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The Paris Court Of Appeals Quashes A Landmark FCA Decision On Excessive Pricing

On November 14, 2019, the Paris Court of Appeals annulled a decision of the French Competition Authority ("FCA") which, for the first time since the 2011 Fining Guidelines, had fined a company for abusing its dominant position through excessive pricing.[1] The Court set the conditions for finding exploitative abuses and held that the FCA had failed to show that Sanicorse's price increases were "*objectively unfair*".

Background

Under the public health code, healthcare establishments are required to treat and dispose of infectious medical waste. In Corsica, Sanicorse is the only provider of infectious medical waste disposal services. On September 20, 2018, following a report by the DGCCRF, the FCA found that from February 2011 onwards, Sanicorse had imposed "*abrupt, lasting and significant*" price increases on Corsican healthcare establishments. On average, Sanicorse had increased prices by around 88% between 2010 and 2012, and up to 100-200% for certain hospitals.

Abuses of dominance are commonly divided into (i) exclusionary abuses, where the dominant firm's practice has the object or effect of excluding competitors from the market, and (ii) exploitative abuses, where the dominant company uses its dominant position to extract unfair advantages from its customers or trading partners. Exploitative abuses include excessive pricing and unfair contractual conditions.

The FCA found that Sanicorse had engaged in

[1] Judgment of the Paris Court of Appeals of November 14, 2019, No. 18/23992 (the "Sanicorse ruling").

both exploitative and exclusionary abuses. The FCA noted that Sanicorse had increased prices while threatening to terminate contracts or not to bid for upcoming tenders. It also found that Sanicorse had failed to provide any objective justification, such as a cost increase, for its behaviour. On the contrary, the FCA found that Sanicorse had threatened hospitals with price increases in order to deter them from developing alternative solutions for the disposal of infectious medical waste. The FCA imposed a fine of €199,000 and Sanicorse appealed[2]

Since 2009, the FCA had never fined a company for exploitative abuse in the form of excessive prices.[3] Similarly, the European Commission had only considered exploitative abuses in rare cases.[4]

The Court's Ruling

While the Paris Court of Appeals confirmed that Sanicorse held a monopoly position in Corsica, it ruled that the FCA had failed to prove that Sanicorse had abused its dominant position by engaging in exclusionary or exploitative practices. The Paris Court of Appeals also confirmed that a practice may occasionally belong to both categories of abuse exclusionary and exploitative.

First, the Court ruled that the FCA had not demonstrated that Sanicorse had engaged in exclusionary practices. The Court found that Sanicorse had never admitted to threatening hospitals with price increases in order to deter them from developing alternative solutions. In this regard, a significant price increase is likely to incentivize hospitals to intensify competition, not abandon plans to develop alternative solutions. In addition, in the case at hand, none of the Corsican hospitals had abandoned plans to develop alternative solutions.

Second, and most importantly, the Court ruled that the FCA had failed to demonstrate an exploitative abuse. Citing the *United Brand* ruling, the Court held that for an exploitative abuse to occur, the dominant firm must have "*made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition.*"[5] The Court thus held that two conditions must be fulfilled to establish an exploitative abuse: (i) the allegedly infringing company must have obtained the advantages in question as a result of its dominant position; and (ii) these advantages must be unfair. In regards to the second condition, the Court ruled that the FCA could not take the place of the dominant firm's management in determining what the firm's commercial policy, including prices, should be with respect to the market. It is only when the conditions of a transaction between the dominant firm and its trading partners are "*objectively unfair*" in light of all relevant circumstances that the FCA has jurisdiction to step in.[6]

With regard to the first condition, the Court acknowledged that the price increases resulted from Sanicorse's dominant position in Corsica. Indeed, it is because Sanicorse held a monopoly position that it could charge higher prices without fearing that hospitals would switch to competitors.

Concerning the second condition, however, the Court ruled that the unfair nature of Sanicorse's prices was not established. It noted that the FCA had not proven, and had not sought to prove, that the price increases were "*not reasonably related to the economic value*" of the service provided and had therefore failed to prove that the price increases were excessive. While doing so, the Court indicated that in a case where a dominant firm breaches an existing contract with its customer to impose a price increase, the price increase is likely to be unfair. The Court

[2] Decision of the French Competition Authority of September 20, 2018, No.18-D-17.

[3] *See* Decision of 28 July 2009 in Case No 09-D-24 – *France Télécom*.

[4] *See*, for instance, Commission Decision of 25 July 2001 in Case COMP/36.915 – *Deutsche Post AG*; Commission decisions of 23 July 2004 in Case COMP/36.570 – *Sundbusserne* and Case COMP/36.568 – *Scandlines Sverige AB*; and Commitment Decision of 9 December 2009 in Case COMP/38.636 – Rambus.

[5] Judgement of the European Court of Justice of February 2, 1978, *United Brands Company v. Commission*, case C-27/76, para. 249, cited by the *Sanicorse* ruling, para. 33.

[6] *Sanicorse* ruling, para. 92.

noted that, in the case at hand, Sanicorse did not challenge existing contracts but refused to renew contracts that were about to expire and implemented price increases in newly concluded contracts.

Implications

This ruling is a major setback for the FCA. It is the first time since the FCA's 2011 Fining Guidelines that the Paris Court of Appeals has fully quashed a FCA decision for abuse of dominant position.

Substantively, the ruling clarifies the conditions for establishing an exploitative abuse, which had been somewhat unclear given the limited number of precedents. It states that exploitative abuse is not established unless the allegedly dominant firm (i) has made use of its dominant position to extract an advantage, or (ii) has extracted "*unfair*" advantages from its customer or trading partner, *i.e.*, advantages that bear "*no reasonable relation to the economic value*" of the service provided to it.

While the FCA's President referred to the *Sanicorse* ruling as a useful tool for the FCA to address unfair condition issues across all economic sectors, particularly the platform industry,[7] the Paris Court of Appeals' ruling may make it more difficult for the FCA to use the exploitative abuse theory more extensively.

The FCA Will Not Extend Most Of The Commitments Undertaken By Altice Upon Acquiring SFR

On October 28, 2019, the FCA decided not to extend the five-year commitments undertaken by Altice upon acquiring SFR in 2014. Yet, the FCA maintained an injunction imposed on Altice in 2017 for co-deploying the fiber optic network with Bouygues Telecom.

Background

On October 30, 2014, the FCA cleared *Altice/SFR* subject to multiple commitments.[8] In particular, Altice undertook two main behavioral commitments:

- Altice committed to give all telecom operators access to its cable network (the "*Cable Access Commitment*").[9] Altice's cable network offered features similar to the fiber optic network, allowing for very high-speed internet connections. The FCA was concerned that, post-transaction, Altice would pre-empt the demand for very high-speed internet connections in areas where competitors had not yet set up their fiber optic network.
- Altice also committed to continue implementing SFR's agreement with Bouygues Telecom for co-deploying the fiber optic network (the "Faber" agreement)[10] by (i) connecting, within two years, buildings that were already fiber-ready at the date of the decision and (ii) connecting other buildings within three months after they become fiber-ready. Altice also committed to offer transparent and non-discriminatory maintenance of the fiber optic network co-developed with Bouygues Telecom ("*Bouygues-Related Commitments*").

These two behavioral commitments were made for a period of five years, starting on October 30, 2014, renewable once if justified by market conditions.

7 "France may apply excessive pricing law to non-price conditions", GCR, Pallavi Guniganti, September 12, 2019. The FCA President declared in an interview with GCR: "*We'll be looking closely at what the Court of Appeal has to say on our [Sanicorse] decision to see if we can continue using that type of framework for other cases. I think for the platform industry, it is quite interesting we have this tool in our toolbox.*"

8 Decision of the French Competition Authority of October 30, 2014, No.14-DCC-160.

9 The FCA was the first competition authority to accept a cable network access commitment, and has since then been followed by the Commission in the recent *Liberty Global/Vodafone* decision (*Vodafone/Certain Liberty Global Assets* (Case COMP/M.8864), Commission decision of July 18, 2019).

10 The Faber agreement is a co-financing agreement entered into by SFR and Bouygues Telecom in order to jointly deploy fiber optics in 22 municipalities located in high-density areas in France. In *Altice/SFR*, the FCA considered that, post-transaction, the merged entity would no longer have an incentive to implement the Faber agreement because Altice operated a cable network capable of providing similar features to the fiber network, and part of the areas covered by the Faber agreement overlapped with Altice's own cable network.

In 2017, the FCA fined Altice 40 million euros for failing to connect fiber-ready buildings in due time under the Bouygues-Related Commitments.[11] It also ordered Altice to (i) connect all fiber-ready buildings that had not yet been connected within one year, subject to penalty payments, and (ii) comply with the initial commitment to connect other buildings within three months after they become fiber-ready.

In October 2019, as the behavioral commitments were about to expire, the FCA examined whether to extend them in light of existing market conditions.

The Decision

On October 28, 2019, the FCA decided not to extend most of these commitments.

— The FCA considered that it was not necessary to extend the Cable Access Commitment because other telecom operators, especially Orange, had significantly deployed their own fiber optic network since the *Altice/SFR* decision.

— Regarding the Bouygues-Related Commitments, the FCA (i) maintained the 2017 injunction to connect fiber-ready buildings as it was still investigating whether Altice had complied with this injunction; but (ii) lifted the injunction to connect buildings that were not yet fiber-ready within three months after they became fiber-ready. The FCA considered that Altice's incentives were now aligned with Bouygues Telecom's and that the network would be deployed in accordance with the three-month period initially set, because (i) Altice had changed its business strategy and was now prioritizing the deployment of fiber optics over cable, and (ii) it amended the Faber agreement to incorporate stipulations similar to the commitment undertaken with the FCA.

Thus, after fining Altice for failure to comply with part of its behavioral commitments in 2017, the FCA decided, two years later, that most of Altice's commitments had become obsolete due to recent changes in the industry. The decision shows that behavioral commitments in fast-changing industries can be more appropriate remedies than structural commitments, even though they require close monitoring from competition authorities.

The French Administrative Supreme Court (*Conseil d'Etat*) Confirms The Decision To Impose A €20 Million Fine On Fnac Darty For Failure To Comply With Commitments

On November 7, 2019, the *Conseil d'Etat* upheld the FCA decision imposing a €20 million fine on Fnac Darty for failing to comply with the commitment to divest three stores, pre-condition for clearance in the acquisition of Darty by Fnac in 2016.[12]

Background

In July 2016, following a Phase 2 investigation, the FCA cleared the acquisition of Darty by Fnac, subject to the divestment of six stores. At the time, the FCA had showed flexibility in accepting this remedy, as some of these stores did not seem attractive enough for potential buyers. At the end of the divestiture period, Fnac Darty was not able to find a suitable buyer for three of these stores. In July 2018, the FCA fined Fnac Darty €20 million for failing to implement the commitments, considering that Fnac Darty had failed to take all appropriate measures to comply with the commitments. The FCA also ordered

[11] Decision of the French Competition Authority of March 8, 2017, No.17-D-04. In 2016, the FCA had also imposed a 15 million euro fine on Altice for failing to comply with certain commitments related to the divestment of the mobile telecom business of Outremer Telecom (decision of the French Competition Authority of April 19, 2016, No.16-D-07).

[12] *Conseil d'Etat* decision of November 7, 2019, No.424702.

Fnac Darty to divest two other stores in lieu of those that it had not been able to sell.[13] Fnac Darty appealed.

The FCA's leeway in setting fines for commitment breaches

The *Conseil d'Etat* rejected all of Fnac Darty's arguments and upheld the FCA's methodology for setting the fine for the reasons below:

— Unlike for anti-competitive practices, there are no rules or guidelines requiring the FCA to explain how it calculates fines in cases of a breach of commitment.

— Contrary to Fnac Darty's claim, the *Conseil d'Etat* considered that, for the fine to be proportionate, the FCA merely had to assess the existence and nature of the breach of commitments – but not the anti-competitive effects of the breach on the relevant markets. In the case at hand, the *Conseil d'Etat* held that the fine set by the FCA was proportionate to the commitment breaches noting that the commitments which Fnac Darty failed to implement concerned half of the stores that it had undertaken to sell and two thirds of the catchment areas where anti-competitive risks had been identified at the time.

— The FCA had correctly taken into account the fact that Fnac Darty requested an extension of the divestiture period only during the last month before the deadline, although it could have anticipated that the FCA would refuse to approve the proposed buyer, notably because Fnac Darty was advised by external legal and economic counsel specialized in competition law.

— The *Conseil d'Etat* also confirmed that Fnac Darty had been negligent in not anticipating that the condition precedent that was included in one of the divestiture contracts – the agreement of a third party (But) to have the store operated by the potential buyer (groupe Dray) under its brand (But City) – would result in a significant implementation risk. The *Conseil d'Etat* agreed with the FCA that Fnac Darty should have anticipated that But would refuse to grant the brand license to the potential buyer, in particular because it had not shown any interest in acquiring the store previously.

Implications

The *Conseil d'Etat*'s decision shows that (i) notifying parties should make sure they are able to implement any structural commitments they offer: while the FCA may be more flexible than the European Commission when negotiating commitments, it will not hesitate to impose significant fines if the party fails to implement its commitments; and (ii) in the event of execution difficulties, notifying parties should reach out to the FCA sufficiently ahead of the end of the divestiture period to find an alternative solution acceptable to the FCA.

The Paris Court Of Appeals Orders Renault Trucks To Disclose The Commission's Statement Of Objections And Its Annexes In A Follow-On Damages Action

On October 25, 2019, the Paris Court of Appeals ordered Renault Trucks to disclose the Commission's statement of objections ("SO") and its annexes in a follow-on damages action arising from the *Trucks* cartel.

On July 19, 2016, the European Commission imposed fines of nearly €3 billion on five truck manufacturers, including Renault Trucks, for

[13] FCA Decision 18-D-16 of July 27, 2018 regarding compliance with commitments annexed to FCA Decision 16-DCC-111 of July 27, 2016 regarding Fnac's acquisition of sole control of Darty. This was the first time the FCA had fined a company for non-compliance with structural commitments consisting of divesting assets before a given deadline. The FCA had otherwise only ever sanctioned conduct that gutted the commitments made (See FCA decisions Nos.16-D-07 and 17-D-04 in the *Numericable/SFR* merger case, where the FCA imposed fines of respectively 15 and 40 million euros on the merging entity).

having colluded on truck pricing and agreeing on passing on costs resulting from stricter emissions rules from 1997 to 2011. Four companies, including Renault Trucks, benefited from fine reductions under the leniency program.

Following the Commission's decision, Eiffage Infrastructure ("Eiffage") sought damages from Renault Trucks. In this context, it asked Renault Trucks to disclose a number of documents it considered relevant to evaluate the damages, including (i) the Commission's SO and its annexes, (ii) Renault Trucks' gross prices, costs and margins between 1997 and 2013, and (iii) documents that Renault Trucks submitted to the Commission under the leniency procedure. Renault Trucks refused, and Eiffage brought interim proceedings to force disclosure. In first instance, the Lyon Commercial Court dismissed Eiffage's request on the ground that Renault Trucks had raised arguments showing that "*the claim could be seriously contested*". Eiffage appealed.

On appeal, the Paris Court of Appeals ordered disclosure of the SO and annexes but rejected Eiffage's other requests. The Court recalled that the effective implementation of cartel victims' right to compensation must be reconciled with leniency applicants' right to confidentiality and, more broadly, the effectiveness of the leniency program. Accordingly, the Court ordered Renault Trucks to disclose the SO and its annexes, considering that such disclosure would allow Eiffage to collect the information needed to support its damages claim, and that Renault Trucks had failed to demonstrate how it could be harmful. By contrast, the Court considered that disclosing gross prices, costs and margins would be disproportionate as it would harm Renault Trucks' business secrets and future negotiations, and that disclosing documents submitted under the leniency program would be disproportionate as it would hinder the effectiveness of the leniency program.

With this judgment, the Court reaffirmed that companies filing for leniency should not be disadvantaged compared to cases in which they did not cooperate, including in damages actions.

Stay Tuned...

On December 18, 2019, the FCA issued two decisions imposing a total of almost €500 million in fines on two cartels in the food sector.

— In one decision, which concerned a food voucher cartel,[14] the FCA fined four issuers of employee restaurant vouchers, along with their payment-processing organization, a combined €415 million for a 15-year (2000-2015) information-sharing cartel that had hindered innovation in the sector. The sanctioned companies are Edenred (€157.1 million), Sodexo Pass (€126.3 million), Natixis (€83.3 million), Up (€45 million) and the Securities Settlement Office (€3 million). Edenred, Natixis and Up have already announced they will appeal this decision.

— In the other decision, concerning a compote cartel,[15] the FCA issued a fine of €58.3 million on six producers of fruit preserves for a price-fixing and market-sharing cartel that affected both private label retailers and the out-of-home catering industry between 2010 and 2014. The sanctioned producers are Charles Faraud (€16.4 million), Andros (€14.1 million), Materne (€13.6 million), Délis (€9.5 million), Valade (€2.8 million) and Conserves France (€1.97 million). Caroos received full immunity as the leniency applicant.

On December 20, 2019, the FCA also issued a decision fining Google a total amount of €150 million for abuse of dominant position on the French market for online search advertising services. Google announced that it will appeal the decision.

More to come in the next edition of the French Competition Newsletter.

[14] The exact reference of this decision has not yet been published on the FCA website.

[15] FCA Decision No 19-D-24 of December 17, 2019 on practices implemented in the sector of fruit sold in cups and pouches.

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