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French Competition Law Newsletter

Highlights

— The French Competition Authority publishes its roadmap for 2023-2024

— The French Competition Authority declines its jurisdiction to review injunctions imposed in a final decision

— The French *Cour de cassation* confirms that the Paris Court of Appeals can rule on the legality of the French Competition Authority's "name and shame" practices

— The French *Cour de cassation* upholds the €180 million in damages imposed on Orange in the *Digicel* case but remands the calculation of interest to the Paris Court of Appeals

The French Competition Authority publishes its roadmap for 2023-2024

On March 3, 2023, the French Competition Authority ("**FCA**") published its roadmap for 2023-2024, outlining its enforcement priorities for the year ahead.

The FCA emphasized the need to take action in three main areas: (i) the digital transition, (ii) sustainability and the green transition, and (iii) the cost-of-living crisis. The FCA also indicated that it will monitor practices that could harm public procurement procedures and the freedom of establishment of regulated legal professions as well as competitive conditions in the French overseas territories.

The competition concerns raised by the digital economy

The FCA noted that the digital economy has been an ongoing area of focus and underscored the upcoming entry into force of the Digital Markets Act ("DMA")[1] as of May 2, 2023, indicating that "*the DMA and competition law are two complementary tools, which mutually reinforce each other*".[2] Without clarifying the exact role of the FCA in the post-DMA era, the FCA noted that it will continue to allocate significant resources to ongoing cases and the review of practices at "*several levels of the advertising technology chain, in a range of ecosystems*".[3] The FCA also announced

[1] For more information on the Digital Markets Act, *see* the EU Competition Law Newsletter – April 2022, available at: https://www.clearygottlieb.com/-/media/files/eu-competition-newsletters/eu-competition-law-newsletter---april-2022.pdf.

[2] FCA "*Roadmap 2023-2024*", March 3, 2023, p. 2, available at: https://www.autoritedelaconcurrence.fr/sites/default/files/2023-03/feuille-de-route-2023-2024-EN.pdf.

[3] FCA "*Roadmap 2023-2024*", March 3, 2023, p. 3, available at: https://www.autoritedelaconcurrence.fr/sites/default/files/2023-03/feuille-de-route-2023-2024-EN.pdf.

that it will closely monitor the implementation of and compliance with commitments made by large online platforms.[4]

Moreover, the FCA noted that it will publish the findings of its investigation into the cloud sector in the first semester of 2023, with the aim of delimiting relevant markets and identifying potential practices.[5] The FCA also announced that it will participate in the discussions on the regulation of the sector at EU level, including as part of the Data Act, and at national level.

The FCA's increased enforcement on sustainability-related practices

The FCA reiterated its commitment to support the green transition within the scope of its mandate. The FCA stressed that it will sanction harmful practices in the sector, while supporting the companies willing to enter into cooperations which are "*necessary*" for a successful transition. Against this background, the FCA invited all stakeholders to engage in an informal dialogue to anticipate the entry into force of the new chapter on sustainability in the European Commission's horizontal guidelines.[6] However, the FCA did not set out the principles for the assessment under Article 101 TFUE of cooperation agreements among competitors, *i.e.*, the cases in which those agreements will be viewed as compatible with Article 101.

The FCA stated that it has a duty to explore sustainability issues and will make use of its power to provide opinions *ex officio*.[7] The FCA has already done so recently, announcing that it will issue an opinion on the competitive functioning of the market of charging stations for electric vehicles in 2024.[8] Similarly, the FCA will launch a sectorial investigation in the first quarter of 2023 to gather evidence in order to publish an opinion on the competitive functioning of the land passenger transport sector. The FCA intends to update past published opinions to reflect the impact of the emergence of intermodality[9] and the importance of this sector in the green transition.

The cost-of-living crisis

The FCA indicated that, in the current inflationary environment, it will focus its efforts in particular on those sectors that have the most direct impact on household budgets. The FCA noted that it is currently investigating undertakings active in various sectors of the energy market.[10] The FCA also indicated that it "*stands ready*" to contribute to the proposal issued by the Commission on March 14, 2023 for an Electricity Market Design reform.[11]

As regards the consumer goods sector, the FCA emphasized that ensuring "*the competitive balance*" of retail distribution throughout the value chain[12] will remain a key objective. The FCA will specifically monitor vertical relationships between suppliers

[4] FCA Decision No. 22-D-13 of June 21, 2022 regarding practices implemented in the press sector. FCA Decision No. 21–D-11 of June 7, 2021 regarding practices implemented in the online advertising sector. FCA Decision No. 22-D-12 of June 16, 2022 regarding practices implemented in the online advertising sector.

[5] FCA Press Release "*The Autorité de la concurrence opens a public consultation until 19 September 2022 as part of its cloud sector inquiry*", 13 July 2022, available at: https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/autorite-de-la-concurrence-opens-public-consultation-until-19-september-2022.

[6] The European Commission published on March 1, 2022 the draft of the revised Horizontal Block Exemption Regulation and the accompanying Horizontal Guidelines, which allow for sustainability agreements to fall outside the scope of application of competition rules when they don't affect price, quantity, quality choice or innovation, more information available at: https://www.clearyantitrustwatch.com/2022/03/new-eu-guidelines-for-horizontal-agreements-a-changing-climate-for-sustainability-cooperation/.

[7] Article L.462-4 of the French Commercial Code.

[8] FCA Press Release, "*E-mobility: The Autorité starts proceedings ex officio to analyse competition in the sector of charging infrastructure for electric vehicles*", 17 February 2023, available at: https://www.autoritedelaconcurrence.fr/en/press-release/e-mobility-autorite-starts-proceedings-ex-officio-analyse-competition-sector-charging.

[9] The European Commission has also launched an initiative on Multimodal digital mobility services, which should be adopted in the first quarter of 2023. Press Release available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6776.

[10] FCA Press Release "*The general rapporteur of the Autorité de la concurrence indicates objections were recently stated in the nuclear clean-up and decommissioning sector*", 11 July 2022, available at: https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/general-rapporteur-autorite-de-la-concurrence-indicates-objections-were.

FCA Press Release "*The Autorité de la concurrence has opened an investigation into alleged practices in the fuel supply, storage and distribution sector in Corsica*", 21 December 2021, available at: https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/autorite-de-la-concurrence-has-opened-investigation-alleged-practices-fuel.

[11] European Commission, COM 2023/148, 14 March 2023.

[12] Roadmap 2023-2024, p. 5.

and distributors, as well as possible mergers or practices that could affect the price or quality of products.

Take-away

The FCA roadmap confirms the FCA's well-known key enforcement priority. It remains to be seen (i) how the FCA will focus its efforts in the digital space in a post-DMA era and (ii) how the FCA will take into account sustainability concerns in its competitive assessment, in particular in merger reviews and horizontal agreements. The current complex landscape will also prompt the FCA to collaborate more closely with the European Commission, national competition agencies but also French sectorial regulators such as the National Commission for information technology and liberties ("CNIL") for data-related competition concerns, and the Commission for energy regulation ("CRE").

The French Competition Authority declines its jurisdiction to review injunctions imposed in a final decision

On February 15, 2023, the French competition authority (the "**FCA**") deemed inadmissible Interflora's application for review of injunctions imposed in 1986 and 2001 decisions (the "**Decision**").

Background

In 1986, the Ministry of the Economy considered that Interflora had abused its dominant position in the flower delivery market by imposing a clause preventing members of its network from belonging to a competing network and ordered Interflora to remove the clause from its internal rules.[13] Years later, competitors complained that Interflora was rewarding members of its network based on certain criteria, including limiting their operations or making sales exclusively under the Interflora brand. In 2001, the Competition Council fined Interflora for abuse and ordered it to stop applying these criteria.[14]

In December 2020, Interflora requested that the FCA review the injunctions imposed by the 1986 and 2001 decisions, claiming that they had become obsolete due to significant market changes.

The FCA's lack of jurisdiction to review injunctions

While the FCA's investigation services initially assessed Interflora's request on the merits and took the view that it should be rejected because of Interflora's persistent dominant position on the flower delivery market,[15] the FCA's *Collège* eventually rejected Interflora's request due to lack of jurisdiction. The FCA's Decision took three aspects into consideration.

— Although the FCA has jurisdiction to impose sanctions, including injunctions, and monitor companies' compliance with injunctions, there is no statutory or regulatory provision allowing it to revise a sanction decision that has acquired the force of *res judicata*,[16] as is the case for the 1986 and 2001 decisions.

— Companies subject to injunctions must comply with those injunctions "*within a reasonable timeframe*". The Decision concludes that Interflora did comply with the injunctions imposed in 1986 and 2001 within a reasonable timeframe.

[13] Decision of the Minister of the Economy No. 86-4/DC of February 6, 1986.

[14] Competition Council Decision No. 00-D-75 of February 6, 2001.

[15] Decision, para. 4.

[16] Decision, paras. 31, 33-34.

— Once injunctions are imposed and the decision imposing the injunctions is final, companies cannot ask the FCA to reassess the validity of the injunctions and issue a negative exemption decision concluding that no competition law infringement has occurred (particularly when the conduct at stake is likely abusive, given that Article 102 TFEU does not allow for any individual exemption). Instead, the companies themselves must assess the validity of the agreements they enter into and the behaviour they adopt in light of antitrust rules, in general, and the injunctions imposed on them to remedy anticompetitive practices.[17] The FCA only assesses compliance of practices with antitrust rules if its investigation services open a fully-fledged investigation (entailing the risk of sanctions).[18]

Takeaway

In abuse of dominance cases, when the FCA orders a company to cease abusive conduct or modify its conduct, it typically does not set a time-limit for the application of the injunctions. The injunctions apply as long as the firm holds a dominant position on the relevant market. The Decision confirms that a company cannot seek confirmation from the FCA that it no longer holds a dominant position and that the injunctions imposed on it are therefore no longer applicable. Instead, the company must practice self-assessment and bear the risk of being found non-compliant should the FCA open an investigation.

By contrast, in merger control proceedings, the FCA can impose injunctions (i) in the absence of commitments (or in the absence of sufficient commitments to maintain effective competition) in Phase II[19] or (ii) if the merging parties fail to comply with commitments.[20] Article L. 461-3 of the French Commercial Code provides that the FCA's President or a Vice-President appointed by him can adopt decisions revising injunctions imposed in Phase II, but makes no mention of injunctions imposed for failure to comply with commitments. In practice, the FCA has agreed to review and lift injunctions when they were no longer deemed necessary to maintain effective competition in both scenarios.[21]

The French *Cour de cassation* confirms that the Paris Court of Appeals can rule on the legality of the French Competition Authority's "name and shame" practices

On March 23, 2023, the French *Cour de cassation* ruled that requests to restrict the French Competition Authority's ("**FCA**") communication actions relating to a fining decision qualify as applications for interim relief under Article L.464-8 of the French Commercial Code and therefore can validly be brought before the Paris Court of Appeals.[22]

Background

On September 9, 2020,[23] the FCA imposed a 385 million euro fine on Novartis and a 59.7 million euro fine on Roche for allegedly abusing their collective dominant position on the French market for the treatment of age-related macular degeneration ("AMD"). Concomitantly

[17] Decision, para. 36.

[18] Decision, para. 38.

[19] Article L. 430-7, III. of the French Commercial Code.

[20] Article L. 430-8, IV. of the French Commercial Code.

[21] See, for instance, (i) in the *SFR/Altice* case, Decision No. 19-DCC-199, para. 240 and Decision No. 22-D-15, para. 147; and (ii) in the Vivendi/TPS and CanalSatellite, Decision No. 17-DCC-92 of June 22, 2017.

[22] French *Cour de cassation*, Commercial Division, March 23, 2023, No. 21-16.868.

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

with the publication of the fining decision and accompanying press release, the FCA published a 1'40 video, for the first time, summarizing the key findings of its decision, available in both French and English on several media and social media platforms (*i.e.*, YouTube, LinkedIn, and Twitter). Roche and Novartis appealed the decision on the merits.

In January 2021, the FCA sent a letter to the union representing pharmaceutical companies informing it of the decision. A few weeks later, Roche brought an application for interim relief before the First President of the Paris Court of Appeals, requesting that the Court order the FCA to stop all communication relating to the fining decision and, in the alternative, to specify in all existing communications that an appeal against the decision was pending and to stop notifying other third parties about its decision. Roche claimed that the FCA's video and letter to the union (i) constituted an additional penalty devoid of any legal basis and manifestly disproportionate to the objective of informing the public, (ii) were harming Roche's image and financial interests as well as Roche's presumption of innocence, and (iii) breached the FCA's obligation of discretion and duty of reserve.

In May 2021, the Paris Court of Appeals declined jurisdiction, considering that the matter fell within the administrative jurisdiction because the communications were not inseparable from the fining decision.[24] Roche appealed. In January 2022, the French *Cour de cassation* stayed the proceedings and referred the case to the *Tribunal des Conflits*,[25] which ruled that the Paris Court of Appeals has jurisdiction over the communications insofar as they were published concomitantly with, and related solely to, the fining decision.[26]

The case was then referred to the French *Cour de cassation*, which was to judge whether Roche's request to order the FCA to stop communicating on the fining decision qualified as an application for interim relief under Article L.464-8 of the French Commercial Code.[27] This provision allows the First President of the Paris Court of Appeals to suspend the enforcement of an FCA decision if it is likely to have "*manifestly excessive*" consequences.

The ruling of the French *Cour de cassation*

The French *Cour de cassation* held that a request to restrict communications relating to an FCA decision is inseparable from the decision itself and, therefore, qualifies as an application for interim relief under Article L.464-8 of the French Commercial Code. Therefore, the First President of the Paris Court of Appeals is competent to review that request and can order the FCA to limit or amend its communications concerning the decision, provided that the appellant demonstrates that the communications in question are likely to have "*manifestly excessive*" consequences.

Take-aways

As the FCA is seeking to publicize its decisional practice more broadly, the ruling of the French *Cour de cassation* provides useful clarification. It is now clear that companies sanctioned by an FCA decision will be able to apply for interim relief before the First President of the Paris Court of Appeals to challenge the FCA's communications concerning the decision.

[24] Paris Court of Appeals, May 12, 2021, No. 21/02163.

[25] French *Cour de cassation*, Commercial Division, January 5, 2022, No. 21-16.868.

[26] French *Tribunal des Conflits*, April 7, 2022, No. 04242.

[27] Article L.464-8 of the French Commercial Code: "*FCA decisions mentioned at Articles L. 462-8, L. 464-2, L. 464-3, L. 464-6, L. 464-6-1 and L. 752-27 are notified to the parties involved and to the Minister in charge of the economy, who may, within a period of one month, lodge an appeal for annulment or reversal with the Paris Court of Appeals.* [...] *The appeal does not have suspensive effect. However, the First President of the Paris Court of Appeals may order a stay of execution of the decision if it is likely to lead to manifestly excessive consequences or if, after its notification, new facts of exceptional gravity have occurred.*"

The French *Cour de cassation* upholds the €180 million in damages imposed on Orange in the *Digicel* case but remands the calculation of interest to the Paris Court of Appeals[28]

On March 1, 2023, the French *Cour de cassation* (*i.e.*, the French Civil Supreme Court) upheld the Paris Court of Appeals' ("Court of Appeals") judgment awarding Digicel €180 million in damages for harm suffered as a result of anticompetitive practices implemented by Orange from 2000 to 2006 in the mobile telephony sector in the French West Indies and Guyana. However, the *Cour de cassation* quashed the Court of Appeals' finding that interest on the damage award should run from April 1, 2003, given that the harm inflicted to Digicel had not fully materialized at that date.

Background

In 2009, the French Competition Authority ("FCA") fined Orange (then France Telecom) and Orange Caraïbe €63 million for impeding competition in the mobile telephony market in the French West Indies and Guyana between 2000 and 2006.[29] The FCA found that Orange Caraïbe, the incumbent operator at the time, had engaged in practices that hampered the development of competition in the mobile telephony sector and raised barriers to entry for competitors, including Bouygues Telecom (which later sold its Caribbean operations to Digicel).

These practices included (i) exclusive agreements with independent local distributors and with the only authorized repair center for cell phones in the Caribbean, (ii) a customer loyalty program discouraging consumers from switching mobile operators at the end of their subscription period, and (iii) price discrimination between calls within the Orange network and calls to other networks. The FCA also found that France Telecom had unduly favored its subsidiary Orange Caraïbe by implementing a loyalty program allowing business customers to make free fixed-line calls to the Orange Caraïbe network and engaging in margin squeeze.

Following the FCA's Decision, Digicel filed an action for damages totaling €494 million.[30] In June 2020, on appeal of a first instance judgment of the Paris Commercial Court, the Paris Court of Appeals ordered Orange and its subsidiary Orange Caraïbe to pay Digicel €181.5 million in antitrust damages and €68 million in interest.[31] Orange and Digicel appealed the ruling to the *Cour de cassation*.

The French *Cour de cassation*'s ruling

First, the *Cour de cassation* upheld the Court of Appeals' assessment of the causal link between Orange's anticompetitive practices and the harm suffered by Digicel.[32] The *Cour de cassation* confirmed in particular that the Court of Appeals had rightly performed (i) a comparative assessment of Digicel's market shares during and after the implementation of Orange's practices and of market dynamics in similar markets, and (ii) an analysis of Digicel's commercial strategy in order to determine if it could be an alternative explanation

[28] *Cour de cassation* ruling, March 1, 2023 (No. 20-18.356) (the "Judgment").

[29] FCA Decision No. 09-D-36 of December 9, 2009 relating to practices implemented by Orange Caraïbe and France Telecom in various telecommunication services markets in the overseas territories of Martinique, Guadeloupe and Guyana.

[30] Paris Court of Appeal, ruling of June 17, 2020 (No. 17/23041). This judgement overturned the initial Commercial Court ruling, December 18, 2017, (No. 2009/016849), *SA Digicel Antilles Françaises Guyane c/ SA Orange Caraïbe, SA Orange*. For a further analysis on this, *see* Cleary Gottlieb Antitrust Watch, *The Paris Court of Appeals Orders Orange To Pay Over €180 Million in Follow-on Antitrust Damage Claim*, June 17, 2020.

[31] The Court of Appeals awarded €173.4 million in compensation for the lost profit; €7.12 million for extra costs relating to exclusivity agreements and €737,500 for extra costs generated by the exclusivity clauses with the authorized repair center, for a total of approximately €181.5 million.

[32] Orange argued on appeal that the Court of Appeals had not established this causal link.

for Digicel's underperformance during the infringement period.[33]

Second, the *Cour de cassation* held that the Court of Appeals had appropriately balanced the parties' competing expert submissions on the relevant margin to be used to quantify the harm, and that it had correctly sided with one of the two diverging analyses submitted by the parties.[34]

Third, on the nature of the harm suffered, the *Cour de cassation* held that the Court of Appeals was entitled to consider that the various anticompetitive practices cumulated and reinforced each other over time to ultimately result in a single obstacle to Digicel's growth.[35] In addition, the *Cour de cassation* held that the Court of Appeals was right to find that the harm suffered by Digicel was not lost opportunity but lost profit which therefore needed to be compensated in full.[36] This is because the anticompetitive practices had actually limited Digicel's sales, and this sales loss had been reconstituted. On the quantification of such harm, the *Cour de cassation* held that the Court of Appeals rightly performed a dual counterfactual analysis based on a comparison over time (before/after the practices) and with similar geographic areas, and that the Court of Appeals retained the lowest of the two estimates.[37]

Finally, regarding the calculation of interest on the damage award, the *Cour de cassation* held that the Court of Appeals had erred in retaining April 1, 2003 as the starting point for the accrual of the interest because the harm that the award was intended to compensate, which necessarily occurred progressively during the infringement period, had not fully materialized at that date.[38] Accordingly, the case was remanded to the Court of Appeals on this issue.

[33] Judgment, paras. 12-13.

[34] Judgment, paras. 16-19.

[35] Orange sought to argue that Digicel had not adduced economic evidence of the harm it suffered for each of the individual practices.

[36] Compensation of a lost opportunity would have required a downward adjustment of the damages award based on the probability that Digicel would have realize the opportunity, whereas compensation of a lost profit requires full compensation of the lost opportunity.

[37] Judgment, paras. 22-25. However, the *Cour de cassation*, rejected Digicel's claim that it should also be compensated for the lost opportunity to reinvest its lost income as there was no "*direct and certain*" evidence of the reality of the investment that Digicel would otherwise have or Digicel's inability to secure financing elsewhere (Judgment, paras. 37-38).

[38] Judgment, para. 49.

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