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Insights

TRANSPOSITION OF THE ECN+ DIRECTIVE: OVERVIEW OF THE NEW DEVELOPMENTS IN COMPETITION LAW

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Order No. 2021-649 of May 26, 2021 (the "Order") finalizes the transposition into French law of the European Directive so-called "ECN +" of December 11, 2018, which aims to strengthen the powers of national competition authorities and increase their effectiveness. The Order then completes the provisions of the so-called "DDADUE" law, which came into force on December 6, 2020, and of the decree of May 10, 2021, which is dedicated to the improvement of the leniency program. All these texts substantially reinforce the powers of the French Competition Authority (« FCA ») and the procedural rules of competition law.

Here, we highlight the new main developments that companies need to know.

The FCA will have the ability to set its priorities

The Order grants the FCA the ability to set its priorities. Article L. 462-8 al. 2 of the French Commercial Code now provides that the FCA may reject certain complaints "when it does not consider them a priority". Therefore, the FCA will be able to set its priorities and focus its action and resources on what it considers to be a significant competitive issue. This new prerogative is particularly important since victims of anticompetitive practices may be toldthat their case is not a priority for the FCA (despite the evidence provided). This could change a company's litigation strategies since the question of bringing the case before the commercial court will arise much more frequently.

The FCA's authorization process to conduct major investigations will be even more seamless

In order to increase efficiency, Article L 450-4 of the French Commercial Code, as amended by the DDADUE Law, now provides that the same judge will be able to authorize simultaneous dawn raids throughout the country, including outside his jurisdiction. In other words, the FCA will not have to submit requests to the various territorially competent judgesas previously required.

In order to impose interim measures, the FCA will be able to initiate an investigation on its own initiative

The Order amends Article L. 464-1 of the French Commercial Code to allow the FCA to initiate an investigation on its own initiative with a view to issuing interim measures. Until now, it could only pronounce such measures in the event of a request for interim measures accessory to the main proceeding. From now on, the FCA will be able to remedy situations likely to cause serious and immediate harm to competition "on its own initiative".

The new simplified procedure will allow the FCA to reach a decision after a round of adversarial procedure, without the fine being capped

The DDADUE law significantly changes the French simplified procedure. Article L. 463-3 of the French Commercial Code, as amended, provides that the Rapporteur général may decide that a case will be heard by the FCA without a prior report, i.e. after only one round of adversarial procedure. The decision to use the simplified procedure will have to be adoptedbefore the statement of objections.

If this is the case, the question remains as to the criteria on which the Raporteur général will be able to decide that a case should be dealt with under the "simplified" procedure, as these criteria are not explicitly set out.

However, in the case of a simplified procedure:

- The FCA has indicated that a "state of play meeting" should precede the statement of objections so that the companies are informed of the major points of the objections beforehand, even though the texts do not mention such a possibility.
- The statement of objections will include both the alleged practices and the elements relating to the penalty incurred. Therefore, companies will have to be prepared to discuss the potential sanction even though they will be discussing the core of the case at the same time.
- Article L. 463-3 of the French Commercial Code, as amended, provides that the time limit for replying to the statement of objections, which is two months in a regularprocedure, may be extended to four months when the combined turnover of all parties in France during the last fiscal year exceeded 200 million euros and when at least one of the parties so requests.
- The DDADUE law suppresses the €750,000 cap on the financial penalty that can be imposed under the simplified procedure. In other words, the parties prosecuted will lose the benefit of a second round of adversarial proceedings, but will not benefit from any reduction of the fine: the 10% cap provided for in the case of regularproceedings will also apply in the case of simplified procedure.

The Rapporteur général may decide, in light of the response of the prosecuted companies to the statement of objections, to revert back to a regular procedure. In such a case, a report will be sent to the parties.

A new repressive toolkit available to the FCA

Companies facing the risk of structural injunctions in case of anticompetitive practices

The Order gives the FCA a new repressive power, provided for in Article L. 464-2 of the French Commercial Code: the ability to issue structural injunctions in the context of litigation relating to anticompetitive practices. The FCA may therefore require the undertaking to divest certain assets.

However, this type of sanction must be strictly necessary to stop the infringement and if several solutions exist to remedy the competition problem (i.e., a structural remedy and a behavioral remedy), the FCA will have to choose the least restrictive of the two. It is likely that this will fuel important debates regarding the proportionality and equivalence of sanctions.

Extended scope of structural injunctions applicable in overseas territorieS

The DDADUE law introduces in article L 752-27 of the French Commercial Code - the possibility for the FCA to impose structural injunctions in overseas territories on wholesalersholding a dominant position, while this possibility was previously restricted to retail businesses. In addition, these injunctions may be issued when the dominant position raises "competition concerns" (without this notion being defined) and no longer, as was previously the case, in case of an "impairment of effective competition in the area concerned".

A significantly increased risk for associations of undertakings

The Order significantly changes the rules applicable to associations of undertakings. Until now, these associations were exposed to a risk of fines capped at 3 million euros. From now on, Article L 462-4 of the French Commercial Code provides for a cap of 10% of the annual turnover of the offending association or, where the infringement relates to the activity of its members, of 10% of the sum of the worldwide turnover of the members active on the market affected by the infringement. Undeniably, these new rules will have a significant impact on the operation of these associations and will likely lead to coerced compliance.

The leniency procedure is modified

The leniency procedure is also undergoing a number of changes.

Introduction of a criminal immunity for natural persons benefiting from leniency

The Order creates a new article L 420-6-1 in the French Commercial Code, providing for an exemption from the criminal penalties provided for in article L 420-6 of the Code (i.e. 4 years of imprisonment and a fine of 75,000 euros), for the benefit of the directors, managers and other employees of an offending company, as long as the latter has benefited from a total immunity from fines under the leniency program. However, individuals are only exempt from criminal sanctions if they have actively cooperated with the FCA.

This reform is significant because it remedies a paradoxical situation: the directors of a company that benefitted from total immunity from punishment under leniency, remained exposed to the risk

of a criminal sanction and could be prosecuted personally for having played a fraudulent and determining role in the commission of the anticompetitive practice. This could reduce the incentive for managers and the company to apply for leniency.

The leniency application may be submitted via the new secure exchange platform Hermès

The decree of May 10, 2021 introduces in article R 464-5 of the French Commercial Code the possibility for companies and individuals wishing to benefit from the leniency program, to submit their application via the secure electronic document exchange platform Hermès, which has recently been set up by the FCA to accelerate and simplify exchanges in terms of procedure.

Suppression of the leniency notice

The DDADUE law removes the leniency notice, which was previously provided for in Article R 464-5 of the French Commercial Code. The leniency notice was adopted following a company's application for immunity, and defined the conditions under which the exemption could be granted. The leniency notice was criticized because it caused a slowdown in the procedure. Its abolition should therefore accelerate the leniency procedure.

Suppression of the criterion of the importance of the damage caused to the economy

The Order suppresses the criterion of the importance of the damage caused to the economy, which the FCA had to take into account when determining the amount of the fines imposed on the perpetrators of anticompetitive practices. From now on, the FCA will only have to take into account the situation of the sanctioned company and the gravity of the infringement, as well as its duration. The FCA has just launched a public consultation on this suppression and on the revision of the sanction guidelines (which have been in force since 2011).

Extension of the scope of the decisions that can be adopted by the President of the FCA

The DDADUE law amends Article L. 461-3 of the French Commercial Code and extends the scope of decisions that may be adopted by the President or a Vice President of the FCA acting alone on the proposal of the Rapporteur général.

Until now, the President of the FCA could adopt a certain number of decisions alone. Inparticular:

- decisions of inadmissibility;
- decisions to reject a complaint for lack of evidence;
- phase I merger control decisions.

Thanks to the DDADUE law, now the President may, upon proposal of the Rapporteur général, single-handedly decide a self-referral, regarding:

- all types of anticompetitive practices;

- all types of merger control rules violations (e.g. lack of prior notification, gun jumping, non-compliance with commitments).

Since a self-referral decision is not part of imposing a sanction, this type of decision escapesthe principle of collegiality and can be adopted by the President alone. This amendment will likely have a simplifying effect on the procedure while reducing its duration.

Easing the conditions for sanctioning micro anticompetitive practices

The sanctioning of "micro ACP" (i.e., cartels and abuses of dominant position implemented by companies whose turnover does not exceed 50 million euros individually and 200 million euros in total) is now facilitated by the DDADUE law. Until now, these practices had to affect a market of local dimension. This requirement, previously provided for in Article L 464-9 of the French Commercial Code, has been removed. Therefore, the DGCCRF can sanction "micro ACP" regardless of the geographic dimension of the market affected.

Two general conclusions can be drawn from this reform:

- The legislator intends to improve the effectiveness of the detection and enforcement of competition law. In this context, it becomes fundamental for companies and professional associations to ensure compliance with the applicable rules. Compliance programs have a bright future ahead of them.
- While the objectives are clear, the implementation of some measures raises questions and there is no doubt that the first cases in which the FCA will apply its new prerogatives will be the subject of much debate. To be continued...

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