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French Competition Law Newsletter

Highlights

- The French Competition Authority considers for the first time an overall market for the online and offline distribution of toys
- British Steel/Ascoval
- The French Conseil constitutionnel invalidates the provisions of the PACTE law empowering the government to transpose the ECN+ directive into French law

The French Competition Authority considers for the first time an overall market for the online and offline distribution of toys

The French Competition Authority (the “FCA”) considered online and offline sales of toys as forming part of the same market in the context of its investigation of the merger of toy companies Luderix International and Jellej Jouets. The FCA thus relied once more on the methodology it applied in its Fnac/Darty merger clearance decision, when it concluded to the existence of a single market including both physical and online retail channels for the distribution of consumer electronics.

Background

On April 17, 2019, following a phase 1 investigation, the FCA unconditionally cleared the acquisition of joint control of Luderix International (“Luderix”) by Jellej Jouets and Gifram, a company owned by the Mulliez family.¹ Both Luderix International and Jellej Jouets (which had acquired Toys’R’Us in October 2018 after the group was placed into

receivership) are active in the toy sector, both in the upstream market for the manufacture and wholesale distribution of toys, and in the downstream market for retail distribution. In the downstream market, Luderix operates 20 specialized toy stores and a website under the “Picwic” brand, while Jellej Jouets runs 44 specialized toy stores and a website under the “Toys’R’Us” brand. The decision highlights the FCA’s willingness to take into account the competitive pressure exerted by online sales in retail distribution markets.

The relevant product markets for toys

The FCA first distinguished the market for the manufacture and wholesale distribution of toys from the toy retail market, before analysing whether an additional distinction should be made, within the toy retail market, between in-store/

¹ Decision No.19-DCC-65 of April 17, 2019, regarding the acquisition of joint control of Luderix International by Jellej Jouets and the Mulliez undivided ownership.

offline and online distribution channels. As regards in-store sales, the FCA considered that the toy retail market includes large specialized toy retailers as well as hypermarkets, stores specialized in recreational equipment, and shops selling home decoration and leisure products, provided that they dedicate more than 200m² of their retail space to the sale of toys. As a second step, and in line with the notifying parties' argument, the FCA thoroughly analysed the competitive pressure exerted on brick and mortar stores by online sales – whether through “pure players” platforms (such as Amazon or Cdiscount) or through traditional retailers' websites. The FCA concluded that the development of online sales in the toy sector over the past five years justified taking the competitive pressure exerted by online sales on brick-and-mortar sales into consideration, and thus included both distribution channels in the definition of the relevant retail market.

To reach this conclusion, the FCA relied on precise and concurring evidence showing that offline and online sales were sufficiently substitutable.

First, on the supply-side, the FCA noted that (i) the penetration rate of online sales in the toy sector has been consistently high over the past few years (28,3% in France in 2017); (ii) traditional players have adapted their internal organization and their commercial and pricing strategy in order to respond to the growth of online players (*e.g.*, through the development of websites) and remove any differentiation between the online and in-store distribution channels (*e.g.*, through specific refunding policies); (iii) the same type of products and services are offered in brick and mortar stores and on online platforms; and (iv) retail prices offered in the online and offline channels are increasingly aligned.

Second, on the demand-side, the FCA found that consumers do not differentiate between the online and offline channels and use both channels to first compare prices and then purchase toys. Moreover, the majority of participants to the market test conducted by the FCA indicated that differences between online sales and brick-and-mortar sales

had significantly decreased, and considered that both channels belonged to the same market. In particular, participants estimated that most consumers would switch to other online shops to purchase toys in the event of a 5 to 10% price increase by the new Luderix-Jellej Jouets entity following the transaction.

The FCA's analysis is consistent with the approach followed in its landmark decision approving the acquisition of Darty by Fnac in 2016 where the FCA considered for the first time that the relevant market for the retail distribution of consumer electronics and certain home appliances should include both online and in-store sales.²

The competitive analysis

When analysing the horizontal effects resulting from the transaction, the FCA considered that the transaction did not give rise to any competition concerns whether in the upstream market for the manufacture and wholesale distribution of toys or in the downstream toy retail market, regardless of the scope of the geographic market.

As regards the retail distribution of toys in particular, the FCA conducted its assessment both at the national and local levels. In practice, the FCA first estimated in-store market shares at the local level through the application of a coefficient, corresponding to the proportion of retail space dedicated to toys compared to the total turnover achieved by each brick and mortar store. Then, based on the assumption that the competitive pressure exerted by online sales is homogeneous on the French territory, the FCA allocated, for each catchment area, the turnover associated with online sales to each competitor, according to their market shares on the online channel at the national level.

Based on this methodology, the FCA concluded that the transaction led to horizontal overlaps in nine catchment areas but considered that a detailed local assessment of the competitive situation was only needed when the combined local market shares of the parties were between 25% and 50%. In those areas, the FCA ultimately

² Decision No. 16-DCC-111 of July 27, 2016, regarding the acquisition of Darty by Fnac.

ruled out any risk of competitive harm following the transaction given the competitive pressure exerted by other local brick-and-mortar stores (especially large specialized toy stores such as JouéClub or Maxi Toys) and pure players (in particular Amazon and Cdiscount).

British Steel/Ascoval

On May 17, 2019, the French Competition Authority (the “FCA”) unconditionally approved the acquisition of Ascoval by the British Steel group. Ascoval is a steel mill specialized in the production and supply of semi-finished steel products that are necessary for the production of finished steel products. British Steel is a European steel manufacturer that is active in the production of both semi-finished and finished steel products. Given the limited overlap between the Parties’ activities, the FCA did not identify any horizontal or vertical competition concerns arising from the transaction.

Interestingly, the clearance decision was issued after the transaction was completed. Although in principle, a merger cannot be effectively implemented prior to being approved by the FCA, article L430-4(2) of the French Commercial Code provides that the standstill obligation may be waived in case of “special need” (“*en cas de nécessité particulière*”), if the parties present a reasoned request. Such derogations are usually granted when the target company is in liquidation or receivership. Other exceptional circumstances include a risk of imminent dissolution of the target, the opening of insolvency proceedings, or the need for the buyer to provide guarantees or obtain external funding to save the target.

In the present case, Ascoval had been placed in receivership in January 2018, and was originally to be taken over by French-Belgian company Altifort, before the latter withdrew its offer. Consequently, the FCA granted a derogation from the standstill obligation on April 19, 2019 three days after the formal notification. This allowed British Steel to submit a firm takeover offer before the Strasbourg

With a second merger control decision concluding to the substitutability of online and in-stores sales, the FCA clearly shows its ability to adapt its enforcement action to changing competitive dynamics resulting from the growth of online sales and the development of “pure players”. This significant evolution is expected to progressively extend to other sectors as online sales keep growing.

Court of First Instance, which was accepted on May 2, 2019. The peculiarities of the situation nevertheless led the FCA to adopt a decision in four weeks, following an accelerated assessment of the transaction. While British Steel was placed in receivership a few days after the FCA issued its clearance decision, this should not impact the rescue acquisition of Ascoval.

The issuance of a derogation does not prejudice the outcome of the FCA’s final decision. The FCA may still impose commitments on the parties, or prohibit a transaction that would adversely impact competition. For example, in June 2018, in the *William Saurin* case, despite having previously granted a derogation from the standstill obligation, the FCA imposed commitments on Cofigeo before approving its acquisition of certain securities and assets of Agripole. Following an in-depth assessment, the FCA found that the transaction raised serious competition concerns. In the absence of adequate commitments on Cofigeo’s part, the FCA ordered the divestment of Cofideo’s brand Zapetti. The FCA also ordered the sale of a production site needed for Zapetti’s operation and for the production of private label products in the relevant markets. Following the derogation, the transaction was authorised by the Paris Commercial Court, and later by the FCA under the above-mentioned conditions.

The French *Conseil constitutionnel* invalidates the provisions of the PACTE law empowering the government to transpose the ECN+ directive into French law

On May 16, 2019, the French Conseil constitutionnel validated most of the provisions of the law on business growth and transformation (“loi relative à la croissance et la transformation des entreprises” or “PACTE law”), but deemed that the provisions relating to the transposition of the ECN+ directive into French law violated the Constitution.

A month after the adoption of the PACTE law by the French Parliament on April 11, 2019, the French *Conseil Constitutionnel* issued a decision on the compatibility of said law with the Constitution.

The *Conseil constitutionnel* upheld most of the provisions of the PACTE law, including flagship measures dealing with the sale of the French State’s participation in several key infrastructure companies such as Aéroports de Paris, Engie and La Française des Jeux, even though the French Constitution contains provisions prohibiting the privatization of companies that are in a *de facto* monopoly or provide service of national economic interest. Interestingly, as regards the privatization of Aéroports de Paris, the *Conseil constitutionnel* noted that although Aéroports de Paris was dominant in the French airport sector, it was nevertheless subject to the competition pressure exerted by the main regional airports.

The *Conseil constitutionnel* however invalidated several provisions of the PACTE law as it considered that they had little to no connection with the actual subject matter of the draft law, and were therefore prohibited under Article 45 of the Constitution. The *Conseil* notably declared that Article 211, which was meant to enable the Government to transpose the European Competition Network Directive into French law and to take any necessary antitrust measures through executive orders (“*ordonnances*”), was incompatible with the Constitution. By contrast, Article 212, which authorizes agents of the French Competition Authority to obtain telephone and telecommunications technical data (i.e. excluding data relating to the content of communications), was somewhat surprisingly deemed compatible – despite being equally unrelated to the subject matter of the PACTE law.

Following the *Conseil constitutionnel*’s decision, the PACTE law was enacted on May 22, 2019.

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