The Public Competition Enforcement Review

Fourth Edition

Editor
Shaun Goodman

Law Business Research

The Public Competition Enforcement Review

This article was first published in The Public Competition Enforcement Review, 4th edition (published in April 2012 – editor Shaun Goodman).

For further information please email
Adam.Sargent@lbresearch.com

The Public Competition Enforcement Review

Fourth Edition

Editor
Shaun Goodman

Law Business Research Ltd

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGER
Adam Sargent

MARKETING MANAGERS
Nick Barette, Katherine Jablonowska

MARKETING ASSISTANT
Robin Andrews

EDITORIAL ASSISTANT
Lydia Gerges

PRODUCTION MANAGER
Adam Myers

PRODUCTION EDITOR
Joanne Morley

SUBEDITOR
Caroline Rawson

EDITOR-IN-CHIEF
Callum Campbell

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

ISBN 978-1-907606-33-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

BAKER & McKENZIE

BAYKANIDEA LAW OFFICES

BULBOACA & ASOCIATII SCA

CAMPOS MELLO ADVOGADOS

CLEARY GOTTLIEB STEEN
& HAMILTON LLP

D'EMPAIRE REYNA ABOGADOS

DLA PIPER

DRYLLERAKIS & ASSOCIATES

ELVINGER, HOSS & PRUSSEN

ESTUDIO BERGSTEIN

FRORIEP RENGGLI

GIDE LOYRETTE NOUEL

KASTELL ADVOKATBYRÅ AB

KHAITAN & CO

KIRKLAND & ELLIS INTERNATIONAL LLP

KIRKLAND & ELLIS LLP

LEE AND LI,
ATTORNEYS-AT-LAW

LLOREDA CAMACHO & CO.

L PAPAPHILIPPOU & CO LLC

MARVAL, O'FARRELL & MAIRAL

NATÁLIA OLIVEIRA FELIX

NISHIMURA & ASAHI

NOERR OOO

R&P LEGAL

RAJAH & TANN LLP

STEK ADVOCATEN BV

STEPANOVSKI, PAPAKUL
& PARTNERS

STIBBE

WILHELM & ASSOCIÉS

ZHONG LUN LAW FIRM

CONTENTS

EDITOR'S PREFACE

Notwithstanding the economic turbulence of the past year, public antitrust enforcement in 2011 remained strong, reflecting a clear belief among antitrust regulators that efficient and effective enforcement of competition laws can be a positive contributor to economic growth. Cartel enforcement therefore remained a priority for regulators globally. While cases of explicit collusion continue to be uncovered, the cartel agenda is also gradually turning its attention to less obvious antitrust infringements, focusing not only on 'smoking gun' documents identifying apparently unlawful activity, but also on more subtle economic analyses of pricing and other market data. It has never been more important for companies to ensure that compliance systems do not simply 'tick the box'; they need to be specifically tailored to individual companies and industries and rigorously applied.

The need for international coordination in cartels cases is also very apparent. In a key 2011 judgment in the *Pfleiderer* case, the European Court of Justice refused to provide blanket protection against disclosure of leniency statements in private damages actions. Instead, where a claimant in national litigation seeks access to the file of a national competition authority, including leniency material, the national court must balance the importance of protecting the leniency regime (and withholding any leniency statement from disclosure) against the possibly greater interest of the claimant in obtaining effective redress for an antitrust infringement. This reflects an increasing recognition that, while the leniency regime is important in identifying and prosecuting cartel cases, an effective system of private actions – including the availability of damages for competition law infringements – is also key to ensuring effective deterrence. While courts outside the European Union have so far refused to require disclosure of leniency materials on grounds of international comity, this principle may be threatened as and when national courts develop a more nuanced line.

A further area of international interest is the application of the antitrust rules in the digital economy. Following the 2007 judgment of the US Supreme Court in *Leegin*, which subjected vertical pricing restraints to a 'rule of reason' approach, there is a

potential disconnect between the US and EU regimes with regard to the anti-competitive nature of resale pricing requirements. Vertical supply and distribution agreements have subsequently raised their antitrust profile, as exemplified by the ongoing investigation – both in the US and the EU – of the vertical aspects of agency agreements for the sale of e-books. Such cases are likely to revisit and refresh established precedent on the nature of a 'true' agency arrangement, and on the circumstances in which manufacturers and retailers may agree on pricing structures, particularly in the online context.

I would like to thank all of the contributors for their energy and efforts in the preparation of this Review.

Shaun Goodman
Kirkland & Ellis International LLP
London
May 2012

Chapter 10

FRANCE

Pascal Wilhelm, Delphine Prioux and Anne-Sophie Delhaise[1]

I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

2011 was a year devoted to the consolidation of the 2008 reform by which the French Competition Authority ('the FCA') was granted more powers and extensive resources. With this new regime, set out by the French law of 4 August 2008, known as the Law on the Modernisation of the Economy ('the LME'), and its implementing decree of 13 November 2008, the FCA has taken over the full spectrum of competition enforcement powers (cartel and antitrust enforcement, as well as merger control). It has also been granted the right to issue, on its own initiative, opinions on competition-related issues and to submit recommendations to the government in order to improve 'the competitive functioning of the markets'.[2]

In 2011, the FCA established its priorities in order to allocate its resources to both its enforcement activity as well as competition advocacy. It continued its battle against hard-core restrictions, especially with regards to cartels, through the implementation of its leniency programme and its new guidelines on the calculation of fines published on 16 May 2011.[3]

In relation to competition advocacy, an increase of the FCA's institutional activity concerning the promotion of competition was observed by way of different means including the publication of three sets of guidelines after wide public consultation, opinions and recommendations on various competition-related issues, the publication of brochures

1 Pascal Wilhelm is the managing partner, Delphine Prioux and Anne-Sophie Delhaise are senior associates at Wilhelm & Associés. The authors would like to thank Anna Kellner for her contribution to this chapter.

2 Article L462-4 of the French Commercial Code.

3 Notice of 16 May 2011 on the Method Relating to the Setting of Financial Penalties

dedicated to a 'better understanding of competition law',[4] regular interaction with the press, and the provision of online information.

ii Enforcement agenda

Compared with 2010, there was a relatively low number of decisions rendered by the FCA in the field of antitrust and cartels (21 in 2011 compared with 40 in 2010). It should, however, be noted that, at the time of writing, nine decisions have already been issued by the FCA during the first months of 2012.

2011 has also seen the confirmation of some successfully negotiated procedures, with five commitments decisions,[5] two settlement decisions and one leniency decision. This trend seems set to continue in 2012, with two decisions already rendered in the context of a settlement procedure, as well as one commitment decision and one leniency case.

Moreover, with 20 opinions rendered in 2011 (in addition to the launch of two sector-wide inquiries), the importance of the FCA's advisory capacity can also be confirmed. The FCA acknowledged its role in the capacity as regulator, which it had started to develop over recent years. In relation to sectoral inquiries, the FCA has been particularly active in the retail sector and in the telecommunications and network industries.

The main developments in 2011 and early 2012 relate, however, to the publication, after wide public consultation, of three sets of guidelines.

On 16 May 2011, the FCA published its Notice on the Method Relating to the Setting of Financial Penalties, which sets out the different steps to be followed in the assessment of antitrust fines in application of Article L464-2, I and II of the French Commercial Code.

The FCA subsequently released two key documents in February 2012: a framework document on antitrust compliance programmes and a notice on settlement procedures in antitrust cases.[6]

The Notice of 10 February 2012 on Settlement Procedures formalises the FCA's decisional practice developed since 2001. According to Article L464-2, III of the French Commercial Code, companies that have been accused of infringing competition law may waive their rights to challenge the charges notified by the FCA in return for a potential reduction in fine. The aim of such procedure is to simplify and accelerate antitrust investigations, thus allowing the FCA to allocate its resources more efficiently.

The Notice explains how the FCA will take into account settlement procedures and any commitments made by companies with regard to their future behaviour. If commitments are submitted, the Notice provides for a reduction in fine of between 5 per cent and 15 per cent (for instance, a reduction of up to 10 per cent may be granted if companies commit to setting up an internal compliance programme). This reduction

4 Collection Déclic: 'Mieux comprendre la concurrence', available at www.autoritedelaconcurrence.fr/user/standard.php?id_rub=393.

5 Article L464-2, I of the French Commercial Code (Commitments submitted before the charges have been notified).

6 Press release of the FCA of 10 February 2012 on 'Corporate compliance programmes and antitrust settlements'.

may come in addition to the reduction of 10 per cent resulting from the settlement procedure itself (i.e., a potential maximum total fine reduction of 25 per cent).

The framework document on antitrust compliance programmes gives guidance on how companies may set up an effective *ex ante* compliance programme and how the FCA will take these efforts into account when handling antitrust cases.

Mirroring the position adopted by the European Commission in its brochure on compliance matters,[7] the FCA indicated that the fact that a company has a compliance programme in place would not in itself serve as a mitigating or aggravating factor when setting antitrust fines. The FCA did, however, incorporate some of the observations submitted during the public consultation preceding the publication of the framework. In particular, the FCA considers that having a compliance programme may be of benefit with respect to its investigations into vertical agreements and abuses of dominant positions, which are traditionally not eligible for leniency. Accordingly, in the event that an undertaking that has implemented a compliance programme comes to discover such misconduct (not eligible under leniency), it may benefit from mitigating circumstances if it can prove that it has ceased the misconduct before the FCA proceeds with any inspection or investigation.

Although the FCA has recognised that there is no 'one-size-fits-all' approach to the matter, the FCA recommends five key features for an efficient compliance programme. The FCA is aware of the fact that compliance programmes have to be tailored according to the means and resources available to each company at hand. It does, however, believe that it is important for all companies to be able to set up such a programme and stresses that the five key features can be adapted for small and medium-sized companies ('SMEs').

With these three sets of guidelines, the FCA aims to provide companies with better guidance and to enhance the transparency of its procedures. Moreover, companies will be able to better anticipate the consequences of infringing competition law, which thereby enhances the deterrent effect of the rules in place. It is also worth mentioning that these guidelines have a binding effect on the FCA (except for specific cases of general interest).

Another interesting subject this year relates to the fact that numerous judgments have been rendered on the matter of visits and the seizure of incriminating evidence (dawn raids). These rulings, which followed two judgments of the European Court of Human Rights ('ECHR') of 21 December 2010,[8] particularly concerned the legality of global and indifferent seizures of electronic mailboxes,[9] which, in addition, may run the risk of including documents covered by legal privilege.[10]

---

7 European Commission, 'Compliance Matters: What companies can do better to respect EU competition rules', November 2011.

8 ECHR, 21 December 2010, Case No. 29408/08, *Canal Plus and others v. France*; and Case No. 29513/08, *Compagnie des Gaz de Pétrole Primagaz v. France*.

9 For example, Supreme Court, Chamber for Criminal Matters, 30 November 2011, Case No. 10-81.748; 14 December 2011, Case No. 10-85.293; as well as 16 June 2011, Case No. 11-80.345; confirmed by three cases rendered on 11 January 2012, Case Nos. 10-88.193, 10-88.194, 10-88.197 (in relation to the inseparability of electronic mailboxes).

10 In order for a document to be covered by professional secrecy, it needs to have been formally identified as such by the defendant (i.e., the correspondence from or to his or her lawyer needs

Moreover, several judgments were rendered in relation to the judicial control of the orders authorising such visits or the seizure of incriminating evidence.[11]

II CARTELS

i Significant cases

Laundry detergent cartel: cartel on price fixing and commercial promotions

In December 2011, the FCA imposed fines totalling €367.9 million in relation to a cartel between four major laundry detergent manufacturers active in France.[12] The manufacturers (Unilever, Procter & Gamble, Henkel and Palmolive) had coordinated their sale prices and promotional policies for the grocery retail sector. The cartel agreement, which lasted between 1997 and 2004 (with an interruption of several months between October 1998 and November 1999), concerned the entire spectrum of major laundry detergent brands available in France.

The case was handled under the leniency programme whereby Unilever, who first disclosed the agreement, obtained full immunity from fines and the three other undertakings each received reductions in fines of between 15 per cent and 25 per cent for cooperating with the FCA throughout the investigation.

It is worth noting that the European Commission also fined Unilever, Procter & Gamble and Henkel on 13 April 2011. On 22 April 2010, it had informed the FCA that the two cases were separate and that the FCA had jurisdiction over the practices that had occurred in France.

The FCA aligned its rulings with EU law in several respects, especially with regard to the criteria used to qualify the cartel as a complex and continuous infringement.[13] One of the most notable aspects of this decision relates, however, to the fact that it is the first application by the FCA of its newly implemented Notice on the Method Relating to the Setting of Financial Penalties. In accordance with this Notice, the FCA specified for the first time each step of the analysis, with a particular emphasis on the importance of the damage caused to the economy.

It should also be pointed out that, although it was not applied to the case at hand (due to the lack of significant contributions to procedural efficiencies), the FCA allowed

---

to relate to the exercise of the rights of defence in order for it to be covered by legal privilege): Supreme Court, Chamber for Criminal Matters, 30 November 2011, Case No. 10-81.748.

11 In numerous judgments, the Supreme Court has confirmed that the review, by the same panel of judges, of the regularity of the order authorising visits and seizures, and at the same time, of the decision on the merits rendered by the FCA, is contrary to the principle of impartiality provided for in Article 6, Section 1 of the European Convention on Human Rights (e.g., Supreme Court, Chamber for Commercial, Financial and Economic Matters, 21 June 2011, Case No. 09-67.793; 14 February 2012, Case Nos. 11-11.750 and 11-13.130).

12 Decision No. 11-D-17 of 8 December 2011.

13 For the qualification of a cartel as a complex and continuous infringement, see also: Supreme Court, Chamber for Commercial, Financial and Economic Matters, 15 March 2011, Case No. 09-17.055.

for the coexistence of leniency and settlement procedures in principle (an approach that was subsequently integrated into the final Notice on Settlement Procedures).

Cartel involving the restoration of historic monuments: sharing of public markets

In January 2011, the FCA imposed fines totalling €10 million on 14 undertakings for having shared almost all public markets for the restoration of historical monuments in three French regions.[14] This exchange of information was qualified as a complex and continuous cartel.

This was the first time that the FCA applied the presumption that a parent company was liable for the unlawful conduct of its wholly owned subsidiary in a case where only French competition law was applicable. It had already adopted this EU law principle in a case where Article 101 of the Treaty on the Functioning of the European Union ('the TFEU') was applicable.[15]

Cartel in the banking sector: unjustified interbank fees

In September 2010, the FCA fined 11 French banks €384.9 million for having charged unjustified interbank fees during the transitory period towards a new digital system for the processing of cheques.[16] In February 2012, the Paris Court of Appeal overturned this decision in its entirety and ordered the refund of sums paid.[17]

The court considered that the transitory agreement, which had introduced the interbank fees under investigation, could not be qualified as a secret cartel, as the FCA had failed to demonstrate the existence of a restriction to competition by object, thus rendering a detailed analysis of the effects of the agreement on competition indispensable. It is likely that the FCA will appeal against this decision.

Cartel in the sector of temporary employment

In March 2011, the Supreme Court rendered a judgment that clarified certain aspects of the impact of settlement procedures.[18]

In the case at hand, several members of the cartel (Adia, Adecco, Groupe Vedior France and VediorBis) had waived their rights to challenge the charges. On the basis of the settlement procedure, these companies obtained a reduction in fine. The company Manpower, on the other hand, did contest the charges notified. It argued that the FCA could not infer the existence of an agreement from the settlement procedure initiated by other members of the cartel, and would consequently have to prove more than just Manpower's participation in the cartel.

Confirming the rulings of the FCA and the Court of Appeal, the Supreme Court, however, found that the procedures initiated by the other members of the cartel were not

14 Decision No. 11-D-02 of 26 January 2011.

15 Decision No. 09-D-36 of 9 December 2009, *Orange Caraïbes v. France Telecom.*

16 Decision No. 10-D-28 of 20 September 2010.

17 Paris Court of Appeal, 23 February 2012, *LCL and others v. Autorité de la concurrence.*

18 Supreme Court, Chamber for Commercial, Financial and Economic Matters, 29 March 2011, Case Nos. 10-12.913 and 10-13.686

neutral for the company challenging the charges: for this company, the FCA only has to demonstrate its personal participation in the cartel.

ii Trends, developments and strategies

The most significant cartel case in France in 2011 has most certainly been the laundry detergent cartel. It is the fifth leniency case in France since the introduction of the leniency procedure in 2001 but certainly the most important. The fines imposed have been the highest yet in a leniency case. In addition, it is the first time in France that a leniency case has concerned a mass-market product and only the second time that a 'type 2' leniency has been awarded.[19]

Moreover, the FCA recognised for the first time that undertakings may benefit, under certain conditions, from both the provisions on leniency and those on settlement proceedings. As has already been mentioned, this was reaffirmed by the FCA in its final Notice on Settlement Procedures. The FCA noted, however, that such a cumulative application can only be justified in cases where sufficient procedural gains have been demonstrated.

More generally, it attested to the FCA's willingness to take advantage of leniency procedures. With this decision and the subsequent guidelines on settlement procedures and on compliance programmes, the FCA confirmed the importance of negotiated procedures in French competition law.

In relation to the cartel involving the restoration of historical monuments, it should be pointed out that it was not only sanctioned by the FCA, but also by the French criminal courts. These proceedings resulted in nine company executives and managers being subject to conditional prison sentences.[20] To date, criminal penalties have not been frequent under French law, but they might be part of a rising trend.

iii Outlook

In October 2011, the FCA appointed its own Leniency Officer, following the example of its Dutch and German counterparts.

Her role is to participate in company hearings and to advise the case officer in charge of leniency applications. At the same time, the Leniency Officer cooperates with other competition authorities in cases of multiple leniency applications.

This nomination shows, on the one hand, that the fight against cartels continues to be one of the FCA's priorities and that leniency programmes are considered an effective tool with which to bring cartels to light. On the other hand, it attests to the FCA's willingness to consolidate the cooperation between competition authorities with regard to the respective national and European proceedings.

Further leniency cases can be expected during the next few years. It is worth noting that four leniency applications were submitted in 2011 and are currently pending

19 The first one concerned the steel cartel in Decision No. 08-D-32 of 16 December 2008.

20 Judgment rendered by the Criminal Court of Rouen on 27 January 2011.

before the FCA. At the time of writing, a leniency case in the context of a Franco-German cartel in the packaged flour sector, gave rise to a decision of the FCA.[21]

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Significant cases

Corsica Cement case: fine calculation in relation to an abuse of dominance

In July 2011, the Supreme Court upheld a judgment of the Paris Court of Appeal, which considered that the annulment of a decision of the FCA in relation to an abuse of dominance did not imply any modification of the fine imposed.[22] Two French cement producers (Lafarge Ciment and Vicat) had been sanctioned by the FCA for having adopted practices that aimed at, and had the effect of, maintaining their dominant position on the Corsican cement market to the detriment of their competitors. These practices had been sanctioned by the FCA both as anti-competitive agreements (cartel) and as an abuse of a collective dominant position.

The Paris Court of Appeal subsequently reversed the decision of the FCA, considering that the practices could not be qualified as an abuse of a collective dominant position. Nevertheless, notwithstanding the change in legal bases, the Paris Court of Appeal did not reduce the fine imposed.

The Supreme Court ruled that the Paris Court of Appeal correctly concluded that the fine was not to be adjusted, since the change of legal basis did not modify the anti-competitive nature of the undertakings' conduct, nor did it modify the importance of the damage caused to the economy. Thus, the fine was not determined in relation to the number of enforceable legal bases (cartel or abuse of collective dominance) in order to impose penalties, but with regard to the nature of the practices and their impact on the economy.

Diddl case: resale price maintenance and calculation of fines

Another interesting decision concerning fines, and more specifically their method of calculation, was rendered on 15 December 2011.[23] The FCA fined Kontiki, the exclusive supplier in France of toy products featuring the Diddl mouse character, for resale price maintenance between 2003 and 2007. Kontiki required its retailers to sign an agreement, which subjected their listing on the website 'www.diddl.fr' to their compliance with retail prices presented as 'recommended prices'.

Even though recommended maximum prices are prohibited neither under French nor EU law, the FCA considered that the prices had in fact been imposed in the case at hand. The FCA noted that the retailers considered that they were not free to sell the

21 Decision No. 12-D-19 of 13 March 2012 (a German miller applied for leniency in 2008, which gave rise to the case before the FCA).

22 Supreme Court, Chamber for Commercial, Financial and Economic Matters, 12 July 2011, Nos 10-17.482 and 10-17.791, *Stés Lafarge Ciment SA* and *Vicat SA*.

23 Decision No. 11-D-19 of 15 December 2011.

products below these prices, and some retailers recalled that they had received warnings or were subject to pressure when they applied prices below the 'recommended' ones.

To determine the amount of the fine (€1.34 million), the FCA took Kontiki's exceptional situation into account: its turnover had decreased significantly in the years following the events. This situation led the FCA to reduce the basic amount of the fine by 90 per cent, which had been calculated according to the criteria set out in the Notice on the Method Relating to the Setting of Financial Penalties (gravity of the behaviour and damage to the economy).

Météo-France: commitments preventing cross-subsidies

In January 2012, the FCA made commitments binding in a cross-subsidies case.[24] Météo Consult had filed a complaint in relation to practices carried out by Météo-France, a state-owned administrative institution, on the market for meteorological services to businesses. It accused Météo-France of using charges and subsidies allocated to its public service activities (under monopoly) in order to fund its business activities, thereby allowing it to practice predatory pricing with the purpose of excluding its competitors from the market.

In a preliminary assessment issued in September 2011, the FCA considered that there was a risk of cross-subsidies between the public service activities and the business activities of Météo-France. The public company did not have a detailed analytical accounting system for its costs, income and public subsidies. In order to address the competition concerns, Météo-France submitted several commitments, which were subsequently rendered mandatory by the FCA.

Météo-France notably committed to changing its accounting system for an unlimited period of time in order to clearly separate its public service activities under monopoly from its business activities open to competition. It also accepted the appointment (for a period of five years) of an independent auditor in charge of auditing the accounting system. Furthermore, Météo-France has undertaken to provide the FCA with a summary statement of its costs and income on an annual basis up to 2016.

ii Trends, developments and strategies

Negotiated procedures have recently come to compete with litigation proceedings. This past year has shown that it is especially in the context of antitrust cases that the FCA is more and more willing to take commitments decisions. Besides the *Météo-France* case mentioned above, commitments were made mandatory in several other cases. This was notably done in relation to an abuse of economic dependence in the retail distribution sector.[25] Moreover, the FCA made commitments binding in abuse of dominance cases with regard to exclusivity agreements[26] and discriminatory practices.[27]

---

24 Decision No. 12-D-04 of 23 January 2012.

25 Decision No. 11-D-20 of 16 December 2011, *Carrefour*.

26 Decision No. 11-D-08 of 27 April 2011, *Accentiv' Kadeos*.

27 Decision No. 11-D-18 of 15 December 2011, '*Accès au scanner et à l'IRM du centre hospitalier d'Arcachon*'.

In relation to commitments, 2011 was also marked by the FCA's concern about the monitoring of (behavioural) commitments.

The latest decisional practice has shown the difficulties encountered when monitoring commitments, not only in the context of merger control,[28] but also in antitrust proceedings. A decision rendered in July 2011 (in relation to commitments made by the city of Marseille with regard to funeral services) particularly reaffirmed that, by not meeting the commitments made, companies do risk penalties.[29]

2011 has thus confirmed the FCA's willingness to further increase the use of commitments procedures and ensure their success.

iii Outlook

The issue of fine calculation will definitely still be under the spotlight during the next year. Similarly, the FCA will continue to pursue the implementation of the other two new sets of guidelines on settlement procedures and compliance.

Furthermore, the upcoming months will be interesting to monitor with regard to the selective distribution case of *Pierre Fabre*, currently pending before the Paris Court of Appeal after a preliminary ruling by the CJEU.[30]

It should be recalled that in the *Pierre Fabre* case, the CJEU considered that clauses inserted into a selective distribution agreement, prohibiting online sales of the contract products in general and absolute terms, constitutes a restriction by object, thereby falling under Article 101(1) of the TFEU.

Together with the likely appeal by the FCA in the interbank fees case mentioned previously, clarifications will probably be given in relation to the appreciation of a restriction to competition by object.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

As has already been mentioned, the Commercial Code grants the FCA the power to issue, on its own initiative or upon request of public bodies (such as the government, courts or sector regulation authorities), consultative opinions (i.e., without imposing fines) on any competition related matter. This includes the power to carry out sector-wide inquiries. In 2011, the FCA published 20 consultative opinions, including one on its own initiative.[31]

28 Decision No. 11-D-12 of 20 September 2011, *Canal Satellite/TPS*.

29 Decision No. 11-D-10 of 6 July 2011, '*Affaire des services funéraires dans la ville de Marseille*'.

30 CJEU, 13 October 2011, Case No. C-439-09, *Pierre Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la Concurrence and Ministre de l'Economie, de l'Industrie et de l'Emploi.*

31 Opinions No. 11-A-02 of 20 January 2011 (online gambling market), No. 11-SOA-01 of 4 July 2011 (car maintenance and repair), No. 11-SOA-02 of 4 July 2011 (e-commerce).

i Significant cases

Telecommunications sector

In 2011, the FCA was particularly active in the telecommunications sector, and published several consultative opinions in this area. These opinions related, in particular, to competition concerns in the wholesale broadband market,[32] the wholesale mobile voice call termination market,[33] and the fixed telephony market,[34] as well as to the risk of exchange of information on the radio sites of mobile operators.[35]

The most interesting opinion in this context is opinion No. 11-A-05 of 8 March 2011 on the competitive aspects of the broadband and very high broadband wholesale market. This opinion followed a request from the authority for electronic and postal communications ('ARCEP') and took the European Commission's Next Generation Access Recommendation of 20 September 2010 into account for the first time.

In its opinion, the FCA recommended that the regulation regarding high speed Internet in high-density zones imposed on the incumbent operator France Telecom be reduced. Conversely, the FCA underlined that in less densely populated areas, where the level of competition is lower and France Telecom still holds a strong position, sustained regulation remains. With regard to the optical-fibre market, it suggested introducing a mid-term clause (in 12 or 18 months) to review the efficiency of the regulatory framework. Finally, the FCA suggested that, following the implementation of the EU telecoms framework, ARCEP should begin preliminary works on the possible separation of functions of France Telecom's monopoly and its competitive activities.

Retail sector

Following its two consultative opinions rendered in 2010,[36] the FCA kept the food retail sector under close scrutiny in 2011 and early 2012.

First, it accepted commitments from Carrefour and made them legally binding, aiming to address competition concerns resulting from its practices towards one of its franchisees.[37] The commitments proposed by Carrefour are in line with the analysis carried out by the FCA in its opinion No. 10-A-26 relating to affiliation contracts with the network, in which the FCA had denounced the restrictive clauses integrated into contracts between retail groups and their affiliated shops. According to opinion No. 10-A-26, it is especially the excessive duration of agreements and the multiplicity of restrictive contractual clauses that raise concern.

Second, on 11 January 2012, it issued an opinion stating that the food retail market in Paris was extremely concentrated, with Casino holding a dominant position (even if it had not formally been qualified as such). Despite the absence of any anti-competitive

32 Opinions No. 11-A-05 of 8 March 2011, No. 11-A-08 of 10 June 2011, and No. 11-A-10 of 29 June 2011.

33 Opinion No. 11-A-19 of 9 December 2011.

34 Opinion No. 11-A-07 of 27 May 2011.

35 Opinion No. 11-A-20 of 15 December 2011.

36 Opinions No. 10-A-25 and No. 10-A-26 of 7 December 2010.

37 Decision No. 11-D-20 of 16 December 2011.

behaviour, the FCA suggested the creation of a new instrument – structural injunctions – in order to be able to modify the structure of the market.[38]

Energy

On 15 March 2011, the FCA published an opinion on the draft implementing decree of the law relating to the new organisation of the French electricity market ('loi NOME' of 7 December 2010).[39] This law grants new entrants access to the nuclear energy market – at a regulated price and during a transitional period (until 31 December 2015). The final text of the decree, published on 29 April 2011,[40] took the FCA's recommendations, at least partially, into account.

Railway market

On 3 October 2011, the FCA published two opinions concerning new entrants having access to passenger railway stations.[41] It invited the public authorities to prepare for the next stage of the opening up of the railway market. It suggested that, until a legal unbundling has been achieved in the medium term, a functional separation of the railway station operator ('Gares et Connections'[42]) should take place. Understanding the rigidity of the sector, the FCA agreed with the government that, during the first phase of the opening up of the market, a step-by-step approach should be privileged; however, it strongly recommended reinforcing the powers of the sectoral regulator, especially with regards to *ex ante* and *ex post* control of prices for services and infrastructures.

Online gambling

On 20 January 2011, the FCA issued an opinion on the newly opened online gambling market.[43] It should be noted that this market had been liberalised following the entry into force of Law No. 2010-476 of 12 May 2010. The law allows online betting and gaming operators to offer bets on certain sports and horse-racing events as well as certain poker games, when licensed by the newly created French authority in charge of regulating online games and bets.

In this respect, the FCA notably issued a series of recommendations in order to avoid any distortion of competition between the ex-monopolies, La Française des Jeux and PMU, and new entrants.

ii Trends, developments and strategies

As previously mentioned, in its opinion No. 12-A-01 relating to the retail sector, the FCA proposed structural injunctions as a new tool for modifying the structure of the market.

38 Opinion No. 12-A-01.

39 Opinion No. 11-A-06.

40 Decree No. 2011-466 of 28 April 2011.

41 Opinions No. 11-A-15 and No. 11-A-16 of 29 September 2011.

42 A legal entity within SNCF, in charge of managing all passenger stations of the national railway network.

43 Opinion No. 11-A-02.

In the event that such a proposal was to be implemented in the existing national legal framework, it would constitute a major change in French competition law. It would enable a competition authority to oblige a market participant to sell assets in order to reduce a market position attained on merits, notwithstanding the absence of any anti-competitive activity.

iii Outlook

On 4 July 2011, the FCA announced the launch of two vast sector-wide inquiries concerning the e-commerce sector and the car repair and maintenance sector. These proceedings are still pending.[44]

V CONCLUSIONS

i Pending cases and legislation

It has already been mentioned that the pending case of *Pierre Fabre* might give some clarifications as to the qualification of a restriction of competition by object.

More generally, it should be noted that the reviewing courts continue to regularly seek the advice and clarifications on competition law matters from the Court of Justice of the European Union by means of preliminary questions. Several cases are currently pending and it will be worth monitoring their outcome.[45]

Moreover, it will be interesting to follow the developments in the *Oracle* case. On 10 January 2012, the FCA declined to impose emergency measures against Oracle but allowed for the continuation of proceedings on the merits as to Oracle's practices in the market for high-end corporate servers;[46] however, it is likely that the case will eventually be handled by the European Commission, as several other markets within the European Union are concerned.

As concerns legislation, the upcoming year will be eventful with regard to the adoption of the 'law reinforcing the rights, protection and information of consumers', which has been submitted to the National Assembly for its second reading. Following the opinions rendered by the FCA in 2010 in relation to the retail sector,[47] the draft law provides for the setting up of standard affiliation contracts allowing affiliates to change retailers (Article 1).[48]

---

44 *Supra*, footnote 32.

45 Case C-226/11, Reference for a preliminary ruling from the Supreme Court, lodged on 16 May 2011, *Expedia Inc v. Autorité de la concurrence and others*; Case C-158/11, Reference for a preliminary ruling from the Supreme Court, lodged on 1 April 2011, *Auto 24 SARL v. Jaguar Land Rover France.*

46 Decision No. 12-D-01 of 10 January 2012 *concerning a request for interim measures with respect to the practices engaged in by Orace Corporation and Oracle France*.

47 Opinion Nos. 10-A-25 and A-26 of 7 December 2010.

48 For more information, see www.assemblee-nationale.fr/13/dossiers/protection_information_consommateurs.asp.

ii Analysis

As has been shown in the preceding paragraphs, the FCA has been increasingly resorting to alternative procedures, which have come to complement or replace traditional sanctions. In addition, the FCA regularly reverts to its advisory capacity and to instruments of soft law, confirming its willingness to be regarded as a regulator.

It should finally be noted that the FCA actively pursues its cooperation with other national competition authorities within the European Competition Network.

Appendix 1

ABOUT THE AUTHORS

PASCAL WILHELM

Wilhelm & Associés

Pascal Wilhelm is the managing partner of Wilhelm & Associés, a Paris law firm specialising in competition law, IP law, corporate litigation and public law. In addition, he is also head of the competition law practice group. He has over 20 years of experience in this area, advising his clients on all aspects of EU and French competition law, including abuses of dominance, vertical agreements, cartels, litigation, and merger control. He has led high-profile public enforcement cases before the French Competition Authority and the Paris Court of Appeal. Mr Wilhelm is a renowned expert in the media sector (TV, press and radio). He is regularly quoted as a leading individual in major rankings such as *Chambers Global* or the *Legal 500*.

DELPHINE PRIOUX

Wilhelm & Associés

Delphine Prioux is a senior associate at Wilhelm & Associés. She joined the practice in 2003 and primarily works within the competition law practice group, advising clients on all aspects of EU and French competition law, including abuses of dominant positions, vertical agreements, cartels, litigation, and merger control.

ANNE-SOPHIE DELHAISE

Wilhelm & Associés

Anne-Sophie Delhaise has been practising French and EU competition law since 2005. As a senior associate at Wilhelm & Associés in Paris, Anne-Sophie regularly advises clients and handles disputes before the French and European authorities and courts on all aspects of competition law, especially abuses of dominant position, vertical agreements and merger control.

WILHELM & ASSOCIÉS
70 boulevard de Courcelles
75017 Paris
France
Tel: +33 1 53 93 92 30
Fax: +33 1 53 93 92 31
pwilhelm@wilhelmassocies.com
dprioux@wilhelmassocies.com
asdelhaise@wilhelmassocies.com
www.wilhelmassocies.com