

Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2023 – France

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The French Competition Authority (“FCA”) is one of the most vigorous national competition authorities (“NCA”) of the European Competition Network. For instance, it opened 333 investigations between 2004 and 2022, not that far behind the 447 investigations initiated by European Commission (see the statistics [here](#)). 2023 was not an exception, with an active fight against anticompetitive practices and a wide range of points of interest, in very diverse sectors, including regulated professions and transports, with issues like Digital Economy or Green Economy always being in the background.

Another point of interest was the umpteenth attempt to rebalance relations in the agro-food industry with the adoption of the Egalim III law, which was unfortunately not quite a success and will probably be source of more complexity for the FCA in the future.

Finally, following the ECJ decision *Eurelec*, in December 2022, two Paris Court of appeal’s judgments were a relevant reminder of the exorbitant powers of the Minister of Economy in the fight against restrictive competition practices.

The umpteenth (failed) attempt to rebalance relations in the agro-food industry: Egalim III

The farmers’ claims making headlines in France this January 2024 ([‘Our farming system is sick’: Mona Lisa soup stunt to be followed by farmers protests in Paris](#)), are an opportunity to recall the recurring theme of rebalancing relations between supplier and distributor in French competition law.

This had led to the adoption in 2018 of the Egalim legislation (law no. 2018-938 of October 30, 2018, for balanced trade relations in the agricultural and food sector [...]), followed by Egalim II in 2021 (law no. 2021-1357 of October 18, 2021, to protect farmers’ remuneration) and Egalim III this past year (law no. 2023-221 of March 30, 2023, to strengthen the balance in commercial relations between suppliers and distributors).

While one of the stated aims of the first laws was to ensure better and fairer remuneration for farmers, this goal has now been somewhat lost in the face of the risk of inflation and lobbies with divergent interests.

The law sets a new timetable and framework for negotiations, bringing back line-by-line control of the counterparties, introducing the notion of good faith in negotiations, maintaining the ban on resale at a loss, and contains many (many) more provisions. The specific regime – whose scope has been extended – now sits side by side with the competition-restrictive practices regime, creating ever-greater confusion for the authorities and the administration.

In the words of Professor Nicolas MATHEY, “the quality of the text calls for numerous comments, which can be summed up in two words: complexity and confusion”, “as long as power relationships are not addressed structurally, the reconciliation of freedom and balance in commercial negotiation will remain largely illusory”[1].

Another tool for rebalancing relations between distributor and supplier is the general regime of restrictive competition practices such as the submission or attempt to submit to a significant imbalance between the parties’ right and obligations or the gaining of an unfair advantage. The Minister of Economy plays a key role in the fight against these practices, as reminded in 2023 by two Paris Court of Appeal’s judgements issued on March 15, 2023.

A notable reminder of the exorbitant powers of the Minister of Economy

Article L. 442-4 of the French Commercial Code allows the Minister of Economy to open legal proceedings to put an end to restrictive competition practices and ask for a civil fine. In fact, victims of these practices wishing to maintain their contractual relations – even if unbalanced – with a crucial co-contractor will not engage into such legal proceedings themselves. Truth be told, during the first cases brought by the Minister of Economy some had opposed the legal action or refused to collect the fine (E.g.: [Cour de cassation, Chambre commerciale, July 8, 2008, no. 07-16761](#)). Hence, a substantial body of jurisprudence was necessary to establish the nature of this legal action, which is autonomous, public, and repressive.

Autonomous, because the Minister of Economy does not need the victims’ approval and is just mandated to inform them of the introduction of such legal proceedings (E.g.: [Cour de cassation, Chambre commerciale, July 8, 2008, no. 07-16.761](#)). The constitutionality of this provision has been declared by the French Constitutional Council, on May 3^d, 2011, in a priority preliminary ruling on constitutionality (see [dec no. 2011-126](#)). The European Court of Justice has confirmed the public nature of the Minister’s action. It ruled that such action is not of a civil or commercial nature when the Minister uses exorbitant powers of investigation ([ECJ, 22.12.2022, C-98/22 – Eurelec](#)).

Two Paris Court of Appeal’s judgements issued on March 15, 2023, strongly remind this particularity ([CA Paris, pole 5, ch. 4, March 15, 2023, no. 21/13227; no. 21/1348](#)). Casino and Intermarché had challenged the admissibility of certain documents and the proceedings on the grounds of deceptive practices from the Minister of Economy but their claims were not recognized by the Paris Court of Appeal’s, since the “the Administration’s methods can be somewhat devious without irremediably infringing the rights of the defence”[2].

Casino and Intermarché attempts to modify the written agreement a few weeks after it had been signed was punished, as the investments required of the suppliers had no counterpart, leading to a civil fine of €500,000 for the first and €2 million for the second based on the ex-article L. 442-6, I,

2°, now L. 442-1, I, 2°, of the French Commercial Code.

An active fight against anti-competitive practices

The FCA issued interim measures against Meta in a decision no. 23-MC-01, on May 4th, 2023 ([dec. 23-MC-01 of May 04, 2023](#)), requested by the French company Adloox, that provides ad verification services on the Internet after Meta's lack of answer to Adloox' requests for access to its two partnerships related to third-party ad verification services.

Article L. 464-1 of the French Commercial Code grants the FCA the power to issue interim measures in case of (1) the existence of serious doubts as to the likelihood of the infringement, (2) serious and immediate harm – i.e. the risk of serious and irreparable damage to the victim or to competition, if the measure is proportionate and limited to what is strictly necessary.

The first condition was met, as Meta's non-transparent, non-objective, and discriminatory criteria for accessing these partnerships could likely be qualified as an exploitation abuse – the refusal being discriminatory (just as in the Google/FCA case – [Paris Court of Appeal, April 7th, 2022, no. 20/08071](#)). The second was also met as the FCA identified “serious and immediate harm to the independent ad verification sector” and to “the interests of Adloox”.

As a result, the FCA has ordered Meta “to suspend the criteria implemented in January 2023” and to create new objective, transparent, non-discriminatory, and proportionate criteria within two months, applied in “the context of a transparent access procedure”. These measures will have to remain in effect until the issuing of a final decision on the merits, the case currently being pending.

On the 29th of June 2023 the FCA issued its final opinion in the cloud sector ([opinion 23-A-08 of June 29, 2023](#)) after announcing on the 27th of January 2022 (announcement which can be found [here](#)) the opening of ex-officio proceedings to issue a market study on competition conditions in the sector.

Nonetheless, it was December 2023 that was especially active in the fight against anticompetitive practices with the issuing of four decisions in just a few days – three cartels and an abuse of dominance case. Selective distribution networks were particularly under scrutiny, with a cartel in the luxury tea sector (FCA, [dec. no. 23-D-12, December 11, 2023](#)) and a second in the luxury watches sector (FCA, [dec. no. 23-D-13, December 19, 2023](#)). It is well established that these networks are lawful when justified by the need for reserved distribution (E.g.: [ECJ, 25.10.1977, case 26/76 – Metro](#)). However, they can become anti-competitive in the presence of litigious practices, in this case the entire and total ban of online sales leading to a fine of €4 million in the first case, and more than €90 million for Rolex in the second.

The third cartel, quite remarkable in terms of the number of professional organizations involved – fifteen were sanctioned – concerned practices in the sector of the manufacture and sale of foodstuffs in contact with materials that may contain bisphenol A (FCA, [dec. no. 23-D-15, December 29, 2023](#); commented [here](#)). The cartelists used various means to ensure that it was impossible to communicate on the absence of this product, so as not to compete on this point, and had therefore delayed the introduction of products not containing bisphenol A as long as possible, even though it was harmful to consumer health, leading to a fine of around €19 million.

Lastly, as Professor David BOSCO pointed out, the gaming industry is “a new laboratory for antitrust experimentation”[3], which can be illustrated by Sony’s €13 million pecuniary sanction on December 20, 2023. Indeed, Sony implemented technical countermeasures to disconnect controllers not produced or licensed by the PS4 console and an opaque licensing policy under the *Official Licensed Product* program that is difficult to integrate in practice, favouring the sales of its own products, resulting in an abuse of dominance on the market for PS4 controllers (FCA, [dec. no. 23-D-14, December 20, 2023](#)).

Nevertheless, in the fight against anticompetitive practices, the Paris Court of Appeal’s judgement from February 16, 2023 (CA Paris, [pôle 5, ch. 7, February 16, 2023, no. 20/14632](#)) constitutes a strong reminder that competition authorities must motivate enough the implementation of the practice as it censured a previous FCA decision ([dec. no. 20-D-11, September 9, 2020](#)) for having imposed a €444 million fine for abuse of dominance through the practice of the smear campaign of a generic medicine. Indeed, the Paris Court of Appeals considered that the arguments raised were part of a public health interest debate and were not malicious or erroneous. The discourse was neither alarming or misleading and hence there was no abuse, and consequently, no abuse of dominance was proven by the FCA.

Regulated professions

The FCA has the authority to deliberate on issues regarding the establishment of notaries, bailiffs, and judicial auctioneers and 2023 was a busy year in France for regulated professions.

On the 1st of February 2023, the FCA launched two consultations ([FCA press release](#)) concerning the freedom of establishment of notaries and commissioners of justice to prepare opinions and review the maps adopted in 2021. The maps for notaries, bailiffs, and judicial auctioneers are made public by joint decrees of the Ministers of Justice and Economy, which must be revised within two years of their adoption. As part of its powers, these maps are first subject to a proposal by the FCA which is also required to make recommendations to improve access to public and ministerial offices. While this procedure is not new, the professions of court bailiff and judicial auctioneer have been brought together as part of the new profession of “commissioner of justice” since July 1st, 2022. Therefore, on the 7th of July 2023 ([opinion no. 23-A-10, July 7, 2023](#)) it was the first time that the FCA issued an opinion and a proposal for a single map for the profession of commissioners of justice. Acknowledging that targets for the appointments of new professionals were met under the latest maps, the FCA issued qualitative recommendations and observations in the 2023-2025 maps.

On the 7th of April 2023, the FCA issued an opinion ([opinion no. 23-A-03, April 7, 2023](#)) on the freedom of establishment for lawyers to the French Administrative Supreme Court and French Supreme Court, recommending the creation of two offices by 2025. The recommendation followed the analysis by the FCA of supply and demand to the courts, confirming the good economic performance of the profession. However, the FCA also acknowledged two uncertain economic factors – a continued decline of demand for services from litigants before the French Supreme Court as well as a start of decrease of activities for the French Administrative Supreme Court in 2022 and the potential limited pool of applicants – leading their cautious approach.

The FCA received two requests for opinions in 2023 relating to the sector or regulated professions. On the 7th of June 2023, the Minister of Economy, requested an opinion ([FCA press release](#)) on the property brokerage market. The FCA, in its draft opinion, analyzed the Act from 1970 governing the profession of property brokers in France and came to the conclusion that it was an obstacle to offering innovative services or lower commission rates, therefore, submitted recommendations to make the Act more flexible. The FCA, as questioned by the Government, issued an opinion on the 27th of July 2023 ([opinion no. 23-A-13, July 27, 2023](#)) on a draft decree relating with the register of security interests over movable property, which would amend provisions of the French Commercial Code. In its opinion, the FCA made four recommendations to clarify the draft decree, with the aim to obtain clearer fees charged by commercial court registrars.

When the FCA deliberates on issues concerning regulated professions, its Board includes two qualified professionals appointed by decree for a non-renewable three-year term. In 2019 Jean Louis Gallet and Frédéric Marty joined the Board of the FCA as qualified professionals working in regulated professions, their term came to the end of the three-year, with the appointment of Walid Chaiehloudj and Camille Chaserant.

Transports

At the crossroads between digital and transports, on the 17th of February 2023 ([E-mobility: FCA press release](#)), the FCA started proceedings to analyze and issue an opinion of the competitive dynamics of the electrical vehicle charging infrastructure sector. The opening of the ex-officio proceedings is aligned with the Paris Agreement setting carbon neutrality as a target for 2050, for which the development of e-mobility participates in the ecological transition and confirms that sustainable development is one of the key priorities of the FCA. In this framework, it sent questionnaires ([E-mobility : FCA questionnaires](#)) to the main stakeholders in the sector.

Following a public consultation in March 2023, the FCA published in November its opinion ([opinion no. 23-A-18, November 29, 2023](#)) on the competitive functioning of the land passenger transport section, informed by the results of the public consultation. With this opinion, the FCA reviewed the implementation of its past recommendations in the sector and updated its competitive analysis by including two dimensions, intermodality and sustainable development. The opinion was released in the context of rail transport soon opening to competition.

A final noteworthy observation, especially after the General Court judgment, *Grail/Illumina* (GC, 13.07.2022, T-227/21 – *Illumina/Grail*) the EU Commission opened a review proceeding of Qualcomm's acquisition of Autotalks following the referral requests of the FCA and six other NCAs under Article 22 of the 2004 merger Regulation ([FCA press release](#)). This is the second time that the EU Commission has accepted referral requests to refer a transaction below the thresholds. The FCA relied on Article 22 describing Autotalks as an innovative company, for which turnover might not reflect the current or future competition potential.

In the words of the FCA, the French economy “faces many challenges: consolidating growth reindustrialize, make a success of the energy transition, assert our sovereignty in an increasingly fragmented world. Meeting these challenges is even more urgent that the answers are long-term” ([FCA 2025 roadmap](#)). 2023 was certainly a step in the right direction.

[1] N. MATHEY, “Distribution – Egalim 3 : loi n° 2023-221 du 30 mars 2023 tendant à renforcer l’équilibre dans les relations commerciales entre fournisseurs et distributeurs”, *Contrats Concurrence Consommation*, no. 8-9, September 2023, Etude no. 8 ; <Distribution – Egalim 3 : loi n° 2023-221 du 30 mars 2023 tendant à renforcer l’équilibre dans les relations commerciales entre fournisseurs et distributeurs – Etude par Nicolas MATHEY – Lexis 360 Intelligence>.

[2] N. MATHEY, “Déséquilibre significatif – Soumission et tentative de soumission et action du ministre”, *Contrats Concurrence Consommation*, no. 5, May 2023 ; <Déséquilibre significatif – Soumission et tentative de soumission et action du ministre – Commentaire par Nicolas Mathey – Lexis 360 Intelligence>.

[3] D. BOSCO, “Gaming – L’industrie du gaming, nouveau laboratoire d’expérimentation antitrust”, *Contrats Concurrences Consommation*, no. 1, January 2023 ; Gaming – L’industrie du gaming, nouveau laboratoire d’expérimentation antitrust – Repère par David Bosco – Lexis 360 Intelligence.

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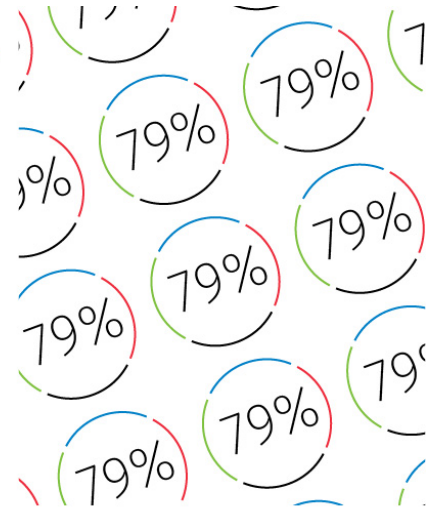
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