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French Competition Law Newsletter

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The French *Cour de cassation* clarifies the scope of judicial review regarding orders authorizing dawn raids

On January 4, 2022, the *Cour de cassation* confirmed the rulings of the president of the Court of Appeals validating dawn raids carried out in May 2017 by the French Competition Authority ("**FCA**") in the rendering sector.[1]

The FCA suspected certain anticompetitive behavior in the form of geographic market allocation following cross asset sales in the rendering sector, and requested court orders allowing it to conduct dawn raids. These dawn raids took place in May 2017.

The companies which were subject to the raids decided to appeal the liberty and custody judge ("**LCJ**")'s orders authorizing the dawn raids, claiming that the evidence on which the orders were based related to merger proceedings and not anticompetitive practices.

On November 28, 2019,[2] the president of the Versailles Court of Appeals confirmed the legality of the orders authorizing the dawn raids, finding that whether the practices qualify as merger proceedings or anticompetitive practices was not relevant. The judge in charge of authorizing the raids only need to carry out an overall

[1] *Cour de cassation*, Criminal division, January 4, 2021, No.20-83.813, No.20-83.815, No.20-83.817.

[2] Versailles Court of Appeals, November 28, 2019, No.6418 – 6420 – 6432 – 6433/17.

assessment of the evidence provided by the FCA and determine whether there exists a presumption of anticompetitive practices.

The companies further appealed the orders before the *Cour de cassation*.

On January 4, 2022, the *Cour de cassation* confirmed the rulings made by the president of the Court of Appeals. First, it clarified that the mere existence of a potential concentration may not *prima facie* exclude the LCJ's jurisdiction. Second, it confirmed that the Court of Appeals only needs to verify the existence of a presumption of anticompetitive practices justifying the carrying out of dawn raids. Conversely, the Court of Appeals is not required, at this stage of the proceedings, to ascertain whether the alleged practices fall within the scope of antitrust or merger control proceedings.

The *Cour de cassation* found that, having examined the evidence provided by the FCA's investigation services, the president of the Court of Appeals had, in his own discretion, and based on an overall assessment, ruled that the evidence at hand constituted a sufficient presumption of anticompetitive practices, regardless of the transfer of assets. The president of the Court of Appeals found that the LCJ had relied on statements from customers, farmers, and slaughterhouse managers, whose evidence pointed towards the existence of a presumption of anticompetitive practices.

The French *Cour de cassation* seeks clarification on jurisdiction to rule on the French Competition Authority's "Name and Shame" practices

On January 5, 2022, France's top civil court ruled that the question of jurisdiction in the case opposing pharmaceutical company Roche and the French Competition Authority ("**FCA**") in respect of the communication campaign led by the FCA in the Avastin/Lucentis case was particularly complex, and decided to refer it to the *Tribunal des conflits* to be settled.[3] According to Roche, following its 2020 decision, the FCA led an aggressive and unprecedented communication campaign on the case, going beyond the scope of its usual practice.

Background

On September 9, 2020, the FCA found that pharmaceutical companies Novartis, Roche, and Genentech had abused their collective dominant position on the market for the treatment of age-related macular degeneration ("**AMD**") by spreading misleading and sometimes alarmist information regarding the risks related to the use of Avastin, a cheaper product competing with Lucentis, for the treatment of AMD (the "**Decision**").[4] Novartis, Roche, and Genentech were fined €444 million.

Roche then lodged an appeal on the merits of the Decision with the Paris Court of Appeals, which is still pending.

The FCA's Name and Shame Practices at issue

The heart of the issue lies not with the substance of the case, but with the FCA's decision to communicate heavily on the Decision after its publication while the appeal on the merits was still pending. Following publication of the Decision, the FCA launched a significant communication campaign across all media: press, social networks (Twitter, LinkedIn), video platforms (YouTube), and conferences as well as podcasts, and wrote to the French professional organization of

[3] *Cour de cassation*, judgment of January 5, 2022 (No. 21-16.868).

[4] FCA, Decision No. 20-D-11 of September 9, 2020 regarding practices implemented in the treatment of age-related macular degeneration sector.

pharmaceutical companies ("**LEEM**") in order to raise awareness and as a consequence potentially encourage private damages actions.

Roche's Appeal Before the Paris Court of Appeals

Roche took issue with the FCA's communication, claiming that it was disproportionate and misleading, and requested that the FCA cease such practices. Upon refusal from the FCA, Roche lodged an appeal with the Paris Court of Appeals under summary procedure to request that the FCA stop this communication campaign.

Roche considered that the FCA's communication campaign was disproportionate as it was across all media and still ongoing nearly four months after the Decision was published, misleading in that it misrepresented the price difference between the competing drugs, Avastin and Lucentis, and consequently, the damage to public finances that could result from the alleged infringement and omitted key information, such as the fact that the practices had ended in 2013. In addition, Roche considered that the communication was in breach of the presumption of innocence as the appeal of the merits of the Decision was still pending, which the FCA failed to mention. Finally, Roche claimed that the FCA's communication strategy breached the *College*'s duty of discretion and reserve.

While Roche decided to seize the civil courts on the basis that such communication from the FCA constituted a publication injunction in disguise, and therefore, an additional penalty, the Court of Appeals dismissed the request on May 12, 2020 on the basis that civil courts had no jurisdiction to rule on the matter,[5] noting that the FCA's communication campaign derived either from its general communication policy or from its mission to protect competition and consumer welfare and consequently did not fall within the jurisdiction of civil courts, thereby referring Roche to the administrative courts.

Moving On Up – The *Cour de cassation*'s Ruling

Roche appealed the Court of Appeals' ruling before the *Cour de cassation*, which considered that the question of jurisdiction in this case was of a complex nature and decided to refer the case to the *Tribunal des conflits* to settle the question of jurisdiction.

On the one hand, the *Cour de cassation* noted that the FCA's communication could be interpreted as forming part of its general communication policy, seeking to inform the general public of the actions taken to ensure the appropriate functioning of the market, for which only the administrative courts have jurisdiction. On the other hand, the *Cour de cassation* acknowledged that the litigious communication only related to the Decision and could thus also be interpreted as an additional sanction in the form of a publication injunction for which the civil courts have jurisdiction.

Limits to the FCA's Name and Shame Policy

These proceedings raise the question of how extensively the FCA may communicate on a case after publication of a decision. The underlying question that the *Tribunal des conflits* will have to settle is the extent to which such communication, which postdates the Decision and is solely focused on the case at hand, is inseparable from said Decision and therefore can be said to constitute an extension of such Decision. The outcome of this case is expected to be closely monitored and will be instrumental to undertakings seeking to limit reputational damage.

[5] Paris Court of Appeals, ruling of May 12, 2021 (No. 21/02163).

Former ECB official Benoît Coeuré takes over from Isabelle de Silva as head of the French Competition Authority

On January 12, 2022, former European Central Bank official Benoît Coeuré was appointed President of the French Competition Authority ("**FCA**") following his hearing by both houses of the French Parliament.[6] He was unanimously appointed by members of the Commission for Economic Affairs of the *Assemblée Nationale*, while the Commission for Economic Affairs of the *Sénat* displayed a more balanced distribution of votes (only 12 in favor out of 22 votes cast).

Mr. Coeuré follows in the footsteps of Isabelle de Silva, who chaired the FCA from October 2016 to October 2021, and whose mandate was not renewed. Since 2020 he had been heading the Innovation Hub of the Bank for International Settlements, designed to foster international cooperation between central banks on topics relating to innovative financial technology. Prior to that, Mr. Coeuré served as an executive director at the European Central Bank and deputy director general and chief economist at the French Treasury between 2009 and 2011. From 2007 to 2009, Mr. Coeuré worked as France's Assistant Secretary for Multilateral Affairs, Trade and Development. He was also the co-chair of the Paris Club, and G8 and G20 Finance Sous-Sherpa for France. Before that, Mr. Coeuré trained as an economist at *École Polytechnique* and graduated with an advanced degree in statistics and economic policy from the *École nationale de la statistique et de l'administration économique* (ENSAE), and a bachelor's degree in Japanese.

Mr. Coeuré's hearing was meant to confirm before Parliament his ability to fulfill his duties as head of the FCA, his understanding of its cases, and reaffirm his commitment to promote competition on the merits. In that regard, Mr. Coeuré stated that he would endeavor to promote the FCA's independence, in particular against private interests and political power,[7] by fostering a culture of open debate and collegiality. He also indicated that the corollaries of independence are accountability, transparency, and strong ethics.

Mr. Coeuré then highlighted three key priorities for his term, starting with the strengthening of the FCA's independence and responsiveness. On that front, Mr. Coeuré intends to pursue the authority's current efforts to reduce the time needed to process cases as well as toughen *ex-post* monitoring of commitments. He also indicated that the FCA should lead on current competition policy debates, including on topics related to the digital economy and sustainability issues.

Competition law enforcement in the digital economy is the second priority of his mandate. He acknowledged the difficulties raised by the fast-changing evolutions of the sector and suggested that the FCA anticipate those by instituting a dialogue with stakeholders, allowing the FCA to better understand the impact that large platforms have on market equilibriums. Furthermore, Mr. Coeuré expressed the view that the authority should invest in modern digital tools, for example, to detect price-fixing, as well as strengthen dedicated staff, referring to the UK's Competition and Market Authority's digital unit.

His third priority is ensuring that competition enforcement serves as a tool to support the French economy and its competitiveness. In particular, his view is that competition enforcement should not be perceived as going against industrial policy and should instead strive to rebuild France's competitive advantage globally, acknowledging

[6] *See* FCA's press release of January 21, 2022, available at: https://www.autoritedelaconcurrence.fr/en/press-release/benoit-coeure-appointed-president-autorite-de-la-concurrence.

[7] *See* http://www.senat.fr/compte-rendu-commissions/20220110/ecos.html#toc4.

that the French economy is recovering from the COVID-19 pandemic. He warned against the risk of market power in certain sectors, in particular that of everyday products (*e.g.*, hygiene products, household appliances, laundry detergents, dairy products) which were already subject to the FCA's prior scrutiny.

Separately, on the topic of killer acquisitions, he indicated that he was in favor of using Article 12 of the Digital Markets Act,[8] together with Article 22 of the Merger control regulation,[9] which enable national competition authorities to refer transactions to the European Commission that would normally fall below jurisdictional thresholds. He also stressed that both the Commission and national competition authorities should be involved in competition law enforcement and ensure a proper dialogue in pursuit of that objective.

When questioned on ongoing cases, such as the high-profile proposed combination of France's number one and two TV networks TF1 and M6,[10] he acknowledged the fast-paced evolution in the sector as well as the growing influence of platforms in the advertising and broadcasting sectors, cautiously concluding that he would reserve his judgement until the results of the market test are made available.

The French Competition Authority dismisses long-standing claim of anticompetitive practices in consumer electronics[11]

On December 28, 2021, the French Competition Authority ("**FCA**") dismissed a claim brought against Samsung by one of its authorized distributors regarding alleged anticompetitive agreements in the sale of consumer electronics.[12]

The case goes back as early as 2014, when distributor Concurrence lodged a multi-pronged complaint with the FCA, claiming that Samsung had participated in both vertical and horizontal anticompetitive practices[13] and requesting interim measures. On July 23, 2014, the FCA rejected the request for interim measures, dismissed a number of these claims for lack of evidence, and decided that the investigation should continue on a limited number of practices, including the legality of Samsung's selective distribution agreement and its implementation, and the access to products for distributors or price discrimination between distributors.[14]

The December 28, 2021 FCA decision marks the end of the FCA investigation on these outstanding matters, resulting in the FCA ultimately dismissing all of Concurrence's remaining claims.

[8] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final, December 15, 2020. This provision would require gatekeepers to inform the European Commission of their intended concentrations involving another provider of core platform services or of any other services provided in the digital sector, irrespective of whether such transaction would meet the legal filing thresholds.

[9] Council Regulation No. 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, January 20, 2004. *See also,* Cleary Gottlieb's Alert Memo, *European Commission Implements New Policy To Investigate Transactions That Would Otherwise Escape Merger Review*, April 23, 2021, available at: https://www.clearygottlieb.com/-/media/files/alert-memos-2021/20210423-european-commission-implements-new-policy-to-investigate-transactions-that-would-otherwise.pdf; Cleary Gottlieb, *European Commission Announces New Policy to Accept Member State Referrals for Merger Review Even if EC and National Thresholds Are Not Met*, October 12, 2020, available at: https://www.clearygottlieb.com/news-and-insights/publication-listing/new-ec-policy-anticipates-merger-referral-even-if-national-thresholds-not-met.

[10] *See*, TF1's Press release of May 17, 2021, available at: https://groupe-tf1.fr/sites/default/files/communiques/communique_de_presse_groupe_tf1_-_les_groupes_tf1_et_m6_entrent_en_negociations_exclusives.pdf.

[11] Televisions, camcorders, hi-fi and audio equipment, digital devices, and DVD players.

[12] FCA Decision No. 21-D-30 of December 28, 2021 relating to practices implemented in the sector of the distribution of brown products.

[13] For details on all requests, see FCA Decision No. 14-D-07 of July 23, 2014, para. 35.

[14] *See* FCA Decision No. 14-D-07 of July 23, 2014, which was upheld by a Paris Court of Appeals ruling of December 3, 2015 (no. 2014/18125). Concurrence subsequently filed a second request for interim measures which was rejected by the FCA in 2015. *See* FCA Decision No. 15-D-11 of June 24, 2015.

The FCA first pointed out that Concurrence had already filed a complaint with the European Commission (the "**Commission**") in parallel, for the same alleged anticompetitive practices. As the Commission's case already covered two of the litigious clauses in Samsung's selective distribution contract,[15] the FCA rejected Concurrence's claim on these matters.[16]

In respect of the other claims, and in particular as regards the clause requiring Concurrence to provide its installation services for the products sold via its brick-and-mortar stores within a "reasonable" catchment zone without specifying a maximum distance or travel time, the FCA found that there were no grounds to consider them anticompetitive. In reaching that conclusion, the FCA found that (i) as the contracts applied throughout Europe, a specified distance criteria may have been discriminating against certain distributors depending on their location, and that (ii) if the retailer was unable to provide the installation service, it could appoint an alternative installer.[17]

Finally, the FCA ruled that Samsung was entitled to prohibit the marketing of products on online marketplaces, and found that the other practices Concurrence claimed Samsung had engaged in, such as restricting access to certain products and related information,[18] price discriminating between its various resellers, and excluding online purchases from a number of promotional operations, were not found to have had the object or effect of restricting competition.

The Paris Court of Appeals annuls €2 million damages award to Carrefour for body care cartel

On January 5, 2022, the Paris Court of Appeals annulled a €2 million damages award that the Paris Commercial Court ordered feminine hygiene products company Vania to pay Carrefour[19] as a result of its participation in a cartel in the body care sector, which resulted in maintaining artificially high prices between 2003 and 2006, and for which Vania was fined €45.03 million by the French Competition Authority ("**FCA**") in 2014.[20]

In substance, the Paris Court of Appeals held that the EU Damages Directive[21] (the "**Directive**") was not applicable at the time of the infringement, and that accordingly, Carrefour should have proved that the overcharge resulting from the anticompetitive practice had not been passed on[22] to consumers, which in this case it failed to do.

The Court observed that the Directive, which introduces a presumption that the victim of anticompetitive practices has not passed on the overcharge caused by the infringement to its customers, and which therefore shifts the burden of proof to the defendant to prove that the

[15] *I.e.*, the clauses relating to (i) the compulsory demonstration of the product at home for any customer buying online and (ii) the extension from seven to 30 days of the cooling-off period.

[16] Based on Article L. 462-8 of the French Commercial Code, which provides that the FCA may also reject the claim if it is informed that another national competition authority of a Member State of the European Union or the European Commission has dealt with the same facts falling under the provisions of Articles 101 and 102 of the Treaty on the Functioning of the European Union.

[17] The distribution contract provided that if the retailer was unable to provide an installation service, it should: "(i) appoint an installer to perform the installation (at the customer's expense) provided that the [...] retailer has first verified that the installer appointed by it can comply with the specifications and installation instructions given by SAMSUNG, or (ii) refer the customer to SAMSUNG in order for the latter to inform it of any company able to perform the installation service."

[18] Some of Samsung's products were not available to Concurrence, but only to some of Samsung's partners.

[19] Paris Court of Appeals ruling of January 5, 2022 (no. 19/22293).

[20] *See* FCA Decision No. 14-D-19 of December 18, 2014, relating to practices implemented in the cleaning products and insecticides sector and in the hygiene and body care products sector. This decision was confirmed by a Paris Court of Appeals ruling of October 27, 2016 (no. 2015/01673), which reduced the fines for Procter & Gamble and Henkel, but which was later partially overruled in the *Cour de Cassation* ruling of March 27, 2019 (no. 16-26.472).

[21] Directive 2014/104/UE of the European Parliament and of the Council of 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.

[22] "Passing-on" is an economic concept whereby an injured party passes on its actual loss resulting from an antitrust infringement to the next level of the supply chain ("overcharge"), by increasing the price of its products or services sold to its own customers.

overcharge was in fact passed on to consumers, was transposed into French law only in March 2017.[23] However, since the infringement occurred between 2003 and 2006, the changes introduced by the Directive, which, according to the court, were material, could not apply retroactively to the case.

The Court of Appeals also confirmed that the damages claim was filed on time, reminding that, with respect to a cartel decision, the statute of limitation period starts from the time the FCA makes its decision of the infringement public, and that Carrefour had correctly established the existence of an infringement based on the FCA's decision.

Implications

The Court of Appeals' ruling (still subject to appeal before the *Cour de Cassation*) provides similar conclusions to that of its April 2021 ruling on Carrefour's damage claim against Johnson & Johnson Santé Beauté France in relation to the same infringement. It also follows another decision from the Court of Appeals handed down in November 2021 in the dairy products case,[24] where it also considered the passing-on defense and the substantial nature of the presumption introduced by the EU Damages Directive, preventing its retroactive application.

[23] Order no. 2017-303 of March 9, 2017 on actions for damages due to anticompetitive practices and decree no. 2017-305 of March 9, 2017 on actions for damages due to anticompetitive practices.

[24] Paris Court of Appeals ruling of November 24, 2021 (no. 20/04265).

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