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# French Competition Law Newsletter

## Highlights

- The French Competition Authority suspends procedural time limits due to Covid-19
- The French Competition Authority publishes its contribution to the debate on competition policy in the digital sector
- Paris Commercial Court dismisses follow-on damage claim in the Dairy Products case
- The French Competition Authority imposes record fine on Apple for vertical practices and abuse of economic dependence

## The French Competition Authority suspends procedural time limits due to Covid-19

On March 27, 2020, the French Competition Authority (“FCA”) published a press release announcing that a number of applicable deadlines for merger review and antitrust proceedings will be adapted further to legal order no. 2020-306 of March 25, 2020 relating to the extension of time-limits during the state of public health emergency.

In particular, the FCA clarified that the following deadlines will be adjusted:

- Phase 1 and Phase 2 merger review deadlines are suspended as from March 12, 2020 until one month after the state of public health emergency ceases.
- The two-month deadlines to reply to statements of objections or reports sent by FCA case handlers are suspended as from March 17, 2020 until the entry into force of the government decree lifting the movement restriction measures.
- Appeals against FCA decisions imposing interim measures or against FCA prohibition decisions which should have been lodged during the period between March 12, 2020 and one month after the end of the state of public health emergency will be considered timely provided they are lodged within two months after the state of public health emergency ceases. In this respect, the FCA also specified that although decisions issued during the public health emergency period may be electronically notified to the concerned parties, formal notifications triggering the appeal deadline will take place (barring “*exceptional cases*”) after the movement restrictions measures are lifted.
- The deadlines to comply with injunctions, interim measures or commitments set by FCA decisions are suspended as from March 12, 2020 until one month after the state of public health emergency ceases – although the press release does not

expressly specify whether this suspension applies equally to merger control and antitrust proceedings.

In addition, the FCA specified that by way of derogation from Articles R. 463-1, R. 464-5, R. 463-11, R. 463-13, R. 463-15 and R. 464-30 of the French Commercial Code, complaints, leniency applications, briefs in reply to statements of objections or reports, and requests for the protection or waiver of business secrets, may be submitted to the FCA via email. Similarly, the FCA may notify such documents electronically.

Finally, as regards the application of the statute of limitations set by Article L. 462-7 of the French Commercial Code and according to which the FCA cannot investigate practices which occurred more than five years ago if no investigative step was carried out by it during that five-year period, the FCA clarified that when the limitation period was set to expire between March 12, 2020 and one month after the end of the state of public health emergency, investigative steps may validly interrupt the statute of limitations provided they are accomplished within two months after the state of public health emergency ceases.

## The French Competition Authority publishes its contribution to the debate on competition policy in the digital sector

On February 19, 2020, the FCA expressed its views on the possible lines of approach to enhance antitrust enforcement in the digital sector, both at the EU and national levels. This publication covers questions relating to anticompetitive practices and merger control, and shows the FCA's willingness to be part of the on-going thinking process launched by the European Commission and many competition authorities and regulators around the world in order to deal swiftly with questions raised by the growth of digital platforms. The FCA will endeavor to update its contribution in light of legislative proposals that could be formulated in the coming months and the reactions that the publication might trigger.

### **Anticompetitive practices in the context of the digital economy**

While acknowledging that competition law is already able to address a number of issues such as interoperability, access to data or exclusionary practices, the FCA's publication identifies several areas of reform to specifically address issues raised by anticompetitive practices that may be implemented by digital platforms. The FCA's proposals relate to (i) the notions of dominant position and essential facilities, (ii) the improvement of procedural tools (in particular, the use of interim

measures) and (iii) the introduction of specific rules applicable to "structuring digital platforms".

**First**, the FCA suggests extending the notion of dominant position to "structuring digital platforms" ("*plateformes numériques structurantes*"). "Structuring digital platforms" would be defined as companies which (i) provide online intermediation services and (ii) have structuring market power (by virtue of their size, financial capacity, user community and/or the data they hold), enabling them to control access to the market ("gatekeeper role") or significantly affect the functioning of the market ("regulator role"). Moreover, "structuring platforms" would be characterized by the fact that their competitors, users and/or third parties depend on access to the platforms in order to carry out their economic activity. This proposal stems from the FCA's belief that traditional concepts of competition law may be ill-suited to deal with market participants operating in "new" multisided markets, on which several platforms of more or less equivalent size may be active.

**Second**, the FCA suggests redefining or adapting the notion of essential facilities, while ensuring that incentives to innovate are preserved. Essential facilities should include certain data bases,

communities of users, and ecosystems. The standard should include unavoidable assets to address issues such as access restrictions and interoperability hampering.

**Third**, the FCA notes that the ECN+ Directive generalizes the possibility for European competition authorities to impose interim measures including on their own initiative, allowing them to act swiftly without having to wait for complaints from market participants.<sup>1</sup> The FCA also proposes two alternative options to facilitate the use of interim measures *i.e.*, either modifying the standard applicable to the imposition of interim measures at the EU level based on the criteria applicable under French law,<sup>2</sup> or allowing parties to submit to the FCA a request for interim measures without having to simultaneously file a request on the merits, which could be submitted afterwards.

**Finally**, the FCA proposes to introduce new rules applicable only to “structuring digital platforms”, ideally at the EU level, suggesting the establishment of a non-exhaustive list of practices that may raise competition concerns when implemented by “structuring platforms”. This list would include practices such as discrimination against competitors, restriction of access to non-dominated markets, use of data to raise barriers to entry, restriction of product interoperability, restriction of data portability or limitation of multi-homing possibilities. Competition authorities would be able to impose commitments or prohibit such practices if implemented by a “structuring platform”, unless that platform can demonstrate that the practices generate efficiencies and are therefore objectively justified. This mechanism would allow competition authorities to act more

rapidly so as to remedy distortions of competition as soon as they emerge, while ensuring that the action is scalable and proportionate, following a case by case analysis.

## Merger control in the context of the digital economy

Concerning merger control, the FCA considers that it has already taken into account some of the specificities of the digital economy in its analytical framework, for instance by taking into consideration the role that digital platforms play as potential competitors of more “traditional” market participants and the impact that mergers in the digital economy can have on competition parameters beyond prices.

Yet, the FCA identifies an enforcement gap in respect of transactions that do not meet the notification thresholds and enable the acquirer to “kill” the target (so-called “killer acquisitions”), or reinforce its dominant position (*e.g.*, the *Facebook/Whatsapp* and *Facebook/Instagram* mergers).<sup>3</sup>

To close this enforcement gap, the FCA proposes three possible ways forward: (i) using Article 22 of Regulation 139/2004<sup>4</sup> to refer problematic mergers to the European Commission even though national notification thresholds are not met, (ii) imposing mandatory information requirement for mergers involving “structuring platforms”, compelling them to inform the Commission (or relevant national competition authorities) of any acquisition they carry out,<sup>5</sup> and (iii) introducing the possibility for competition authorities to review mergers *ex-post* when the transaction does not meet the EU merger control thresholds but significant

<sup>1</sup> Directive 2019/1 of the European Parliament and of the Council of 11 December 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 2019 L 11/3, art. 11 (“Member States shall ensure that national competition authorities are empowered to act on their own initiative to order by decision the imposition of interim measures on undertakings and associations of undertakings, at least in cases where there is urgency due to the risk of serious and irreparable harm to competition, on the basis of a prima facie finding of an infringement of Article 101 or Article 102 TFEU. Such a decision shall be proportionate and shall apply either for a specified time period, which may be renewed in so far that is necessary and appropriate, or until the final decision is taken. The national competition authorities shall inform the European Competition Network of the imposition of those interim measures. Member States shall ensure that the legality, including the proportionality, of the interim measures referred to in paragraph 1 can be reviewed in expedited appeal procedures.”).

<sup>2</sup> Under French law, the FCA can grant interim measures if the alleged practices (i) are likely to breach competition rules, and (ii) cause “serious and immediate damage” to the general economy, the economy of the sector concerned, the interest of consumers, or the company which had brought the complaint. The measures must be limited to what is “strictly necessary to handle the emergency”.

<sup>3</sup> Facebook/Whatsapp (Case COMP/M.7217), Commission decision of October 3, 2014; Decision of the Office of Fair Trading of August 14, 2012, ME/5525/12.

<sup>4</sup> Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

<sup>5</sup> If the competition authority determines that such merger raises competitive concerns, it could request a full notification pursuant to Article 3 of Regulation 139/2004.

competition concerns have been identified in the “concerned territory” (the period during which the transaction could be reviewed *ex post* would be limited to 12 months after closing).

Beyond the notification of mergers involving digital platforms, the FCA also suggests updating the substantive merger control assessment, in particular to reflect the importance of data and users communities. In addition, the FCA considers that competition authorities could make better use

of behavioral commitments in order to restore effective competition.

Overall, the FCA’s propositions – as they stand – would be particularly intrusive for digital platforms, with respect to both antitrust and merger control aspects. These measures come at a time when the FCA has clearly expressed its desire to strictly enforce competition rules against digital platforms, in particular against the GAFAs.

## Paris Commercial Court dismisses follow-on damage claim in the Dairy Products case

On February 20, 2020, the Paris Commercial Court dismissed the damages claim brought by various entities of Belgian retail group Louis Delhaize following the French Competition Authority’s 2015 sanction decision in the Dairy Products case.<sup>6</sup> The Court considered that the claimants’ economic assessment of their harm was insufficiently substantiated, whereas the defendants were able to successfully raise the passing-on defense.

### Background

In March 2015, the FCA imposed a €192.7 million fine (reduced to €132 million on appeal)<sup>7</sup> on ten producers of dairy products for having engaged in anticompetitive exchanges of sensitive information and agreements on prices and volumes in the market for dairy products sold under private label between 2006 and 2012.

Two years later, in March 2017, two entities of the Belgian retail group Louis Delhaize, namely the hypermarket chain Cora and the supermarket chain Match (the “**Claimants**”), initiated an action for damages before the Paris Commercial Court (the “**Court**”) against the infringing companies.

### The Claimants’ alleged loss and the dairy producers’ defense

The Claimants indicated that they had purchased €99 million worth of fresh dairy products sold under a private label over the affected time period (including €74 million from the defendants), and alleged that the practices had caused an overcharge of 5-10% as regards products sold by the defendants, and of approximately 2% as regards other products as a result of “umbrella pricing”, *i.e.*, of non-infringing companies’ ability to set their resale prices higher than they would otherwise have been able to absent the infringement. Further, the Claimants asserted that although the infringement had ended in 2012, its “spillover” effects had lasted until December 2015, causing additional overcharges (albeit to a lesser extent) for four additional years. Finally, the Claimants alleged that they had only ever passed on a third of the overcharge to end customers. Consequently, they claimed to be entitled to compensation for both the harm directly caused by the anticompetitive practices and for the damage caused by their umbrella and spillover effects.

In reply, the defendants questioned the validity of the economic study submitted by the Claimants, noting in particular that (i) one of the control groups used to assess the overcharge was overly

<sup>6</sup> See FCA Decision No. 15-D-03 of March 11, 2015 relating to practices implemented in the fresh dairy products sector.

<sup>7</sup> See Paris Court of Appeals ruling of May 23, 2017 (no. 15/08224).

narrow, and (ii) the passing-on rate was likely much higher than 35%.<sup>8</sup>

### The Paris Commercial Court's assessment

**First**, the Court recalled that since the practices at stake ended before the entry into force of the French law provisions implementing the EU Damages Directive (*i.e.*, before March 2017), the pre-Damages Directive legal framework was applicable and, accordingly, it was up to the Claimants to demonstrate that they had not passed on the overcharge to their customers, in line with the *Ajinomoto* precedent.<sup>9</sup> By contrast, had the EU Damages Directive been applicable, the defendants would have borne the burden of proving that the overcharge had been passed on.

**Second**, the Court assessed whether the economic study submitted by the Claimants effectively established the existence and amount of the damage they had allegedly suffered. While the Court took the view that the “differences in differences” method used in the study was valid, it criticized the choice of control groups, considering in particular that one of the two control groups constituted of an overly small sample of products. The Court also criticized the study’s choice of using different time periods for the affected products and the control group in their analysis. Consequently, the Court took into account the

analysis submitted by one of the defendants, which showed that affected and unaffected products’ pricing did not vary in a significant manner, and concluded that the Claimants had failed to establish both the existence of the alleged damage and causation.

**Third**, according to the Court, the Claimants also failed to establish the passing-on rate which they had allegedly implemented. In this respect, the Court noted that (i) dairy products sold under a private label are entry-level products for which a consumer is unlikely to find a substitute, regardless of the retail price, (ii) most of the producers of dairy products sold under a private label had been involved in the practices, and (iii) although all of the main retail supermarket/hypermarket chains had been impacted, their market shares had remained stable over the infringement period. The Court concluded that the passing-on rate was likely close to 100% for all the impacted retailers.

### Implications

The Paris Commercial Court dismissed the entirety of the follow-on damage claim. While the decision is likely to be appealed, it nevertheless illustrates the potentially key implications of the applicable legal framework, as well as the importance of submitting substantiated economic studies when seeking to establish the quantum of damages.

## The French Competition Authority imposes record fine on Apple for vertical practices and abuse of economic dependence

On March 16, 2020, the FCA imposed a €1.1 billion fine on Apple for entering in anticompetitive agreements with its distributors and abusing the situation of economic dependency of its network of Apple Premium Resellers, issuing by far its highest fine ever. The decision follows a lengthy investigation initiated in 2012, when

the then-largest French Apple Premium Reseller eBizcuss accused Apple of abusing its dominant position.

In France, Apple distributes its products either directly, through its Apple Retail Stores and its Apple Store website, or indirectly through

<sup>8</sup> The Claimants respectively evaluated their pass-on rates to be 32.7% (Cora) and 35.4% (Match).

<sup>9</sup> French Supreme Court, ruling of May 15, 2012 no. 11-18.495.

multi-brand retailers (e.g., Fnac or Darty) and a network of resellers. Resellers include, in particular, Apple Premium Resellers, which are Apple-dedicated resellers. Retailers and resellers can purchase Apple products either directly from Apple or indirectly from Apple's two French wholesalers.

In its decision, the FCA found that Apple had engaged in two vertical infringements, one with its wholesalers and the other with its network of Apple Premium Resellers, and – for the first time in over a decade – in an abuse of economic dependence under L.420-2 of the French Commercial Code.

**First**, the FCA found that, from 2005 until March 2013, Apple had entered into a vertical anticompetitive agreement with each of its wholesalers to allocate volumes of Apple products to be delivered to its network of resellers. In practice, Apple gave explicit instructions to the wholesalers to deliver specific quantities of Apple products to specific customers, and therefore the wholesalers did not freely determine their commercial policy.

**Second**, the FCA found that Apple had engaged in resale price maintenance by preventing the Apple Premium Resellers from freely setting their resale prices. According to the FCA, Apple Premium Resellers were “*strongly incentivized*” to align their prices with those charged by Apple in its retail stores or on its Apple Store website, while Apple strictly monitored their resale prices and promotional activity. This practice led to an alignment of all prices of Apple products (except the iPhone) to end consumers in almost half of the retail market.

**Third**, the FCA held that Apple abused the situation of economic dependence of its Apple Premium Resellers, which were under a contractual obligation to achieve 70% of their turnover through sales of Apple products. The abusive practices unduly restricted the resellers' commercial freedom and included delays/cancellations of deliveries, discriminatory treatment, instable remuneration (discounts and outstanding credit lines), and a discretionary implementation of Apple's terms.

The FCA imposed a €1.1 billion fine on Apple, as well as €76 million and €63 million fines on each of Apple's wholesalers. The overall fine (€1.24 billion) is the largest fine ever handed down by the FCA. In addition, Apple's fine is the highest individual fine ever imposed on a company, surpassing the €350 million fine imposed on Orange in 2015 for abuse of dominant position.

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