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French competition authority and the impact of the LME law : first year in review

The Law no. 2007-776 of August 4, 2008 on the Modernization of the Economy (called the “LME Law”) created the *Autorité de la concurrence* or the French Competition Authority (the “FCA”) as of January 1, 2009, which replaced the Competition Council (please cf. article entitled “*The new French Competition Authority: up and running as from January 1, 2009*” published in our December 2008 e-newsletter).

The FCA has been in existence for one year now, and an assessment of what it has accomplished this past year should be made. Before addressing the decisions taken by the FCA in 2009 (please cf. article entitled “*Decisions and main cases of the French competition authority: first year in review*” also published in our July-August 2010 e-newsletter), this article will attempt to measure the impact of the 2008 reform on the FCA’s activity.

1. The FCA’s use of its power to take initiative to investigate litigious matters and act in an advisory capacity

Throughout 2009, the FCA has examined a case on its own initiative eight times for files relating to practices likely to be considered anti-competitive:

- 6 were tied to the implementation of the new provision of Article L.450-5 paragraph 2 of the French Commercial Code^[1] allowing the general rapporteur to propose to the FCA that it automatically examines on its own initiative the results of the investigations carried out by the DGCCRF (General Directorate for competition, consumer protection and fraud).
- 2 occurred within the framework of the possibility granted to the FCA to take the initiative to act in an advisory capacity. Pursuant to Article L.462-4 of the French Commercial Code introduced by the LME Law, “*The Competition Authority may take the initiative to provide an opinion on any issue concerning competition*” and may, in this regard, “*express its point of view each time it deems necessary, for example to propose avenues of thought, to assess current legislation on competition, to contribute to the drawing up of regulatory or legal texts or to recommend measures necessary to improve competition in certain markets*” (Internet site of the FCA).

Twice in 2009 the FCA took the initiative and rendered the following opinions on the basis of Article L.462-4:

1.1 Opinion no. 09-A-55 of November 4, 2009 on the passenger land-based public transport:

This opinion concerns the issue of competition in the passenger land-based transport and of intermodality (ability to provide continuous services between trains and other transport modes) within the framework of opening competition in the railway sector on January 1, 2010. The FCA took the initiative with regard to this issue by decision 09-SOA-01 of May 18, 2009. In its opinion no. 09-A-55, the FCA analyzed, in particular, the competition framework surrounding the relationship of the incumbent operator (SNCF) with the newcomers in the passenger land-based transport and other operators of public transport.

As a preventive measure, the FCA provided several recommendations:

- the separation of the management of train stations: SNCF owns the train stations under a legal monopoly. To allow these stations to freely use operators that are competitors of SNCF, separation of the management of stations from the other SNCF activities must seriously be considered: either by the transfer of this activity to an independent infrastructure manager that will ensure non-discriminatory station access to all train operators, or by a legal separation (e.g. entrusting a subsidiary with the mission), or by the functional separation within an autonomous department of SNCF;
- the allocation of space to competitors accessing the train stations;
- the diversification of the activities of SNCF: within the framework of intermodality (ability to provide continuous services between trains and other transport modes), rail transport is the preferred method within the transport chain likely to grant SNCF and its subsidiaries a competitive advantage. Further, SNCF must take care not to distort competition (for example: it cannot propose a vertically integrated transport offer to organizing authorities for interconnections to which competitors of Kéolis, an SNCF subsidiary in urban public transport, have no access;
- the necessary supplying of information relating to rail transport.

1.2 The opinion no. 10-A-13 of June 14, 2010 relating to the crossed usage of client databases (“cross-selling”):

This opinion was issued following the decision no. 09-SOA-02 of December 14, 2009 by which the FCA took the initiative with regard to the issue of crossed usage of client databases in the telecommunication sector. It was revealed that the operators in this sector focused on convergence strategies between fixed-line telephone, mobile telephone and high speed Internet access markets.

As a result, the operators are prompted to make crossed usage of their client databases and to propose “all in one” bundled offers (or convergence offers) such as “triple play” offers (fixed-line, Internet and television) or even “quadruple play” offers (fixed-line and mobile telephone, Internet and television).

Faced with questions from France Télécom-Orange on the legality of this “universal” operator model before its

intention to launch its own quadruple play offer, the FCA, in its opinion no. 10-A-13, that:

- the crossed usage of client databases from one market to another is not likely to distort competition insofar as this data is not inside information and was acquired through merit-based competition;
- on the other hand, Orange's quadruple play offer entails competition risks as the generalization of convergence offers (i) could further increase the cost to change operators thereby deterring the consumer from doing so, (ii) bring to light a risk of foreclosure: households are prompted to migrate towards one single operator for all of their needs, and (iii) may constitute an entry barrier for mobile operators that operate on only one market.

Additionally, the FCA provides several recommendations to improve market fluidity and to facilitate changing operators for consumers with multiple subscriptions with one supplier (reducing commitment terms, synchronizing of the terms of the subscriptions for high speed and mobile services, standardization of certain functionalities to ensure interoperability, etc.).

2. The increased advisory role of the FCA

2.1 Opinion upon request of the Senate

On the basis of Article L.461-5 of the French Commercial Code^[2], the Commission of Economic Affairs of the Senate requested the FCA to render an opinion on how the dairy sector was functioning.

The FCA subsequently rendered the corresponding opinion no. **09-A-49** of October 2, 2009 pursuant to which it recommended the producers and the factories contract between themselves to deal with the issue of the collapse in the price of milk. Insofar as this opinion constitutes the first sector-specific investigation on this issue within the European Union, the FCA was elected, jointly with the Bundeskartellamt, to represent the national competition authorities alongside the European Commission for the preparation of the sector report addressed to the European Council in July 2010.

2.2 Opinion upon the request of the Minister of the Economy

As is more the tradition, the Minister of the Economy requested the FCA to provide a certain number of opinions on the multi-sector agreements that deviated from the mandatory payment terms required by Article L.441-6 of the French Commercial Code.

As explained in our [January 2009 e-newsletter](#)^[3], the LME Law instituted a ceiling for contractual payment terms of 45 days from the end of month or 60 days as from the date of invoice for transactions between companies (Article L.441-6 §9 of the French Commercial Code). This entered into force on January 1, 2009 and was to be respected, failure of which resulting in a civil fine (up to 2 million Euros) as set forth in Article L.442-6 III of the French Commercial Code. Nevertheless, Article 21-III of the LME Law provides a possibility to deviate therefrom temporarily through multi-sector agreements setting forth the particular economic

reasons of this sector that may justify delaying the application of this ceiling and thereby allowing the progressive reduction of the terms used to reach the legal timeframes by January 1, 2012 at the latest.

To be applicable, this type of agreement must be approved by decree after the FCA issues its opinion thereon.

This is the reason why, this year, the FCA was faced with influx of requests from the Minister of the Economy on the basis of these multi-sector agreements deviating from the legal payment terms. Consequently, the FCA issued **34 opinions** – in large part favorable – on such agreements between February 2009 and June 2009.

These opinions concerned sectors as different as those of do-it-yourself/odd jobs, jeweler, manual and artistic activities, arms and munitions for hunting, pneumatics, canned foods, industrial hardware, food supplement, cooperation, etc.

3. The new powers of inquiry and investigation of the FCA

The inquiries and investigations services, which were divided between the DGCCRF and the Competition Council, were regrouped within the FCA by the 2008 reform.

They are now under the general rapporteur's responsibility, who has real powers and means in terms of investigation. Notably, the FCA was given a true investigation department, fully equipped and comprised of investigators from the DGCCRF and former rapporteurs of the ex-Competition Council.

Pursuant to Article L.450-1, the agents within the investigation department of the FCA, led by the general rapporteur, carry out any inquiries or investigations. Nevertheless, the general rapporteur may ask the Minister of the Economy to make available his agent for a specific period of time (Article L.450-6).

In 2009, 6 investigations alone required the visit of 50 sites and the participation of 170 rapporteurs and 39 investigators of the DGCCRF.

Although, as a residual matter, the Minister of the Economy retains certain investigative powers, pursuant to Article L.450-5 paragraph 1 of the French Commercial Code^[4], he must first present to the general rapporteur the investigations he plans on carrying out on acts falling under Articles L.420-1 and L.420-2 of such Code (anti-competitive practices). The general rapporteur has one month to decide whether he wishes to lead the investigation or allow the DGCCRF to do so.

In 2009, out of 81 proposals to investigate sent by the Minister's department, only 30 were led by the FCA.

4. The examination by the FCA of the notification of a

concentration

Principally, the LME Law entrusted the FCA with the examination of all requests for merger authorizations. This responsibility was previously granted to the Minister of the Economy who would solicit an opinion only from the Competition Council.

Therefore, for the first time, the FCA alone examined the notifications of a concentration this year and decided whether to authorize the merger or to require possible undertakings by the concerned companies.

The FCA was particularly active in exercising its new power: on the one hand, on December 16, 2009, it adopted its own guidelines with regard to concentrations, which replaced those of the DGCCRF issued in 2004 (*see our February 2010 e-newsletter*^[5]).

On the other hand, out of the 115 notifications of a concentration it received, the FCA rendered **94 decisions**.

It should be noted that the number of notifications sent to the FCA is just about similar to the number of notifications sent to the Minister of the Economy over the last three years.

The drop in the number of operations carried out, resulting from the economic recession, was offset by the increase in the number of operations notified in the retail sector due to the lowering of the threshold levels^[6].

Out of the 94 decisions rendered by the FCA:

- 88 were authorizations rendered in Phase I, out of which 3 were granted subject to undertakings (these 3 decisions will be detailed in the article entitled *“Decisions and main cases of the French competition authority: first year in review”* also published in our [July-August 2010 e-newsletter](#)), and
- 6 noted the inapplicability of the merger control.

[1] Article L.450-5 paragraph 2 of the French Commercial Code: *“The general rapporteur shall be immediately informed of the results of the investigations carried out by the departments of the Ministry. He may, within the timeframe set forth by decree, propose that the Authority confer jurisdiction upon itself automatically.”*

[2] Article L.461-5 of the French Commercial Code: *“the commissions of Parliament competent in competition matters may hear from the President of the Competition Authority and consult this Authority on any issue falling within the scope of its jurisdiction”*

[3] Cf. article entitled *“Useful Information on the Application of Maximum Contractual Payment Terms Effective since January 1, 2009”*

[4] Article L.450-5 paragraph 1 of the French Commercial Code: *“the Minister of the Economy shall first inform the general rapporteur of the Competition Authority of any investigations he wishes to carry out on acts*

likely to fall under Articles L.420-1 and L.420-2”

[5] Entitled *“Things to Remember about the French Competition Authority’s New Guidelines on Merger Control”*

[6] As a reminder, since the LME Law, merger operation between retail companies must be notified when *“(i) the companies concerned by this merger generate together a worldwide turnover greater than 75 million Euros [instead of 150], and (ii) at least two of these companies generate, in at least one of the concerned departments or regions, a turnover of 15 million Euros [instead of 150]”* (Article L.430-2 II of the French Commercial Code)

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