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Decisions and main cases of the french competition authority: first year in review

Following the first year of operation of the *Autorité de la Concurrence* (French Competition Authority, hereinafter the “FCA”), it is time to make an assessment and try to indentify the major trends of the decisions it rendered in 2009.

1. Overview

1.1 Main industries targeted by the FCA’s decisions and opinions

Most of the FCA’s decisions and opinions were rendered in relation to companies operating in the following industries: distribution (notably because of the numerous inter-professional derogatory agreements)^[1], telecommunications, services, edition/media/press, transport, buildings and public works and healthcare (which was a noteworthy aspect of the FCA’s activity in 2009).

Regarding merger control, out of the 94 decisions rendered by the FCA:

- 41% concerned the retail trade sector: this is probably due to the fact that the notification thresholds applicable in this sector have been lowered; indeed, before the 2008 reform, less than 5% of the FCA’s decisions concerned this sector.
- 12% concerned the food industry.
- 10% concerned the banking and insurance sector.
- 9% concerned the manufacturing industry.

With the remainder divided among the various other business sectors.

1.2 Amount of the fines/penalties imposed in 2009

In 2009, the FCA rendered **15 decisions** for a total fine/penalty amount of **206.6 million Euros**. This amount

is quite in the norm if we do not use as a benchmark the 2008 amount (631 million Euros) mainly due to the record fine of 575,4 million Euros imposed by the French Competition Council (the FCA's predecessor) on 11 companies of the steel industry (including three subsidiaries of ArcelorMittal) for forming a cartel.

2. The decisions rendered by the FCA

2.1 Anti-competitive practices: cartels and abuses of dominant position

Out of the 15 sanctions rendered against 58 companies in 2009 (compared to 82 companies sanctioned in 2008), nine concerned cartel cases, 4 concerned the offense of abuse of dominant position and 2 concerned a combination of these two offenses.

a) The main decisions that imposed sanctions

5 main decisions leading to fines/penalties rendered by the FCA in 2009 will be discussed hereafter.

The following count among the entities that were imposed the highest fines in 2009:

- Three temporary employment agencies, i.e. Adecco, Manpower and VediorBis, were ordered to pay a total fine of **94.4** million Euros for anticompetitive market sharing;
- France Télécom was fined **27.6** million Euros for abuse of dominant position and **63** million Euros for anticompetitive practices in two separate files;
- The *Fédération Française de Football* (French Soccer Federation or hereinafter "FSF") and the company Sportfive were fined **6.9** million Euros for entering into very long-term exclusivity agreements;
- The SNCF (French National Railway Corporation) was fined **5.5** million Euros for favoring its subsidiaries running the website *voyages-sncf.com* to the detriment of its competitors.

(i) The 94.4 million Euros fine imposed on three temporary employment agencies (decision n°09-D-05)

In summary, the three largest temporary employment agencies in France (Adecco, Manpower and VediorBis), covering 70% of the French market and satisfying 90% of demand from "major accounts" (i.e. large companies which regularly require significant numbers of temporary workers), were fined for colluding in their commercial policy concerning their major account clients.

Following searches and raids carried out, the documents seized provided sufficient evidence that the companies in question colluded frequently on various elements of their commercial and pricing policy (alignment of invoicing coefficients applied to the salaries of temporary workers, end-of-year discounts, discussion on offers) for key account clients (such as Eiffage, La Poste, Alstom, les Galeries Lafayette). As such, the three firms were able to fix higher margins than would normally have been the case under free competition conditions, to the detriment of clients and temporary workers.

They were charged notably with engaging in highly reprehensible practices by limiting the retrocession to be

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paid to clients as a result of the applicable social contribution reduction scheme (known as “Fillon law”).

The Competition Council ruled that *“Disturbing public policies is a serious offense and disrupting the incentive effects of employment policy not only directly affects the job market, but also has a negative budgetary impact (...) any practice likely to undermine the effects of social cost reduction and to increase labor costs for companies is counter-productive, actively hindering efforts to reduce unemployment and promote economic growth”*.

Yet, as Adecco, Adia and VediorBis decided not to contest the charges brought against them and undertook substantial commitments regarding the implementation of a professional training and awareness program, their respective fine was reduced.

The total amount of the fines imposed is 94.4 million Euros, broken down as follows:

Manpower: 42 million Euros

Adecco: 32.5 million Euros

Adia: 1.7 million Euros (a member of the Adecco group)

VediorBis: 18.2 million Euros

This decision was appealed before the Paris Court of Appeals, which then dismissed the appeal on January 26, 2010. The case is now pending before the *Cour de Cassation* (French Supreme Court).

(i) *France Télécom, in the line of fire: a cumulated fine of 90.6 million Euros (decisions n°09-D-24 and 09-D-36)*

With these two additional decisions (which brings the total number of decisions rendered against it to 12), France Télécom is the company that is the most regularly sanctioned by the French competition authorities. This is the reason why, notwithstanding France Télécom’s choice not to contest the charges, the penalties are often increased by 50% given the existence of repeated similar infringements.

Decision n°09-D-24:

In summary, France Télécom was fined 27.6 million Euros for having abusively used its dominant position and hindered the development of new competing operators in the fixed telephony and Internet access markets in the French overseas departments (Martinique, Guadeloupe, Guyana and Reunion).

France Télécom was notably blamed for having:

- artificially maintained excessively high rates on the connections between the Reunion Island and mainland France and refused to secure the leased connection between Reunion and mainland France, which prevented Outremer Télécom, a potential alternative operator, from offering services similar in quality to the offer of the France Télécom group;
- used the files on subscribers in its possession to win back clients who opted for an alternative operator

(notably by encouraging them to fill out pre-selection cancellation forms);

- applied retail rates that were impossible to replicate by any alternative operator
- been deliberately very slow in implementing a call restriction service (whereas it was supposed to do so), which had negative effects on the image of alternative operators as consumers wrongly believed malfunctions to be the result of their decision to switch to another operator.

This decision was not appealed and is, therefore, final and definitive.

Decision n°09-D-36:

In summary, France Télécom and Orange Caraïbe were jointly and severally ordered to pay 52.5 million Euros for anti-competitive practices on the fixed and mobile phone market in the West Indies-Guyana zone.

France Télécom alone is fined 10.5 million Euros for its own practices.

The anticompetitive practices of Orange Caraïbe (the incumbent operator in the West Indies-Guyana zone) are as follows:

- entering into exclusivity agreements with independent distributors and with the only approved repair center for handsets in the Caribbean;
- implementation of a loyalty-building program called “*Changez de mobile*”, through which the use of loyalty points for the acquisition of a new handset was tied to the obligation to renew one’s 24-month commitment with Orange Caraïbe;
- improper rate differentiation practices between “on net” calls (to its network) and “off net” calls (to a competing network).

France Télécom was also blamed for offering discounts to professionals, companies, local and regional administrations and self-employed people for land-line calls going only to the Orange Caraïbe network. In addition, it marketed “land-line to mobile” telecommunication offers at costs below what an equally efficient operator would be able to bear in order to offer the same service.

The decision was appealed, and the case is now pending before the Paris Court of Appeals.

(iii) The FSF and Sportfive fined 6.9 million Euros (decision n°09-D-31)

In summary, the FSF and Sportfive were fined for (i) entering into very long-term exclusive agreements incorporating anti-competitive clauses, with no competitive bidding process and (ii) subsequently distorting the bidding process, thereby eliminating any and all competition for the management and marketing of the FSF’s sport rights.

The FSF is the leading sports federation in France, in terms of both the number of licensees and the marketing

and audiovisual revenues generated. The Sportfive Group has a dominant position in the management of marketing and audiovisual rights for sports.

The seriousness of the anticompetitive practices (exclusivity clauses combined with a non-transparent bidding process) applied on a particularly attractive market explains the severity of the sanctions imposed. Yet, the FSF's penalty was reduced by 40% as it notably committed to set up an open competition procedure (i) for contracts relating to the choice of sports equipment provider, (ii) for contracts on the acquisition of audiovisual rights and (iii) for intermediation contracts. The amount of its penalty, 900,000 Euros, is quite lower than that imposed on Sportsfive, i.e. 6 million Euros.

The decision has not been appealed.

(iv) *The SNCF fined 5 million Euros (decision n°09-D-06)*

In summary, the SNCF was fined 5 million Euros for favoring its subsidiaries running the website voyages-sncf.com, and in particular its subsidiary created jointly with Expedia, Agence Voyages-sncf.com, to the detriment of its competitors. Expedia was also fined 500,000 Euros.

The French Competition Council received complaints from several competitors of Voyages-sncf.com, i.e. Karavel-Promovacances, Lastminute and Switch, in relation to the practices implemented by the SNCF and Expedia notably through their joint subsidiary Voyages-sncf.com.

The SNCF did not grant competing travel agencies the same technical conditions as that used by Voyages-sncf.com: they did not have access to last minute offers or high-speed intercity services (TGV) at discount rates (so-called "iDTGV offers") and could not use the "Print Ticket" feature. In addition, on-line travel agencies wishing to access the SNCF's computerized booking system had to buy an expensive license from the SNCF, whereas Voyages-sncf.com had no such obligation as it benefitted from a direct connection. Further, following the creation of the Voyages-sncf.com agency, Expedia was granted access to the SNCF's client records, i.e. about 10 million contacts.

The French Competition Council held that the *"agreement, that consisted in relying on a legal monopoly to develop an activity on an competitive auxiliary market, is anticompetitive insofar as it provided the joint subsidiary with a decisive advantage, thereby distorting competition on the merits"*.

The SNCF was fined not only for engaging in anticompetitive practices but also for abuse of dominant position. Yet, as the SNCF decided not to contest the charges and made commitments to restore sound competition, the Competition Board decided to reduce the fine and to cap it at 5 million Euros – quite a high amount already. Expedia was fined 500,000 Euros only for engaging in anticompetitive practices.

Expedia lodged an appeal before the Paris Court of Appeals, which, in a judgment dated February 23, 2010, upheld the Competition Council's decision.

b) Commitments, leniency applications and settlements in 2009

Following the trends of EU competition and antitrust laws, the three participative procedures, i.e. commitments, leniency programs and settlements, have been widely used in 2009:

- Commitments: commitments are proposed by companies before the initiation of the litigation procedure. The commitments proposed by companies are subject to a “market test” carried out by the FCA to make sure such commitments are credible, checkable and adapted to the situation.

In 2009, three market tests were carried out in three distinct business sectors:

- **Marketing of the iPhone in France**: on January 11, 2010, the FCA accepted the commitments proposed by Orange and Apple in November 2009 to waive exclusivity for the distribution of iPhones in France. In 2008, the French Competition Council had imposed interim measures and suspended Orange’s exclusivity, thereby allowing SFR and Bouygues Télécom to market the iPhone. Apple has undertaken not to enter into any exclusivity agreement for greater than three months for the distribution of future models of the iPhone. Orange has undertaken not to claim such exclusivity for more than three months. In addition, the exclusivity agreements do not apply to the iPad. This put an end to the litigation proceedings initiated at the request of Bouygues Télécom.
- **Identity photograph booths in France**: Photomaton and site holders had entered into five year exclusivity contracts that granted Photomaton the exclusive right to install and operate identity photograph booths. As Photomaton holds a dominant position on this market (82% market share), it had to waive exclusivity by committing to no longer enter into contracts containing exclusivity clauses, and limiting the duration of all new contracts to a maximum of 36 months with an automatic renewal for one year maximum (decision n°09-D-32 of October 26, 2009).
- **Highway breakdown services**: breakdown service companies – that must comply with a particularly restrictive set of specifications to obtain official authorization from the concession holders responsible for operating the motorway – are granted a monopoly on callouts. The French Competition Council held that concession holders should reexamine and clarify their tendering procedures and organize competitive tendering processes open to all the motorway breakdown service companies on their network within a period of three years (decision n°09-D-08 of February 16, 2009).
- Leniency applications: in 2009, **5** leniency applications were filed with the FCA. It should be recalled that under the leniency program a company engaged in an anticompetitive agreement or concerted practice that informs the FCA thereof can be exonerated from all or part of the fines that will be imposed (especially if the company provides new evidence concerning the anticompetitive agreement or concerted practice).
- The settlement or non-opposition to charges: under this procedure that was used in **6** cases in 2009, a company admits that it is a party to an anticompetitive agreement or concerted practice in order to benefit from lower penalties. This procedure is not necessarily tied to commitments from the relevant

company.

2.2 Mergers : 3 authorizations subject to commitments

Out of the 88 merger authorization decisions issued by the FCA in 2009, 3 are subject to commitments on the part of the relevant companies. These 3 authorization decisions will be commented below.

First, it should be recalled that there exist two types of commitments:

- Structural commitments: they are considered as the most efficient type of commitments as they require the merged entity or a party to the merger transaction to dispose of certain assets to prevent the risk of excessive market power.
- Behavioral commitments: they are limited in time and provide guidelines for the future conduct of the merged entity on the relevant market.

a) Decision n°09-DCC-16 of June 22, 2009: Merger Banque Populaire / Caisse d'Epargne

Following a national and local analysis of the relevant market (notably the retail banking market intended for individuals) the FCA noticed that, as a result of the merger, 50% of the banking agencies located on the Reunion Island would belong to the new group. Considering that there would be very few candidates for the purchase of assets, the Authority held that only behavioral commitments could be feasible: the new group, therefore, committed to maintain the legal independence and management autonomy of the three networks and trademarks (Banque de la Réunion, Caisse d'Epargne, BRED).

b) Decision n°09-DCC-54 of October 16, 2009: Novartans/Groupe SNCF

The SNCF, the incumbent rail transport operator, increased its equity interest in Novatrans (from 39.89% to 85.05%), thereby acquiring exclusive control of this company. The SNCF made the following commitments:

- Novatrans will provide open competition to rail companies for the motive power for its trains as of 2011 and for a duration of 5 years. Since Novatrans is the main combined rail-road transport operator, it is also potentially the biggest client for motive power services. The objective of this commitment is to guarantee that railway companies competing with the SNCF can commercially access Novatrans, notwithstanding the latter's privileged links with the SNCF.
- For the management of its terminals dedicated to combined merchandise transport, the SNCF has undertaken to establish open capital operating companies that will allow equity interests to be taken by other combined transport operators.
- The SNCF has undertaken, for six years, to guarantee a transparent and non-discriminatory access to all road carriers (notably through the use of public tariffs), preventing any favorable treatment of its own road transport subsidiaries.

A trustee has been appointed to monitor the implementation of these commitments.

c) Decision n°09-DCC-67 of November 23, 2009: Arrivé / LDC Volailles

The FCA held that the acquisition of the Arrivé group by the LDC group could raise competition problems at several points along the production and marketing chain for poultry meat and poultry-based products. LDC made several structural and behavioral commitments: (i) structurally, it has undertaken to sell the assets of the Fermiers Landais group (and the brand *Saint-Sever*) owned by the Arrivé group, and (ii) in terms of behavior, on the poultry-based products market, as its position strengthened as a result of the merger, LDC has undertaken, for example, not to grant discounts linked to the simultaneous purchase of several types of products.

2.3 Summary of the main issues addressed by the FCA in 2009

a) Acknowledgement of the liberalization of rail transport

As recalled above, the FCA carefully examined throughout 2009 the competitive positioning of the SNCF as incumbent rail transport operator, probably because of the forthcoming liberalization of the rail transport sector.

The FCA, acting both in its capacity as advisory body and monitoring authority, made sure that operators competing with the SNCF could penetrate the rail transport market, either by guaranteeing newcomers an access to train stations (opinion n°09-A-55, please cf. article entitled “*French Competition Authority and the impact of the LME law: first year in review*” also published in our [July/August 2010 e-newsletter](#)), by sanctioning the SNCF’s anticompetitive practices (decision n°09-D-06) or by subjecting certain merger authorizations to the implementation of commitments (decision 09-DCC-54 and decision n°10-DCC-02).

b) Incentives for the development of optical fiber networks in telecommunications

Optical fiber is now the flagship technology for the deployment of high-speed Internet in France. In 2009, the FCA issued two opinions to help widen the use of optical fibers in public and private buildings.

- In its **opinion n°09-A-47** of September 22, 2009, the FCA encouraged the installation of multi-fiber architectures in buildings, which was supposed to help newcomers enter the market. Every telecommunications operator that will install an optical fiber network within a building shall be required to install a fiber for each operator under a co-financing scheme. As a result, within a same building, consumers will be able to change operators and with no service interruption.
- In its **opinion n°09-A-57** of December 22, 2009, the FCA encouraged local authorities to implement the optical fiber technology rather than other intermediary solutions for the increase of bitrates for high-speed Internet.

c) Competition and antitrust laws also apply to the healthcare sector despite its specificities

On several occasions, the FCA recalled that competition and antitrust laws were to be applied in the healthcare sector. It notably sanctioned:

- The *Conseil national de l'Ordre des chirurgiens-dentistes* (National Board of the French Dental Surgeons) for encouraging dental surgeons (including through the use of threat of disciplinary proceedings if they did not follow the Board's instructions) to boycott the company Santéclair and not become members of this network (thanks to which patients could receive better services for a moderate cost) (decision **n°09-D-07** of February 12, 2009).
- The Regional Council of the *Ordre des pharmaciens de Basse-Normandie* (Lower-Normandy Association of Pharmacists) for urging a retirement home to use its nearest pharmacies rather than to choose a pharmacist further away but more competitive (decision **n°09-D-17** of April 22, 2009).

The FCA rendered 8 decisions in relation to the healthcare sector.

d) The development of competition in the French overseas departments

As explained above, France Télécom was heavily fined for hindering competition in the French overseas departments (decisions **n°09-D-24**, **09-D-36**). The Authority also issued two opinions to reduce high prices applied in such departments:

- In the fuel industry : the Authority suggested putting an end to the maximum prices set by the public authorities that had in fact become the unique price imposed on all consumers in every single gas station (opinion **n°09-A-21** of June 24, 2009).
- In the mass retail distribution sector where the products imported from mainland France are much higher than the same products marketed in metropolitan France (opinion **n°09-A-45** of September 8, 2009).

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