de vente d'électricité*), available here.

France ("**EDF**") and local distribution companies (*entreprises locales de distribution* – "**ELDs**") are required to supply electricity at TRV level to eligible consumers[2] who opt for TRVs instead of market-based prices.[3] TRVs are calculated based on various cost components and are adjusted once or twice a year.[4]

Under the European Union's ("**EU**") impulse, French retail markets for the supply of electricity have been liberalized between 1998 and 2007, allowing EDF and ELDs to supply electricity at market-based price, and new suppliers to enter the market. In spite of market liberalization, TRVs continue to apply due to various public policy goals such as security of supply, social and territorial cohesion, and consumer protection.[5] Today, TRVs remain the most widely used offer on the French market, with 59% of individual and 35% of small non-household consumer subscriptions.[6]

The FCA's Findings

TRVs constitute a public intervention in price fixing which must comply with the conditions set forth in Directive 2019/944.[7] Such intervention must be transitional and reserved to consumers that are vulnerable or in a precarious energy situation and should not obstruct free and effective competition.[8] According to the FCA Report, TRVs fail to meet these requirements as they (i) remain accessible to a broad range of consumers, (ii) do not participate in the development of a more efficient competitive market, (iii) and appear to have no foreseeable ending.[9]

The FCA Report also notes the growing gap between the TRV mechanism and upcoming regulatory changes in favor of market-based pricing at retail level. More specifically:

— At national level, the regulated access to historical nuclear energy[10] is planned to end on December 31, 2025, providing an opportunity for an in-depth review of the organization of electricity markets in France; and

— At European level, the European Commission will assess by the end of 2025 the need to amend (or abolish) existing European rules governing Member States' powers to regulate tariffs on retail markets for the supply of electricity.[11] Since 2021, the Commission has expressed its disagreement with the French authorities' position that "*it is possible to reconcile general price regulation [...] with a reportedly competitive retail market*".[12] The Commission therefore "*invite[d] the French authorities to reduce the scope of such retail price regulation and to limit its duration to a transitional period [...]*".[13]

According to the FCA Report, TRVs have hindered the development of alternative, more efficient targeted public interventions to address the different objectives that TRVs were initially aimed to foster. The mechanism has, among others:

— failed to provide the lowest prices to consumers and did not prevent the increase in retail prices. The FCA Report contends that competitive dynamics in the market would be sufficient to

[2] TRVs are available to residential and small business customers.

[3] TRVs were established in 1946 by the law nationalizing the electricity and gas sectors in France and granting a monopoly for the supply of electricity and gas to EDF and ELDs.

[4] FCA Report, p. 8.

[5] *See* FCA Report, para. 41. The FCA has identified several public policy goals justifying the existence of regulated tariffs in France including: combatting energy insecurity; stability of retail prices; maintaining low prices; and a fair return on investment in the nuclear infrastructure.

[6] *See* FCA Report press release. *See also* FCA Report, para. 71.

[7] Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast), OJ 2019 L 158/125 ("**Directive 2019/944**"), article 5.

[8] FCA Report, paras. 13-17. *See also inter alia* Directive 2019/944, recital 23 and article 5.

[9] FCA Report, para. 20.

[10] Under this system, retail electricity suppliers can buy wholesale electricity produced by EDF's historical nuclear plants at a fix rate.

[11] *See e.g.* Directive 2019/944.

[12] FCA Report, para. 22. *See also* Commission opinion of 27.8.2021 pursuant to Article 20(5) of Regulation (EU) No 2019/943 on the implementation plan of France, C(2021) 6182 final, p. 14.

[13] FCA Report, para. 24. *See also* Commission opinion of 27.8.2021 pursuant to Article 20(5) of Regulation (EU) No 2019/943 on the implementation plan of France, C(2021) 6182 final, p. 15.

guarantee consumer prices below TRVs under normal market circumstances (*i.e.,* absent an energy crisis);[14]

— failed to limit the State's intervention, for instance during energy crises. In these instances, TRVs have been supplemented by other *ad hoc* public policies (*e.g.*, energy vouchers to vulnerable consumers);[15] and

— undercut, via the price stability it confers, positive effects of price signals in the market.[16] According to the FCA Report, price signals could facilitate the oversight and management of electricity demand, to the benefit of the energy transition. Additionally, the absence of price signals blurs consumers' views of their energy consumption costs, reducing their incentive to adjust their energy consumption.[17]

The FCA Report further concludes that TRVs have affected effective competition on the retail electricity market in France, given that they have inherently favored EDF by not incentivizing consumers to look at competitive offers due to a "status quo bias" in favor of the historical offer and a belief that TRVs are low or stable.[18]

FCA's Recommendations

In light of these findings, the FCA recommends to prepare for the termination of TRVs, while maintaining their public policy goals. Should TRVs be discontinued, the FCA suggests the following actions (*inter alia*):

— continue efforts to meet territorial cohesion in areas served by ELDs, in particular by lowering barriers to entry in terms of information systems;[19]

— establish a special regime to ensure continuity of electricity supply for vulnerable consumers by designating one or several suppliers of last resort, akin to what has been introduced in the gas sector;[20]

— improve the consumer protection framework by replacing TRVs with more targeted instruments, including the development and promotion of the comparison tool of the French energy ombudsman which provides a benchmark index helping consumers to choose between the available market offers;[21] and

— conditionally allow energy suppliers to propose offers with termination penalties (*e.g.*, minimum contract duration or termination penalties that decrease over time),[22] thereby contributing to a fairer risk-sharing between suppliers and consumers while being less detrimental to competition than TRVs.[23]

If the French government decides to maintain TRVs, the FCA Report recommends alternative measures to stimulate competition, including among other things:

— introduce the possibility for all electricity suppliers (not only EDF) to offer TRVs;[24] and

— use a distinct brand name for EDF's market-price offers from the one used for EDF's TRVs to favor the development of competitive offers and reduce the risk of market abuse.[25]

[14] FCA Report, paras. 59-61.

[15] FCA Report, paras. 150-157.

[16] FCA Report, paras. 113-119.

[17] *Ibid*.

[18] FCA Report, paras. 172-173.

[19] FCA Report, recommendation n°1 and para. 52.

[20] FCA Report, recommendation n°3 and paras. 64-27.

[21] FCA Report, recommendations n°4 and n°5.

[22] FCA Report, recommendation n°7.

[23] FCA Report, para. 214.

[24] FCA Report, recommendation n°9.

[25] FCA Report, recommendation n°10 and paras. 254-260.

Finally, the FCA recalls that while targeted measures are generally preferred, EU law leaves great scope for public intervention on the retail electricity markets in time of crisis.[26]

Conclusion

Electricity retail markets across the EU are transitioning towards the end of energy regulated tariffs.[27] Certain Member States have already started amending their legislation to anticipate upcoming changes in EU law.[28] The French energy regulator (the *Commission de regulation de l'énergie*) took an opposing view recommending that TRVs be kept for another five years.[29] The French government has also adopted a law expanding the number of consumers eligible to TRVs as of February 2025.[30] In light of this and the current political and social climate in France, which places a strong emphasis on consumer protection, it seems unlikely that the FCA's recommendation will be followed in the short term, but the debate on electricity regulation will certainly be picked up at political level in the coming months.

The French Competition Authority conditionally clears Intermarché's acquisition of 200 Casino stores after having granted a derogation from the suspensive effect of merger control

On November 28, 2024, the French Competition Authority ("**FCA**") conditionally cleared the acquisition of 200 former Casino stores by the Intermarché group.[31] The FCA decision is conditional on the divestment of 11 stores to ensure that consumers have access to alternative offerings when purchasing mass-market products.

Background

On February 8, 2024, Intermarché notified the FCA of its intention to acquire 200 former Casino food retail stores. The acquisition takes place in the context of important financial difficulties of the Casino group resulting in the sale of the quasi-totality of its large stores, super and hypermarkets, to competitors.[32] This transaction follows a prior sale by Casino group of 61 Casino stores to Intermarché which was previously cleared by the FCA on January 11, 2024, subject to the divestiture of three stores to the Carrefour group.[33]

The FCA Decision

The FCA found that the transaction was unlikely to significantly strengthen Intermarché's

[26] FCA Report, paras. 35-37, and 157.

[27] FCA Report, paras. 39-40. This trend is not specific to retail markets for electricity. Member States' public interventions in the price setting for the supply of gas is governed by the same set of principles. *See* Directive (EU) 2024/1788 of the European Parliament and of the Council of 13 June 2024 on common rules for the internal markets for renewable gas, natural gas and hydrogen, amending Directive (EU) 2023/1791 and repealing Directive 2009/73/EC (recast), OJ 2024 L, article 4. In France, regulated tariffs for gas are abolished since 2023.

[28] Portugal is for instance aiming at terminating regulated prices offered to all consumers by December 2025, with the exception of alternative mechanisms for specific categories of consumers (e.g., existence of a social tariff discount for vulnerable consumers). In Italy and Slovakia, the eligibility for regulated tariffs has recently been limited to vulnerable consumers. *See* FCA Report, p. 19 and para. 40.

[29] *See* CRE report on the evaluation of regulated electricity sales tariffs (*Rapport de la CRE relatif à l'évaluation des tarifs réglementés de vente d'électricité*), November 2024, available here.

[30] Under the previous legislation, eligibility for TRVs was restricted to sites with a contracted power demand of less than 36 kVA. In February 2025, sites of residential and small business customers with power demand exceeding this threshold will become eligible for TRVs.

[31] FCA Decision No. 24-DCC-255 of November 28, 2024, on the acquisition of sole control of 200 stores formerly operated under the Casino banner by ITM Entreprises (**Decision**), available here.

[32] *See* Le Figaro, L'Autorité de la concurrence autorise sous condition le rachat de 200 magasins Casino par Intermarché, November 29, 2024, available here.

[33] FCA Decision No. 24-DCC-02 of January 11, 2024, on the acquisition of sole control of 61 stores formerly operated under the Casino banner by ITM Enterprises, available here.

purchasing power in the upstream markets for the supply of everyday consumer goods. While Intermarché accounts for a significant share of purchases from certain suppliers and is an important customer in the supply of everyday consumer goods, the market share increase resulting from the transaction remained limited to less than 4% at national level.[34] Moreover, the combined purchase share of Intermarché's and the target's stores over the past three years remained below 25%.[35]

The FCA considered that it was unlikely that the transaction would put the parties' suppliers in a situation of economic dependency as most suppliers negotiate through tripartite purchasing alliances. Since both Intermarché and Casino are already part of these alliances, the transfers of stores between them do not alter their bargaining power.[36] The FCA also noted that the new entity will continue to face competition from Leclerc, Carrefour, and Système U.[37]

In the downstream food retail markets, the FCA noted Intermarché's modest share at the national level,[38] but identified competition concerns in 11 local areas around the target's stores.[39] According to the FCA, in these areas, the transaction would have resulted in a significant increase of Intermarché's market power leading to a reduction in the diversity of offering to consumers. To remedy the identified risks, Intermarché offered[40] to divest the target's stores in each of the specific local areas.[41]

Derogation to the Suspensive Effect of Merger Control

In light of Casino's financial difficulties, the FCA accepted Intermarché's request for a derogation from the suspensive effect of merger control. [42] The derogation—which enabled Intermarché to complete the transaction without having to wait for the FCA's clearance—was granted without prejudice to the FCA's final decision.[43]

While the FCA typically receives around ten similar derogation requests per year,[44] it grants such derogations only in exceptional cases where target companies are facing severe financial or operational challenges. For example, a derogation was granted in the book retail sector in relation to Gibert Joseph's acquisition of Gibert Jeune, as the latter was at risk of imminent dissolution.[45] More recently, a derogation was granted in the retail furniture market, in relation to But Group's acquisition of Conforama, in light of Conforama's severe financial situation.[46]

[34] Decision, para. 51.

[35] *Ibid*.

[36] Decision, para. 52.

[37] Decision, para. 53.

[38] [10-20]%, behind Leclerc ([20-30]%) ad Carrefour ([10-20]%). *See* Decision, para. 55.

[39] In line with its decisional practice, the FCA assessed market conditions across two different catchment areas: a first market ("primary zone") where consumer demand meets the supply of hypermarkets that can be reached within a 30-minute drive, and which consumers view as interchangeable with one another; and a second market ("secondary zone") where consumer demand meets the supply of supermarkets and equivalent retail formats (hypermarkets, discount stores, and popular stores) located within a 15-minute drive. *See* Decision, para. 25. On this basis, the FCA identified concerns in the catchment areas of the former Casino group stores in Arc-lès-Gray (70), Bagnères-de-Luchon (17), Blanzac-lès-Matha (17), Boé (82), Charlieu (42), Lambesc (13), Lorgues (83), Revel (31), Solliès-Pont (83), Susville (38), and Valence-d'Agen (82). *See* Decision, para. 261.

[40] The final version of Intermarché's commitments, dated November 19, 2024, is available here.

[41] In Lambesc, Intermarché has committed to either divest the target store or another store in its group. *See* Decision, footnote 73.

[42] FCA press release, Takeover of Casino stores by Intermarché, Auchan and Carrefour: the Autorité de la concurrence grants derogations from the suspensive effect of merger control, March 19, 2024, available here.

[43] *Ibid*.

[44] Competition Policy in the Post-Covid-19 Economy : What to Do of zombification risks ?, 12th New Frontiers of Antitrust Conference, June 10, 2021, p. 12.

[45] FCA Decision No. 17-DCC-186 of November 10, 2017 on the acquisition of sole control of Gibert Jeune by Gibert Joseph, available here.

[46] FCA Decision No. 22-DCC-78 of April 28, 2022 on the acquisition of sole control of Conforama France assets by the Mobilux group, available here.

The French Competition Authority imposes a €14 million fine in the inter-island air transport sector

On December 4, 2024, the French Competition Authority (the "**FCA**") sanctioned two airlines, Air Antilles and Air Caraïbes, and one specialised consultant for having implemented a strategy to increase prices and coordinate offers and conditions in the Caribbean inter-island aviation transport sector (the "**Decision**").[47] The FCA imposed total fines of €14.57 million, concluding a five-year old investigation.[48]

Background

On November 4, 2019, the FCA opened an *ex officio* investigation concerning practices implemented in the Caribbean inter-island passenger air transport sector, leading to inspections and seizures at Air Antilles' premises in 2018 and 2021.[49] The investigation was prompted by a significant and simultaneous increase in Air Antilles' and Air Caraïbes' tickets' prices in the autumn of 2017 on the Fort-de-France / Pointe-à-Pitre route (Fort-de-France and Pointe-à-Pitre being both located in the French overseas territories).[50] In March 2023, the FCA's investigation services sent a statement of objections to the two airlines and the consulting firm Miles Plus, commercially active under the name Aérogestion.[51] In July 2023, Air Caraïbes and Aérogestion agreed not to contest the FCA's objections to benefit from the settlement procedure.[52]

The FCA's findings

The anticompetitive agreements. The FCA investigation concerned seven flight routes across the Caribbean islands, between Pointe-à-Pitre and Fort-de-France, and from these two airports to Saint-Martin, Saint-Lucia and Saint-Domingue.[53] Each route constitutes a distinct relevant market, where Air Caraïbes and Air Antilles were operating in a quasi-duopoly (holding together approx. 92% of market share in terms of turnover).[54]

The FCA found that first in 2015 and again in 2016, Air Antilles and Air Caraïbes (i) exchanged on future prices and pricing conditions, and (ii) agreed (*inter alia*) to reintroduce week-end pricing and a mechanism of price increase for tickets purchased closer to the flight date. This led to price increases ranging from €28 to €58, depending on the fare category at stake.[55]

The FCA's investigation also shed light on a non-aggression agreement implemented by the two airlines between 2017 and 2019, with the support of Miles Plus, resulting in a reduction in the offer and in the allocation of flight slots through a joint flight schedule.[56] Air Antilles and Air Caraïbes indeed agreed to reduce their capacity through a joint fleet pooling programme, followed by a reduction in the number of flight hours, available seats and frequencies.[57] This allowed the airlines to

[47] FCA Decision No. 24-D-10 of December 4, 2024 concerning practices implemented in the inter-island passenger air transport sector, available here.

[48] Decision, Article 6.

[49] Decision, paras. 2-5.

[50] Decision, para. 1.

[51] *See* FCA Press Release of March 21, 2023, "The Autority's General Rapporteur sends statement of objections to three companies in the intra-Caribbean regional air transport sector, available here. *See also* Decision, para. 6.

[52] Decision, paras. 8 and 148.

[53] Decision, para. 162.

[54] Decision, paras. 165 and 417.

[55] Decision, para. 67.

[56] Decision, paras. 88 and 90.

[57] Decision, paras. 193-194.

increase the aircraft's passenger load, and to close down the most economical classes as flights were filled.[58] A passenger exchange quota mechanism enabled the airlines to transfer passengers from an empty or cancelled flight, at a very low cost.[59] The airlines also agreed on fare conditions and price levels for tickets during the 2017-2019 period.[60]

Several exchanges took place under the cover of a recruitment process. Air Antilles used anonymous email accounts[61] to send fake applications with the flight and pricing grids attached as CVs.[62] Air Caraïbes et Aérogestion's responses came as feedback on the application. To preserve the secrecy, the companies also used code names, referring to Air Caraïbes as "company 1" and Air Antilles as "company 2".[63]

The fines. The FCA found that the three companies had engaged in horizontal price fixing and market sharing, two by-object infringements under article 101 of the Treaty on the Functioning of the European Union ("**TFEU**") and article L. 420-1 of the French Commercial Code.[64] When determining the fine amounts, the FCA considered the airlines' "*perfect knowledge of the illegal nature of the practices" and of "the absence of a serious competitor that could jeopardise their plan*".[65] The FCA noted that the practices concerned an essential means of transport, harming passengers who are captive and economically vulnerable.[66] According to the FCA, the very serious nature of the infringements also resulted from the fact that they took place at the time of Hurricane Irma, when Air Caraïbes and Air Antilles had implemented an agreed "*compassion price*" for humanitarian repatriation and rescue groups.[67] The reduction in offer and increase in prices also reduced the attractiveness of the region in terms of tourism and economic development.[68]

Taking into account Air Antilles' ongoing liquidation proceedings and its parent company's inability to pay, the FCA decided not to impose any fine on them.[69] The FCA imposed a €1.5 million fine on Air Antilles' ultimate parent company, K Finance, based on the principle of joint liability.[70] The FCA noted that this amount does not jeopardise K Finance's debt capacity needed to ensure the good functioning of its operations.[71] Air Caraïbes and Aérogestion, who benefited from the transaction procedure, were fined €13 million and €70,000 respectively,[72] representing c. 99% and 49% of their 2019[73] net profit.

Takeaways

The Decision tackled the most serious anticompetitive horizontal agreements, including agreements to fix and raise prices, restrict offer and share markets. The *ex officio* initiative of the investigation and the amount of fines confirm the FCA's strong commitment to prevent and fight cartels. With a total of €1.4 billion, 2024 is the

[58] Decision, para. 92.

[59] Decision, para. 195.

[60] Decision, para. 249.

[61] Decision, paras. 37-41. Several emails were also sent to or from the email address pauline.durantel@gmail.com.

[62] Decision, paras. 42-43.

[63] Decision, para. 45.

[64] Decision, paras. 187-189, 205, 227, 246, and 261. Article 101 TFEU applied in view of the appreciable effect on trade between Member States, in particular the cross-border flight connections between territories belonging to different Member States (Decision, para. 155).

[65] Decision, para. 423.

[66] Decision, para. 420. The FCA found the airlines' consumers were "economically vulnerable" as the insularity of the Antilles caused a surge in prices and thus a higher cost of life than on the mainland.

[67] Decision, paras. 82 and 422.

[68] Decision, para. 421.

[69] Decision, paras. 35, 466 and 468.

[70] Decision, para. 471.

[71] *Ibid*.

[72] Decision, para. 481.

[73] Based on publicly available information, Air Caraïbes' 2019 net profit is €13 million (available here) and Aerogestion's 2019 net profit is €143,947 (available here).

second-highest year in terms of fines imposed by the FCA for anticompetitive practices.[74]

The Decision follows the FCA's 2019 Opinion on the functioning of competition in France's overseas territories, which observed important price differentials between these regions and mainland France in certain sectors, including transport.[75] In 2022, the FCA imposed another fine in the aviation sector, sanctioning a company active in air freight transport of animals to French Polynesia for abuse of dominant position.[76] The FCA has historically paid close attention to anticompetitive practices in France's overseas territories, imposing fines totalling more than 161 million euros between 2009 and 2019.[77]

Paris Court of Appeals clarifies the scope of its referral of the *TDF/Itas* merger back to the French Competition Authority

On December 5, 2024,[78] the Paris Court of Appeals ("**Court of Appeals**") clarified the scope of its judgment of June 27, 2024, referring back the assessment of TDF's acquisition of Itas to the French Competition Authority ("**FCA**").[79] The Court ruled that the referral was limited to further investigation, while the final decision would be taken by the Court of Appeals (not the FCA).

Background

In 2017, Towercast filed a complaint with the FCA alleging that French television broadcaster TDF's acquisition of its rival Itas, in a transaction that fell below EU and French merger control thresholds, was abusive under Art. 102 TFEU and L. 420-2 of the French Commercial Code. The FCA's investigative unit issued a statement of objections alleging that the transaction was liable to constitute an abuse of TDF's dominant position on the wholesale market for the broadcasting of digital terrestrial television. The FCA's decision-making body (the *Collège*), however, dismissed these objections on the ground that there is a "*clear dividing line between merger control and the control of anticompetitive practices*"[80]: since the adoption of the EU Merger Regulation in 1989 and national merger control regimes subsequently, only these rules apply to concentrations, not Article 102 TFEU and Article 420-2 of the French Commercial Code prohibiting the abuse of a dominant position (the "**Decision**"). Towercast appealed.

On July 1, 2021, the Paris Court of Appeal stayed the proceedings and referred a question to the European Court of Justice ("**ECJ**") on the relationship between the EUMR and the review of concentrations under Article 102 TFEU. On March 16, 2023, the ECJ ruled that the adoption of the EUMR as a provision of secondary EU law could not preclude the direct application of Article 102 TFEU, a higher norm of primary EU law. It also clarified the standard for the assessment of concentrations under Article 102 TFEU.[81]

[74] FCA Press Release of January 15, 2025, "2024, a historic year for the Autorité de la concurrence: €1.4 billion in fines imposed and a record 295 mergers examined," available here. The record year is 2020 when the FCA imposed a total of €1.8 billion of fines.

[75] FCA Opinion No. 19-A-12 of July 4, 2019 regarding the functioning of competition overseas ("F**CA Opinion**"), available here, page 3.

[76] FCA Decision No. 22-D-05 of February 15, 2022 concerning practices in the air freight transport of live animals sector, available here.

[77] FCA Opinion, para. 101.

[78] Paris Court of Appeal, December 5, 2024, RG n°24/14636, *Towercast*.

[79] Paris Court of Appeal, June 27, 2024, RG n°20/04300 ("**Initial Ruling**").

[80] Decision 20-D-01 of the French Competition Authority of January 16, 2020 regarding a practice implemented in the digital terrestrial television broadcasting sector and Towercast v Autorité de la concurrence (Case C-449/21), ECLI:EU:C:2023:207, para. 21.

[81] A merger is unlawful under Article 102 TFEU if it is established that "*the degree of dominance thus reached would substantially impede competition, that is to say, that only undertakings whose behaviour depends on the dominant undertaking would remain in the market*." *Towercast v Autorité de la concurrence* (Case C-449/21), ECLI:EU:C:2023:207, para. 52.

On June 27, 2024, following the ECJ ruling, the Paris Court of Appeals annulled the FCA's decision. Rather than immediately ruling on the merits by application of the devolutive effect of appeals,[82] the Court held that it was appropriate to conduct an investigation to assess whether the transaction "*substantially impeded competition*."[83] The Court noted that (i) significant time had passed since the issuing of the statement of objections, (ii) an *ex post* assessment of a merger was complex in light of sparsely developed EU case law on merger control based on Article 102 TFEU (*i.e.*, the *Continental Can* case), and (iii) the sector was subject to *ex ante* (telecom) regulation, which further complicated the analysis.[84] The Court of Appeals thus referred the case back to the FCA for further investigation.

Towercast's request for interpretation

On August 28, 2024, Towercast submitted a request for interpretation to the Court of Appeals for clarification as to whether the referral back to the FCA was limited to further investigation of the matter—a position supported by Towercast and the French Ministry for the Economy—or also extended to the power to rule on the case on the merits—as contended by the FCA and TDF.

The Court of Appeals' ruling

The Court of Appeals ruled in favor of Towercast and the French Ministry for the Economy by clarifying that the Court referred the case back to the FCA for further investigation, specifically on the issues identified in its judgment of June 27, 2024 (that is, the changes in the wholesale market for broadcasting of digital terrestrial television, changes to actual and potential competition on this market, trends in TDF and Towercast's performance).

The Court of Appeals confirmed the reasoning it had taken in its judgment of June 27, 2024, that is, the annulment of the FCA (*Collège*) decision did not impact the validity of the FCA (investigative unit) statement of objections. As such, it is for the Court of Appeals to rule on the merits of the case in lieu of the FCA (*Collège*). That situation is different from the one where the FCA rejects a complaint without having issued a statement of objections, as in such case the devolutive effect of appeals would not operate and thus the FCA would both lead the investigation and take the final decision.

Takeaways

The ruling confirms that, where the annulment of an FCA decision on appeal does not affect the validity of a statement of objections issued by the FCA's investigative unit, for example, because the FCA's decision under appeal did not reject the statement of objection's substantive findings, the Court of Appeals will rule on the merits of the case by application of the devolutive effect of appeals. This does not prevent the Court from referring the case back to the FCA for further investigation while retaining the power to take the final decision.

Such additional investigative measures may be appropriate, in particular, where significant time has passed between the statement of objections and the annulment of the FCA's decision and in complex cases, such as the review of mergers under general antitrust provisions (Article 102 TFEU and Article 420-2 of the French Commercial Code), considering the "*sparsely developed*" case law in this field.

[82] The devolutive effect of an appeal is the principle that transfers the entire scope of a lower court's decision to a higher court for comprehensive review.

[83] Initial Ruling, para. 67.

[84] Initial Ruling, para. 72.

The French Competition Authority fines 12 manufacturers and distributors €611 million for vertical price-fixing in the household appliances sector

Summary

On December 19, 2024, the French Competition Authority ("**FCA**") imposed fines totalling €611 million on 10 manufacturers and two distributors active in the household appliances sector for engaging in resale price maintenance ("**RPM**") practices between February 2007 and December 2014 (the "**Decision**").[85] The FCA found that the companies coordinated prices to limit competition from online distributors for over seven years. This is the second largest fine ever levied by the FCA regarding purely vertical practices. The FCA also ordered the publication of a summary of the Decision in the paper and online editions of *Le Monde* and *Les Echos*' newspapers.

Background

The Directorate General for Competition Policy, Consumer Affairs, and Fraud Control ("**DGCCRF**") detected the practices and informed the FCA, which carried out dawn raids in 2013 and 2014. In 2015, Bosch sought leniency. In 2016, the FCA split the investigation into two separate cases: (i) one concerning horizontal price-fixing resulting in €189 million in fines imposed on six companies (Bosch, Candy Hoover, Eberhardt Frères, Electrolux, Indesit, and Whirlpool) in 2018[86], and (ii) another case regarding the RPM practices at stake in this Decision.

The Decision

On February 21, 2023 (*i.e.*, about 10 years after the dawn raids), the FCA notified objections for violation of competition laws through RPM practices to the 12 companies. All companies settled, except for SEB and Boulanger who contested the objections.

In its Decision, the FCA confirmed the objections, finding that between February 2007 and December 2014, 10 manufacturers — Bosch, Candy Hoover, Eberhardt, Electrolux, Indesit (taken over by Whirlpool), LG, Miele, SEB, Smeg, and Whirlpool — entered into individual agreements with their distributors, including Boulanger and Darty, to set retail prices.

To establish the RPM practices, the FCA applied the established three-part legal test.[87]

— ***Price communication.*** Manufacturers communicated so-called "recommended" retail prices, which were meant to be set prices. Several distributors reported to the FCA that manufacturers used coded language such as "*stock prices*" or "*sensible product*" to conceal the true intent behind the communications. Distributors also told the FCA that manufacturers exerted pressure on them to "*activate*" or to "*do the necessary*" and, as a result, distributors enforced these "recommended" retail prices rigorously.

[85] *See* FCA decision No. 24-D-11 of December 19, 2024, relating to practices implemented in the household appliances sector.

[86] *See* FCA decision No.18-D-24 of December 5, 2018, relating to practices implemented in the household appliances sector.

[87] *See* FCA decision No. 24-D-11 of December 19, 2024, relating to practices implemented in the household appliances sector, paras 577-588.

— ***Monitoring.*** Manufacturers actively monitored whether distributors adhered to the set prices, *via* online tools that tracked retail prices, distributor by distributor, in real time.

— ***Retaliation.*** Manufacturers retaliated against distributors who did not comply with the set prices, through delays in shipments or the ban on the sale of certain products.

Key distributors like Boulanger and Darty not only complied with the manufacturers' pricing policies but also played an active role in enforcing RPM practices. They monitored competitors' prices to ensure that in-store prices were not undercut by online prices, often requesting manufacturers to intervene when spotting discrepancies. They also sought "margin compensation" from manufacturers if a competing distributor applied lower prices. Boulanger and Darty's actions thus helped manufacturers establish a benchmark for pricing applied by other distributors.

The FCA considered these practices to be particularly serious because they were (i) "*institutionalized*" (*i.e.*, systematically incorporated into the companies' regular operations), (ii) "*conducted covertly*", and (iii) "*involved a large proportion of active market participants*".

The FCA found that such vertical agreements sought to inflate retail prices for household appliances, protecting traditional distribution channels (mainly physical stores) from the increasing competition posed by online distributors. The conduct was found to have reduced both intra and inter-brand competition. It prevented consumers from accessing more competitive prices in a rapidly expanding online market and stifled competition between brands due to similar practices being used by a significant number of manufacturers with the same distributors.

No horizontal information exchange

The FCA dismissed the information exchanges concerns. The FCA's investigation services had alleged that the manufacturers of small domestic appliances had entered into anticompetitive information exchanges through a trade association (the *Groupement Interprofessionnel des Fabricants d'Appareils d'Équipement Ménager* ("**GIFAM**")) involving the sharing of individualised data on sales volumes by product category. However, the FCA concluded that the shared data was not commercially sensitive enough to impact the market, and that the exchange did not undermine the autonomy of the participating companies.

Erga omnes effect of the suspension of the 10-year statute of limitations

Several companies argued that the practices were time-barred pursuant to the 10-year statute of limitations. They claimed that the FCA adopted the Decision more than 10 years after the dawn raids conducted on the premises of several companies. The suspension of the 10-year statute of limitations, they argued, only applied to the parties who filed appeals against the dawn raids, and not *vis-à-vis* the other parties involved in the case. However, the FCA considered in the Decision that the suspension of the 10-year statute of limitations had an *erga omnes* effect, *i.e.*, it had affected all the other parties involved in the conduct. Interestingly, the EU Courts have taken an opposite position.[88]

Takeaways

The Decision underscores the FCA's ongoing focus on online restrictions. The FCA has indeed adopted several fining decisions to sanction online restrictions in the recent years.[89]

[88] *ArcelorMittal Luxembourg v. Commission and Commission v. ArcelorMittal Luxembourg and Others* (C-201/09 P and C-216/09 P) EU:C:2011:190, para. 145. *See also Japan Airlines Co. Ltd v. Commission*, (T-340/17) EU:T:2022:181, para. 205 ; *Cathay Pacific Airways Ltd v. Commission*, (T-343/17) EU:T:2022:184, para. 228; and *LATAM Airlines Group SA et Lan Cargo SA v. Commission*, (T-344/17), EU:T:2022:185, para. 117.

[89] *See* in the last two years, FCA decision No. 23-D-12 of December 11, 2023, relating to practices implemented in the premium tea sector (Mariage Frères); FCA decision No. 23-D-13 of December 19, 2023, relating to practices implemented in the luxury watch distribution sector (Rolex); and FCA decision No. 24-D-02 of February 6, 2024, regarding practices implemented in the chocolate distribution sector (De Neuville).

The Decision imposed large fines on distributors for RPM practices, reflecting the active role played by distributors in the conduct. The fines imposed on Darty and Boulanger represent over 30% of the total fine amount and are the highest fines ever imposed (in absolute terms) on retailers for RPM practices.

The Decision may be subject to appeal. The two companies who have not settled may challenge the FCA decision in court. The other parties can challenge the regularity of the procedure and the proportionality of the sanction, provided that they do not contest the penalty range agreed upon in the settlement agreement.[90]

The Paris Court of Appeal confirms that the limitation period applying to claims for damages starts from the French Competition Authority's decision and is not interrupted by prior investigatory action

On January 22, 2025, the Paris Court of Appeal (the "**Court of Appeals**")[91] upheld the Paris Commercial Court's dismissal of Carrefour's claim for damages against L'Oréal on the basis that such claim was time-barred.

Background

On December 14, 2014, the French Competition Authority ("**FCA**") fined several suppliers of hygiene products, including L'Oréal, for having engaged in price fixing practices (the "**Decision**")[92]. The Decision was upheld by the Court of Appeals on October 27, 2016.

L'Oréal appealed to the French *Cour de cassation*, which, on March 27, 2019, dismissed all of L'Oréal's claims except for the level of the fine imposed on its subsidiary, Lascad. Upon remittal, the Court of Appeals upheld the sanction against L'Oréal on June 18, 2020, except for the part concerning Lascad. A subsequent appeal by L'Oréal was dismissed on October 18, 2023.

Meanwhile, on August 17, 2017, *i.e.,* almost three years after the Decision, Carrefour filed a claim for damages against L'Oréal before the Paris Commercial Court. However, this appeal was dismissed on procedural grounds on July 13, 2020, and then later upheld on appeal on September 8, 2021.

Carrefour lodged a new claim on July 20, 2021, *i.e.*, this time more than six years after the Decision. On January 23, 2023, the Paris Commercial Court ruled that the claims were time-barred, which Carrefour appealed before the Court of Appeals, claiming that the limitation period had been interrupted.

The starting point of the limitation period

The Court of Appeals observed that Carrefour became aware of the facts giving rise to the damage, thus enabling the plaintiff to take legal action, upon the FCA's Decision of December 18, 2014. This marked the beginning of the five-year limitation period provided for in Article 2224 of the

[90] Paris Court of Appeal, 13 June 2019, *Alcyon*, RG 18/20229.

[91] Paris Court of Appeal, January 22, 2025, *Carrefour v. L'Oréal* (23/04477).

[92] FCA Decision n° 14-D-19 of December 18, 2014 relative to practices implemented in the home care products and insecticides sector and in the personal and body care products sector.

French Civil Code[93] in force at the time prior to the transposition of Article 10 of Directive 2014/104/EU ("**the Damages Directive**").[94]

The interruption of the limitation period

In its appeal, Carrefour argued that the limitation period, which was set to expire on December 18, 2019, had been interrupted.

First, Carrefour argued that as a result of the transposition of Article 10 of the Damages Directive into Article L.462-7, paragraph 4 of the French Commercial Code,[95] the limitation period had been interrupted by the Competition Council opening competition proceedings against L'Oréal in 2006. Indeed, Article L.462-7, paragraph 4 of the French Commercial Code provides that any investigatory act taken by a competition authority interrupts the limitation period for civil action until a decision becomes final. Carrefour therefore argued that the limitation period had been interrupted between 2006 and 2023, such that its claim was not time barred.

Carrefour pointed out that the European Court of Justice ("**ECJ**") had already ruled that, while Article 10 of the Damages Directive was substantive in nature, such that it should not be applied retroactively, national courts needed to evaluate whether the "situation in question" arose before the deadline for transposition of the Damages Directive, or whether it continued to have effects beyond that date, in which case Article 10 would, in fact, apply.[96]

The parties disagreed on the triggering event that constituted "the situation in question".

Carrefour claimed that, based on the ECJ rulings, the critical event triggering the application of Article 10 of the Damages Directive was the expiration of the applicable limitation period. Therefore, since Carrefour's limitation period had not expired by the deadline set to transpose the Damages Directive, *i.e.* December 27, 2016, it considered that Article 10(4) of the Damages Directive, and, consequently, Article L. 462-7, paragraph 4 of the French Commercial Code, were applicable.

Conversely, L'Oréal argued that the ECJ preliminary rulings did not specifically relate to the interruption of the limitation period, but rather (i) its starting point and (ii) duration. L'Oréal considered that the relevant triggering event for the purposes of Article 10(4) of the Damages Directive was the investigatory action taken by a competition authority, which, in this case, occurred in 2006, such that the "situation in question" arose well before the deadline set to transpose the Damages Directive in 2016, thereby concluding that Article 10(4) of the Damages Directive did not apply.

The Court of Appeals acknowledged the ambiguity surrounding the ECJ's ruling on the temporal application of Article 10(4) of the Damages Directive, but observed that, in any event, since the 2006 investigatory action occurred prior to the commencement of the limitation period in 2014, Article 10 of the Damages Directive could not have interrupted a limitation period that had not yet begun.

Second, Carrefour observed that Article L. 462-7 of the French Commercial Code, introduced by the 2014 Hamon Law,[97] which was in force prior to the transposition of the Damages Directive, already provided that the limitation period was

[93] Article 2224 of the French Civil Code: "*Personal or property actions are time-barred after five years from the day on which the holder of a right knew or should have known the facts enabling him to exercise it*" (Free translation).

[94] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, set to be transposed by December 27, 2016.

[95] Article L 462-7 paragraph 4 of the Commercial Code: "*Any act intended to investigate, detect or sanction anti-competitive practices by the Competition Authority, a national competition authority of another Member State of the European Union or the European Commission interrupts the limitation period for civil action and action for damages brought before an administrative court on the basis of Article L. 481-1. The interruption resulting from such an act shall have effect up to the date on which the decision of the competent competition authority or the court of appeal can no longer be appealed by ordinary means*" (Free translation).

[96] ECJ, June 22, 22, Volvo AB/ DAF Trucks, aff. C-267/20 ; ECJ, April 18, 2024, *Heureka groupe/Google LLC,* aff. C-605/21.

[97] Law No. 2014-344 of March 17, 2014 - art. 2 (V).

suspended by the initiation of proceedings by a competition authority until a final decision was reached. Since the Decision had only become final in 2023, Carrefour argued that the limitation period had been interrupted until such date.

However, the Court of Appeals reiterated established case law according to which laws introducing new causes for interruption or suspension of the limitation period are not retroactive and only apply to interruptive or suspensive events occurring after their entry into force. Therefore, the opening of proceedings by the Competition Council in 2006 could not have interrupted the limitation period.

The Court of Appeals also noted that the principle of effectiveness under Article 101 of the Treaty on the Functioning of the European Union was not undermined since the limitation period had begun well after the end of the practices in question, the Decision had provided Carrefour with sufficient elements to establish the existence and scope of any potential harm, and Carrefour had had a reasonable five-year period to lodge its claim.

Takeaway

The temporal application of Article 10(4) of the Damages Directive and Article L.462-7 of the French Commercial Code remains uncertain.

The limitation period begins when the claimant becomes aware of the facts constituting anticompetitive practices by the defendants, which doesn't necessarily require a competition authority's decision. However, in cartel cases involving concealed practices, such awareness typically arises from the authority's decision, initiating the limitation period.

This ruling clarifies that any prior investigatory steps taken by competition authorities cannot interrupt this period unless the claimant had already obtained effective knowledge of the infringements before the authority's proceedings commenced.

The French Competition Authority is contemplating introducing call-in powers to review below-threshold mergers

In January 2025, the French Competition Authority (the "**FCA**") launched a public consultation on the introduction of a merger control framework for transactions that fall below the current turnover-based notification thresholds.[98] Whereas three options were presented in the consultation, on April 10, 2025 the FCA announced that the first option, namely the introduction of a call-in power based on quantitative and qualitative criteria, had received the most positive feedback and was being prioritized.[99]

Background

The FCA's initiative follows the European Court of Justice's ("**ECJ**") landmark *Illumina/ Grail* judgment of September 3, 2024,[100] which clarified that the European Commission (the "**Commission**") may not accept a request for referral under article 22 of the EU Merger Regulation ("**EUMR**") for transactions which fall both below EU and national jurisdictional thresholds.

[98] FCA, "Public consultation on the introduction of a merger control framework for addressing below-threshold mergers likely to harm competition", January 14, 2025, available here.

[99] FCA, "Mergers below the control thresholds : Following the public consultation, the Autorité is continuing its work to propose a reform ensuring effective control", April 10, 2025, available here.

[100] Judgment of September 3, 2024, *Illumina and GRAIL and Commission*, Cases C-622/11 and C-625/22.

The FCA had already launched a public consultation in October 2017, examining whether it would be appropriate to amend the merger control regulations to capture below-threshold mergers likely to raise competition issues.[101] It had then considered that the pre-*Illumina/Grail* Article 22 EUMR framework was an appropriate tool for reviewing such mergers.[102] The FCA had also decided not to re-introduce a market share threshold – which was abandoned in 2001– and ruled out the introduction of a transaction value-based threshold, viewed as inefficient in capturing problematic transactions and overly burdensome for M&A activities.[103]

The call-in power

After reviewing the submissions of the 26 stakeholders who responded to its latest public consultation, the FCA decided to work on the introduction of a call-in power based on quantitative and qualitative criteria for transactions that "*threaten to significantly affect competition on the French territory*".

Ten Member States currently have such call-in powers.[104] Although this option was "*more favourably*" received by stakeholders than the other options subject to the consultation, respondents highlighted concerns around predictability and legal certainty. In particular, the tool would allow the FCA to review transactions within a certain timeframe after closing,[105] thereby introducing legal uncertainty. Furthermore, a need for clarification of what may constitute a transaction that "*threatens to significantly affect competition*" has been underlined. To address those concerns, the FCA is looking to set "*clear*" application criteria, including criteria to establish (i) a nexus to France, (ii) what would constitute a potential threat to competition, and (iii) a "*clearly defined and short enough*" time limit for implementing the call-in power. The FCA is also intending to publish guidelines detailing *inter alia* the circumstances that would justify the use of the FCA's call-in power.

Two other options were on the table

The FCA's public consultation sought stakeholders' views on two other options:

— **Notification based on prior decisions or DMA gatekeeper designation.** Another option under consideration was the introduction of a mandatory notification requirement for transactions involving companies previously subject to an FCA or Commission decision sanctioning or imposing commitments due to antitrust violations, as well as prohibition decisions or conditional clearances in the context of merger control. Transactions involving companies designated as "*gatekeepers*" by the Commission under the Digital Markets Act[106] would also have needed to be notified. This mechanism is inspired by the Swiss system, which requires notification when a prior decision establishes that a party to the concentration holds a dominant position in Switzerland.[107] The FCA did not retain this option, for which respondents expressed strong criticism because of the legal issues it raises, notably regarding its interaction with the DMA. In addition, it would have required notifications of unproblematic transactions while certain transactions that may have deserved scrutiny would, conversely, have falled outside its scope.

— **Leverage current legal framework.** The third option subject to the FCA's consultation was the leveraging of the existing legal

[101] FCA, "The French Competition Authority is launching a review to modernize and simplify merger control regulations", October 20, 2017, available here.

[102] The FCA also supported the Commission's approach to Article 22 EUMR (FCA, "The Autorité welcomes the announcement by the European Commission, which will henceforth allow national competition authorities to refer sensitive merger transactions to it for examination, including when they are not subject to national merger control", September 15, 2020, available here). The French Republic also intervened in the *Illumina/Grail* case in support of the Commission.

[103] FCA, "Modernization and simplification of merger control", June 7, 2018, available here.

[104] Denmark, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Norway, Slovenia and Sweden.

[105] According to the Communication from the Commission on the guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases of March 31, 2021, the Commission indicated it would not consider referrals after six months from the implementation of the concentration, *see* para 21.

[106] Regulation (EU) 2022/1925 of September 14, 2022.

[107] Article 9(4) of the *Swiss Federal Act on Cartels and other Restraints of Competition*. Available here.

framework related to anticompetitive practices. This option is in line with the *Towercast* judgment,[108] in which the ECJ ruled that concentrations that escape *ex ante* EU and national merger control review may still be subject to an *ex post* review under Article 102 TFEU prohibiting abuse of dominance, including after the closing of the transaction. The FCA has also recently reaffirmed its ability to carry out *ex post* reviews of non-reportable mergers based on Article 101 of the TFEU.[109] This approach generates legal uncertainty in M&A deals as any acquisition might potentially be scrutinized a decade after closing.[110] Despite the criticism and the fact that most respondents indicated that this option should remain the exception, the FCA did not rule out this option and simply stated that, in any event, it does not require any legislative change.

Next steps and takeaways

The FCA intends to present a proposal before the end of the year, which would then need to be enacted through legislation. The adoption of a call-in power would likely result in heightened complexity and more legal uncertainty for M&A transactions as well as, more options for prospective plaintiffs to cause FCA intervention.

[108] Judgment of the ECJ, March 16, 2023, Towercast, Case C-449/21.

[109] FCA, Decision 24-D-05 of May 2, 2024, regarding practices implemented in the meat-cutting sector, available here, and Cleary's Alert Memorandum of May 21, 2024 entitled "First Move by the French Competition Authority to Analyze Non-Reportable Mergers under Article 101", available here.

[110] *See* article L-462-7 of the French Commercial Code, and article 25 of the Council Regulation (CE) n°1/2003 of December,16 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

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