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French Competition Law Newsletter

Highlights

- The French Competition Authorities Announces Its Enforcement Priorities For 2020 And Creates A Dedicated Digital Department
- FCA dismissed abuse of dominance allegations against TDF in relation to the acquisition of Itas
- New Investigative Power For The French Competition Authority To Access Telephone Communications Data

The French Competition Authorities Announces Its Enforcement Priorities For 2020 And Creates A Dedicated Digital Department

On January 9, 2020, the French Competition Authority (“**FCA**”) announced its main priorities for 2020.¹ The regulator stressed that the digital and retail sectors would remain at the top of its agenda given the recent developments in these fields and the challenging competition issues they raise. Trade associations and unions may also face more significant fines while climate concerns may raise discussions between regulators to enhance environmental protection. On the legislative front, the FCA will follow the implementation of the ECN+ Directive in France and the upcoming revision of French merger control guidelines.

Merger control guidelines reform

The planned overhaul of the merger control guidelines will certainly be the hallmark of the year.

The FCA confirmed that the new guidelines would be released early this year. The FCA indicated it will take into account the new challenges raised by the digital economy, in particular to assess the competitive pressure exerted by online retailers and so-called killer acquisitions (i.e., acquisitions by dominant companies of smaller rivals to halt the development of their products at an early stage).

The digital sector

The FCA will dedicate significant financial resources to assess and investigate digital markets. In this respect, the FCA will create a specialized “Digital Economy Unit”, which will be supervised by the *Rapporteur Général* of the FCA and provide dedicated support for cases related to the digital sector. The FCA will use various tools

¹ FCA press release of January 9, 2020, available at: <https://www.autoritedelaconurrence.fr/fr/communiqués-de-presse/lautorite-de-la-concurrence-annonce-ses-priorités-pour-lannée-2020>.

to better understand the economics underlying the regulation of platforms and detect potential violations more efficiently, including when they are implemented through algorithms.² For instance, the FCA may use new investigation methods based on the use of algorithms, mass data, and artificial intelligence as well as implement a new conceptual framework aimed at promoting the service's cooperation with sector-specific regulators and exchanges with research institutions and academics specialized in digital issues.

In addition, large companies in the technology sector will remain subject to the FCA's scrutiny, in particular as to the use of personal data and artificial intelligence, as well as their role in online advertising.³ The FCA will also publish a study on the impact of electronic financial services, fintech, and blockchain technology on the financial sector. The FCA's stance seems to align with that of the European Commission, which has also strived to reshape its competition policy in the digital era.⁴

The retail sector

The FCA will also publish a study concerning innovative retail practices that may raise competition concerns, including multi-channel strategies (*i.e.*, diversifying and multiplying the channels used to reach customers, in particular through the growing convergence of digital and physical channels) and retail models which combine physical and digital retail.⁵ The FCA will also aim to close several investigations related to joint purchasing agreements. While the regulator did not single out any particular players, its enforcement activity at least involved the agreements between Carrefour and Casino.⁶

The outcome of these proceedings should help clarify the risks associated with purchasing organizations that the FCA had identified in a prior opinion released in 2015.⁷

The entry into force of the ECN+ directive

The FCA welcomed the future implementation of the ECN+ directive which reinforces the powers of national competition authorities in the European Union.⁸ In particular, the FCA will be able to decline certain referrals depending on its enforcement priorities. Another key measure will be the possibility to impose interim measures *ex officio* (*i.e.*, even without a prior request from the parties). This may open the door to many more interim measure cases.

Trade unions and associations

The FCA recalled that trade union and associations have faced regulatory backlash in recent years over infringements of competition law. The FCA sanctioned a wide variety of professional bodies for cartel practices, such as notaries,⁹ architects,¹⁰ and courier services.¹¹ The FCA warned that hefty fines were to be expected since the implementation of the directive ECN+, which allows for the imposition of fines of up to 10% of the global turnover of each of the companies that belongs to the union or association.¹²

Climate matters

Sustainable development also fueled discussions among various regulators, including the FCA. The FCA will take a keen interest in practices at the intersection of environmental protection and competition law. These may take the form of

² FCA press release of January 9, 2020, available at: <https://www.autoritedelaconurrence.fr/fr/communiqués-de-presse/lautorite-cree-un-service-de-leconomie-numerique>.

³ *Ibid.*

⁴ The Commission ordered a report on competition policy for the digital era, available at: <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

⁵ Decision of the FCA of April 20, 2018, n° 18-DCC-50 and decision of the FCA of April 20, 2018, n°18-DCC- 53

⁶ FCA press release of July 16, 2018.

⁷ FCA, Opinion 15-A-06 of March 31, 2015 regarding joint purchasing agreements in the food retail sector.

⁸ Directive (EU) 2019/1 of the European Parliament and of the Council of December 11, 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ 2018 L11/3.

⁹ Decision of the FCA of June 24, 2019, n°19-D-12.

¹⁰ Decision of the FCA of September 30, 2019, n°19-D-19.

¹¹ Decision of the FCA of December 15, 2015, n° 15-D-19.

¹² FCA press release of January 9, 2020.

anticompetitive agreements between companies, whereby they jeopardize the promotion of environmental performance. In this respect, the FCA already sanctioned several floor coverings

manufacturers that agreed not to compete based on the environmental performance of their products, thus restricting competition on this parameter of consumer choice.¹³

FCA dismissed abuse of dominance allegations against TDF in relation to the acquisition of Itas

On January 16, 2020, the FCA dismissed a complaint by French terrestrial digital television broadcaster towerCast which alleged that its competitor TDF's acquisition of Itas,¹⁴ constituted an abuse of dominance on the wholesale markets for digital terrestrial television broadcasting services (the "**Decision**").

While the transaction did not exceed neither the French nor the European merger control thresholds,¹⁵ towerCast argued that the transaction would constitute an abuse of dominance by significantly strengthening TDF's dominant position. Post-transaction, TDF and towerCast indeed remained the only two competitors on these markets.¹⁶ The FCA concluded, however, that it did not have jurisdiction to review TDF's acquisition under abuse of dominance rules.

The principles laid down in the 1973 European Court of Justice's *Continental Can* ruling no longer apply

Interestingly, towerCast's claim relied on the European Court of Justice's ("**ECJ**") 1973 *Continental Can* ruling.¹⁷ In this ruling, the ECJ held that a company may abuse its dominant position by acquiring one of its competitors, in particular when the acquisition strengthens

the acquiring company's dominant position "*in such a way that the degree of dominance reached substantially fetters competition, i.e., that only undertakings remain in the market whose behaviour depends on the dominant one.*"¹⁸

However, the FCA recalled that the *Continental Can* ruling was delivered prior to the adoption of any European merger control regulation and concluded on this basis that the principle laid down by the *Continental Can* ruling could no longer apply.¹⁹ The European Union legislator adopted a European merger control regulation for the first time in December 1989,²⁰ considering in particular that Articles 85 and 86 (now 101 and 102) were not "*sufficient to cover all operations which may prove to be incompatible with the system of undistorted competition.*"²¹ This new legal instrument was conceived as "*the only instrument applicable to such concentrations*"²².

Antitrust rules and merger control rules are distinct in nature

The FCA concluded that, under both EU and French law, a concentration could not be considered, in itself, as an abuse of a dominant position, in the absence of any abusive practices that would be severable from the concentration.

¹³ Decision of the FCA of October 18, 2017, n°17-D-20.

¹⁴ The Itas group is a major French industrial player in the telecom sector in France and abroad.

¹⁵ Decision, para. 106.

¹⁶ Decision, para. 61.

¹⁷ *Continental Can* (Case C-6/72) EU:C:1973:22.

¹⁸ *Ibid.*, para. 26. However, the ECJ annulled the Commission's decision given that it had not, "*as a matter of law, sufficiently shown the facts and the assessments on which it is based*" (para. 37).

¹⁹ Decision, para. 131.

²⁰ Merger control was introduced by Council Regulation (EEC) No 4064 / 89 of 21 December 1989 on the control of concentrations between undertakings, OJ 1989 L 395/1 ("**Council Regulation No 4064/89**"), subsequently replaced by Council Regulation (EC) No 139/2004 of 20 January 2004, OJ 2004 L 24/1.

²¹ Council Regulation No 4064/89, Recital 6.

²² *Ibid.*, Recital 7.

EU law. According to the FCA, after the adoption of Council Regulation No 4064/89, the application of Article 86 of the EEC Treaty (now Article 102 TFEU) to a concentration became devoid of purpose.²³ The FCA noted that this was further evidenced by the fact that the Commission no longer applied Article 86 of the EEC Treaty to mergers after the entry into force of Council Regulation No 4064/89.²⁴

French law. Based on the FCA's practice, as well as the Paris Court of Appeal and Supreme Court's case law,²⁵ the FCA recalled that merger control and antitrust rules were also strictly distinct under French law. The FCA therefore cannot find that a transaction, even if it does not meet the national notification thresholds, constitutes in itself an abuse of a dominant position under Article L. 420-2 of the French Commercial Code. The

FCA however specified that any abusive conduct distinct from the transaction itself may constitute an anticompetitive practice, and could result in the transaction being annulled²⁶ under Article L. 430-9 of the French Commercial Code. In the case at hand, the FCA nonetheless concluded that this provision did not apply, in the absence of any abusive conduct by TDF that could be detached from the merger itself.

In this Decision, the FCA therefore clarifies its position on the relationship between antitrust and merger control in Europe and France based on existing legislation. This position is however subject to change if the French legislator decides to implement an *ex-post* merger control mechanism in the near future.

New Investigative Power For The French Competition Authority To Access Telephone Communications Data

Decree n°2019-1247 of November 28, 2019, published in the Official Journal of the French Republic on November 29, 2019 (the “**Decree**”), provides the procedural framework for the FCA's new power to access telephone communications data for the purpose of antitrust investigations under Article L. 450-3-3 of the French Commercial Code. This framework was introduced by the Pacte Law²⁷ and allows the FCA to request access to technical information regarding the identity of a caller, the telecommunication terminals used, the data, time, and duration of each call, and the phone numbers called. It will be operational as soon as the Data Request Supervisor (“*contrôleur des demandes de données de connexion*”) is appointed

(the Supervisor will be appointed among the judges of the French Administrative or Civil Supreme Court).²⁸

The Decree creates five articles (Articles R. 450-4 to R. 450-8) in the French Commercial Code which provide the requirements the FCA's request must fulfil in order to access to telephone communications data and as well as rules concerning the destruction of the data collected by the FCA.

Requirements to access telephone communications data

Under Article L. 450-3-3, II, of the French Commercial Code, the FCA's *Rapporteur général*

²³ Decision, paras. 131 and 140.

²⁴ Decision, para. 135.

²⁵ Decision, para.151. See also Decision, paras. 145-146 and 148-149, quoting: French Competition Council, Decision n° 93-D-29 of 6 July 1993; Paris Court of Appeal, Judgment n° 93/08166 of 28 June 1994; Supreme Court, Judgment n° 94-20055 of 26 November 1996; French Competition Council, Decision n° 98-MC-06 of 1 July 1998. French Competition Council, Decision n° 99-D-04 of 19 January 1999. French Competition Council, Decision n° 99-D-69 of 23 November 1999. FCA, Decision n° 10-D-32 of 16 November 2010.

²⁶ Decision, paras. 153-154.

²⁷ Law n°2019-486 of May 22, 2019, Article 212.

²⁸ As per Article L. 450-3-3, II, of the French Commercial Code, the controlling officer must be either a Conseil d'État or a Cour de Cassation judge. He will be appointed for four years and is entirely independent from the FCA.

must request the approval of the Data Request Supervisor before the FCA can access telephone communications data for a specific investigation. The request must specify the basis for the FCA's suspicions of an infringement and explain why the requested telephone communications data are required for the FCA's investigation.

Article R. 450-4 of the French Commercial Code sets forth a list of information that the FCA must include in its request. In particular, the FCA must provide the suspected individuals' names for which access to data appears necessary for its investigation (or the relevant phone numbers and IP addresses); the telephone communication data or type of data requested for each individual; the relevant time period for such data; and "*the factual and legal elements that justify this request*".²⁹

Article R. 450-5 of the French Commercial Code provides that the FCA must ensure the confidentiality of the collected data.

Destruction of the collected data

Article R. 450-6 of the French Commercial Code recalls that the destruction of the telephone communications data collected by the FCA either six months after a final FCA decision or if the data turns out not to relate to an infringement, as provided by Article L. 450-3-3 of the French Commercial Code. The FCA's agents must also take minutes establishing the destruction of the relevant data, the FCA's request to the Supervisor, and the Supervisor's approval decision.³⁰

According to the FCA's president, this new power constitutes "*an additional valuable asset for the effectiveness of the [FCA]'s investigations*" and will allow the FCA to take into account the "*increasingly sophisticated means to conceal illegal practices*".

²⁹ Article R. 450-4, I, 4^o, of the French Commercial Code.

³⁰ Article R. 450-6 of the French Commercial Code.

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