
GLOBAL – LOCAL COMPETITION LAW ENFORCEMENT BY THE FRENCH COMPETITION AUTHORITY

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INTRODUCTION

1. LOCAL

The French Competition Authority (FCA) renders a great deal of decisions concerning « local markets »

- Bid rigging – Public tenders procedures

 Around half of the « Antitrust » activity of the FCA from 2000 to 2012

- Retail sector

 Around 45% of the concentrations reviewed under the French merger control rules

 Definition of “local markets”

INTRODUCTION

2. GLOBAL

- Global actors
- Global practices

More and more cases with global features

We will focus on the FCA decisions of this type

I. FCA DECISIONS WITHIN A GLOBAL CONTEXT

Example concerning:

1. Abuse of dominant position
2. Anti-competitive agreements/clauses
3. Merger control

II. PROCEDURAL TOOLS TO HANDLE INTERNATIONAL CASES

1. Exchange of information between competition Authorities
2. Cooperation to carry out inquiries (including searches)
3. Cooperation in case of leniency and allocation of cases
4. Cooperation in the post-investigation and decision phases

CONCLUSION

Convergence and consistency in the field of:

1. Merger control
2. Antitrust

Abuse of dominant position (1/2)

1. Online advertising: the Google/Navx case of 28 October 2010
 - > Google commitments to make the functioning of its AdWords service more transparent and predictable
 - > The October 2010 decision only applied in France
 - > Google decided to implement the commitments for all contents and in all countries
 - > Global effect of the FCA's decision

Abuse of dominant position (2/2)

2. The Nespresso case

- > FCA: the first antitrust authority to deal with the barriers to entry for other coffee capsule makers to use such capsules on Nespresso-brand coffee machines
- > 4 September 2014: the FCA accepts Nespresso's commitments
- > Such commitments only concern France – Extension?

Anti-competitive agreements/clauses (1/5)

1. Online reservations: the Booking.com case

- > Digital economy: the same contractual terms are applied globally
- > Main Online Travel Agents (“OTAs”): Booking.com, Expedia and HRS
- > Parity clauses (or “Most Favoured Nation” clause):

The hotels must give the OTA no less favourable conditions (of prices, availability...) than those it puts on any other sales channel: direct, offline, online...

Anti-competitive agreements/clauses (2/5)

Booking.com (continued)

- > In Germany: prohibition of the parity clause (December 2013)
- > In the UK: commitment decision annulled on appeal (Jan. and Sept. 2014)
- > The French, Italian and Swedish Authorities jointly market tested commitments from Booking.com
- > Hearing at the FCA on 31 March 2015
- > Decision of the French, Italian and Swedish Authorities within the next few weeks
- > “Decentralisation” of the enforcement of Articles 101 and 102

Anti-competitive agreements/clauses (3/5)

2. Selective distribution and Online Sales: The Pierre Fabre case

- > Clause in Pierre Fabre selective distribution contract, banning the distributors from selling the products “online”
- > Decision of the FCA prohibiting such clause (29 October 2008)
- > Appeal: Commission “*Amicus Curiae brief*”
- > Preliminary ruling: the Court of Justice decides on 13 October 2011 that such a ban on online sales is a restriction by object
- > 2010 Commission guidelines on vertical restraints
- > Possibility to exclude “pure players” from a selective distribution network – Ongoing cases on third party platforms/market places

Anti-competitive agreements/clauses (4/5)

3. The Bank Card payment cases

- > Commitments decision of the FCA on 7 July 2011 in the “*Groupement des Cartes Bancaires*” case – MasterCard and Visa decisions of the FCA on 20 September 2013
- > More than ten other European competition Authorities investigated and issued decisions in the Bank Card sector
- > The EU Commission: MasterCard decision (2007) confirmed by the European Court of Justice on 11 September 2014 – Visa commitments decisions on 8 Dec. 2010 and 26 Feb. 2014
- > EU Regulation on “Interchange Fees for Card-based Payment Transactions” adopted by the European Parliament on 10 March 2010
- > Influence of the competition law decisions on the EU Regulation

Anti-competitive agreements/clauses (5/5)

4. International Cartels: the Packaged Flour cartel

- > Agreements aimed at limiting imports of flour between France and Germany
- > Parallel procedures in Germany and France (leniencies, dawn raids, decisions and fines in both countries)
- > Rights of defence/due process issues:
 - The German millers complained that the SO was not translated into German
 - The French millers complained that some documents in the file were in German and not translated into French
 - Fines in Germany and in France: contrary to the “*ne bis in idem*” principle?

Merger Control (1/2)

1. Multi-filing of the same concentration
 - > Very common in Europe (and globally)
 - > However, rare cases of discrepancies: the Eurotunnel/SeaFrance case
 - Cleared with remedies by the FCA (on 7 Nov. 2012)
 - But prohibited by the UK Competition Commission (on 6 June 2013)
 - > Need for further convergence of material and procedural rules

Merger Control (2/2)

2. Foreign-to foreign transactions notified to the FCA
 - > Most of the merger control cases decided by the FCA involve at least one French company or group
 - > But there are some cases where the FCA decides on the French aspects of a transaction taking place abroad between two “foreign” companies
 - > Even rare cases of remedies imposed by the FCA in foreign-to-foreign transactions
 - > Illustration of the “global reach” of the French merger control rules

II Procedural Tools to Handle International Cases (1/4)

Due to the increase of “global cases”, European competition Authorities have to adapt to this international dimension.

1. Exchange of information between the European competition Authorities
 - > Example of the “flat-glass” case
 - > Art. 12 of Regulation 1/2003 (2 requests by the FCA to the BKartA and 1 request received from the Commission in 2014)

Procedural Tools to Handle International Cases (2/4)

2. Cooperation to carry out inquiries, including searches

- > First decision on the basis of Art. 22 of Reg. 1/2003: the “jet fuel case” – Dawn raids conducted by the OFT on behalf of the FCA
- > Between 2006 and 2014
 - The FCA received about 20 requests to conduct interviews, inquiries or dawn raids
 - The FCA sent 21 requests for assistance to other European competition Authorities

Procedural Tools to Handle International Cases (3/4)

3. Cooperation in case of leniency

- > “ECN Model Leniency programme” issued in 2006 and amended in Nov. 2012
- > The FCA’s Laundry Detergent cartel case of 8 Dec. 2011:
 - Different leniency applicants in France and in Brussels – Different cases?
 - The EU Commission investigated a “washing powder” cartel and imposed fines by decision of 13 April 2011
 - Was the FCA denied jurisdiction by EU proceedings?
 - Was the FCA procedure contrary to the “*ne bis in idem*” principle?
 - In its decision of 8 Dec. 2011, confirmed by the Paris Court of Appeal, the FCA considered that the French and European cases were clearly different

Procedural Tools to Handle International Cases (4/4)

4. Cooperation in post-investigation and decision phases

See the Booking.com case:

Cooperation between the French, Italian and Swedish Authorities

CONCLUSION

Room for improvement in terms of cooperation in order to deal with more and more “global” cases

1. Merger Control

- FCA Report of 14 March 2014 on the future of merger control in Europe
- Unify the basic concepts of national merger laws
- Referral to the EU Commission possible when 2 or more (instead of 3) European Authorities are competent
- Conciliation committee in case of conflicting approaches
- Align the procedural timetables

2. Anti-Trust

- Harmonisation of the calculation of fines
- Development of interim measures