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**France**

Leyla Djavadi, Séverine Sanglé-Ferrière & Jean-Louis Fourgoux
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**Brief overview of the law enforcement relating to cartels in this jurisdiction**

Under French law, cartels are governed by Article L.420-1 of the French Code of commerce, which reads:

“[Cartels] are prohibited even through a direct or indirect group company located outside of France, where they are intended or may have the effect of preventing, restricting or distorting competition in a market, concerted actions, agreements, express or tacit agreements or coalitions, particularly when they tend to:

- restrict access to the market or the free exercise of competition by other companies;
- hinder the fixing of prices by the free market by artificially encouraging increase or decrease;
- limit or control production, markets, investment or technical progress; or
- divide the markets or sources of supply.”

Under the French jurisdictional system, competition law may be applied by the French Competition Authority (“l’Autorité de la concurrence”), an independent administrative authority: (i) by the civil courts (civil, commercial and criminal courts); (ii) by the administrative courts; and (iii) by the French Minister of Economy (government department) in case of “local-anticompetitive practices” (iv).

**The French Competition Authority**

In accordance with the provisions of Article L.462-5 of the French Code of commerce, the French Competition Authority may deal with anti-competitive practices (cartels, abuse of dominant position and abusive low price) by the Minister of Economy, Business, or for any matter for which interest they are charged by local authorities, professional organisations and trade unions, consumer organisations, accredited chambers of agriculture and trade, or chambers of commerce and industry.

At the end of the investigation phase and adversarial proceedings, the Competition Authority may adopt the following decisions:

- **The interim measures**

Pursuant to Article L.464-1 of the French Code of commerce, and to cope with an emergency situation requiring rapid intervention, the French Competition Authority may be required to impose interim measures, pending a fundamental decision. This comes in extremely swiftly, typically three to four months after the referral. This type of measure can be justified in cases of serious and immediate threat to an economic sector or company. It may take the form of an injunction, such as the removal of anti-competitive clauses in a contract modification of statutory provisions. As a recent example, the Paris Court of
Appeal partially confirmed the decision N° 14-MC-02 of 9 September 2014 (Direct Energie vs GDF-Suez) in the gas and electricity sectors in which the French Competition Council ordered GDF-Suez to disclose parts of its database relating to consumers with regulated gas tariffs (decision based on abuse of dominant position).

- **The acceptance of commitments**

Under Article L.464-2, I of the French Code of commerce (modified by Article 2 of Ordinance N° 2008-1161 of 13 November 2008 for the modernisation of competition regulation) has granted the French Competition Authority the power “to accept commitments proposed by undertakings or associations of undertakings and to put an end to anti-competitive practices, in compliance with articles L.420-1, L.420-2 and L.420-5”.

- **The fines**

Pursuant to Article L.464-2 of the Code of commerce, the Authority may impose a penalty of up to 10% of the global turnover of the company. It is in each case proportional to the seriousness of the practice, the damage dealt to the economy of the sector, the business situation and the possible repetition of facts.

If the company agrees not to contest the allegations and agrees to change its behaviour for the future, it can achieve a reduction of the penalty incurred.

- **The injunctions**

Pursuant to Article L.464-2 of the Code of commerce, this also states that the Authority may require the company to stop the anti-competitive practice complained of, or positively to modify its behaviour in order to comply with competition law (commitment procedure).

- **Non-compliance with an injunction**

In the event that a previous injunction decision has not been complied with, the Authority has the possibility of making a decision for breach of injunction, possibly accompanied by penalties.

- **The order of publication**

Finally, in order to give adequate publicity to the decision, the Authority has the power to order the publication of its decision through the press. Usually this is an extract from the decision, explaining the reason for the sentence, which is published. The objective is then to inform businesses and the general public of the harmful effects of illicit behaviour.

The Paris Court of Appeal, under the control of the French supreme court (“Cour de Cassation”) is able to judge the French Competition Authority’s decisions.

**Civil, commercial and criminal courts**

While the French Competition Authority is responsible for the protection of the economic order, the French courts are responsible for the damages suffered by victims of anti-competitive practices (“private enforcement”).

Specialised civil and criminal courts (under the control of Courts of Appeal and the French Supreme Court) may be used by the victims of cartels for compensation, cancellation or termination of anti-competitive practices prohibited by Article L.420-1 of the French Code of commerce (note that pursuant to Article L.462-3 of the French Code of commerce, the French Competition Authority may be consulted by the courts regarding the anti-competitive practices. Such a consultation suspends the statute of limitation, but the courts are under no obligation to follow the opinion of the French Competition Authority).

In addition, pursuant to the provisions of Article L.462-6 of the French Code of commerce, the Competition Authority may refer the case to prosecutors “when the facts seem to him
to justify the application of Article L.420-6 of the Commercial Code”, noting that Article L.420-6 of the French Code of commerce punishes by four years’ imprisonment and a fine of €75,000, “the fact for any person, to fraudulently take [a] personal and decisive [part] in the design, organisation and implementation practices referred to in Articles L.420-1 and L.420-2”.

The administrative courts

Since the French Administrative Supreme Court has integrated competition rules (EU and national rules) into the rule of reference, the administrative courts must apply these provisions, especially when exercising their exclusive jurisdiction to annul delegated legislation or administrative contracts.

Accordingly, when delegated legislation, or any act of a person acting with prerogatives of public authorities, is taken in breach of competition rules, the administrative courts may annul the act or contract, and award damages.

The Minister of Economy

Since the law N° 2008-776 of 4 August 2008 on the modernisation of the economy called “LME”, anti-competitive practices may be prohibited by national competition law (excluding agreements that may affect trade between Member States), may be sanctioned by the Minister for the Economy if the market is “local dimension”, if the turnover of each of the undertakings concerned does not exceed €50m in France (figure of turnover in the last financial year), and their aggregate turnover does not exceed €100m.

An overview of cartel enforcement activity in the last 12 months

During the past 12 months, the French Competition Authority issued fewer than five decisions on cartels.

1. Decision 14-D-16 of 18 November 2014 on the practices implemented in military personnel relocation removals sector in Martinique

The French Competition Authority has issued a decision in which it fines three removal companies for having presented cover quotes in order to distort competition in the military personnel relocation removals sector. The probe established that in many cases the companies were not competing with each other and in fact were sharing customers. They cooperated to submit bogus quotes (quotes setting out deliberately inflated amounts), so that one of them would definitely secure the business for the removals of the relocating military in question. Similar practices had already been sanctioned in this sector (see in particular decisions 09-D-19 of 10 June 2009, 07-D-48 of 18 December 2007, 02-D-62 of 27 September 2002, 01-D-63 of 9 October 2001 and 99-D-50 of 13 July 1999). Three companies, AGS Martinique (and its parent company Mobilitas), Martinique Déménagements and SMDTE, of the six present in this sector in Martinique, were fined a total sum of €237,840. Moreover, the company Martinique Déménagements committed to set up a compliance programme.

2. Decision 14-D-10 of 25 September 2014 regarding practices implemented in the networks and mobile communications services sector.

Following an urgent request by Orange for the immediate suspension of the network sharing agreement signed between Bouygues Telecom and SFR in January 2014, the French Competition Authority rejected the request for provisional measures presented by the operator, considering that no serious or immediate threat to the sector’s interests, consumers or the complainant company had been established.
On 31 January 2014, Bouygues Telecom and SFR entered into a network sharing agreement. The agreement set out the deployment of a shared mobile network of 11,500 sites over a mutualised area covering 57% of the population. The mutualised area, which does not include the most densely populated areas, is split into two, with SFR and Bouygues Telecom taking responsibility for deployment respectively to the region. The agreement also sets out a temporary 4G roaming service provided by Bouygues Telecom to SFR for a small part of the mutualised area, in order to avoid deploying temporary equipment that would have to be dismantled and replaced by the target network.

In this case, none of the elements put forward by Orange establish the existence of a serious and immediate threat requiring the suspension of the agreement or its appendix on 4G roaming, which remains on a limited scale. The suspension request has therefore been rejected.

This decision was submitted before the Paris Court of Appeal (pending case).

What are the key issues in relation to enforcement policy generally in this jurisdiction?

By the publication of the Framework-Document of 10 February 2012 on the antitrust compliance programme, the French Competition Authority encourages companies to set up antitrust compliance programmes, either on a standalone basis or within the framework of their overall compliance policy, and to allocate sufficient resources to these programmes to ensure they are successful.

What are the key issues in relation to investigation and decision-making procedures in this jurisdiction?

The key issues in relation to investigation and decision-making procedures during the past 12 months in the French jurisdiction are the following:

1. The power of the French Competition Authority to issue opinions and recommendations through a self-referral process

   The French Competition Authority demonstrates that since it has the power to issue opinions and recommendations through a self-referral process, it makes full use of this possibility and has launched several sector inquiries. On 25 February 2013, it launched an inquiry in the sector of distribution of medicinal products to check that the new opportunities linked to the support of the authorities for generic medicines and the opening up of online sales for medicinal products benefit everyone, in the form of price reductions, increased services and innovation. In July 2013, prior to adopting its final conclusions, the French Competition Authority published an initial assessment that it was submitting to public consultation. The various interested parties consequently had the opportunity to put forward their observations and make new suggestions that would help to ensure that competition in this sector develops favourably and benefits both the sector as a whole and consumers. The first phase of this sector enquiry seemed to indicate that at least for generic medicinal products and medicines that cannot be reimbursed, strengthening of competition could lead to lower prices which would benefit both the state health insurance fund and households.

In 2011, the criminal chamber of the French Supreme Court validated the seizure of global electronic mailboxes as “mail documents stored in a single file that were not divisible, are likely to contain elements relating to the purpose of the authorised operation”, and when the electronic files are “useful for parts” to the investigation within the meaning of Article L.450-4 of the French Commercial Code (Cass. crim. 29 June 2011, N° 10-85479 and Cass. crim. 30 November 2011, N° 10-81748 and N° 10-81-749 and Cass. crim. 14 December 2011, N° 10-85.293).

In 2013 (Cass. crim. 24 April 2013, N° 12-80.332 Medtronic/Saint Gobain), the criminal chamber of the French Supreme Court started criticising the global electronic seizure of electronic messages by stating that the power recognised to persons conducting enquiries under Article L.450-4 of the French Commercial Code, to seize electronic messages which are not divisible, is limited by the rights of defence that include the respect of the client/attorney privilege. The Supreme Court states that the breach of the client/attorney privilege occurs as soon as the document is seized by the investigators. However, the presence of unseizable pieces does not invalidate the seizure of all other documents.

Recently, the criminal chamber of the French Supreme Court (Cass. crim. 27 November 2013, N° 12-85.830 and N° 12-86.424) recalls that the right to have legal assistance should be observed at the stage of preliminary investigation, and concluded that the first President of the Court of Appeal should have examined whether the lawyers had not been denied access to the offices visited and to speak.

3. Extension of the powers of agents in simple investigations

In the case of simple investigations (without judicial authorisation), the new “Hamon Law” of 17 March 2014 modifies the right of access of agents by granting them (in addition to a number of minor additions) access to “software and stored data, as well as to the restitution in unencrypted form of information which facilitates the accomplishment of their mission”, and “to request the transcription by any appropriate means of documents directly utilisable for the purposes of their scrutiny” (Article L.450-3 of the French Code of commerce). The agents may only use this procedure for documents of which they have a clear knowledge.

How effective and successful is any leniency/amnesty regime in this jurisdiction?

On 2 March 2009, the French Competition Authority adopted a new procedural notice relating to the French Leniency Programme. Almost 60 leniency applications have been received by the French Competition Authority since the leniency procedure was introduced in France by the 2001 Law on New Economic Regulations. In itself, this figure demonstrates the effectiveness of the procedure. In accordance with the leniency programme, where an undertaking is liable to be fined for taking part in an anti-competitive agreement or concerted practice, the French Competition Authority may grant it full or partial immunity if the undertaking helps to establish the existence thereof. In principle, the agreements concerned are cartels between undertakings consisting in the fixing of prices, the allocation of production or sales quotas or the sharing of markets, including bid rigging, or any other similar anti-competitive behaviour between competitors.

In 2013, the French Competition Authority issued its seventh decision based on the French Leniency Program (which was also the first decision applying the Leniency Program and the settlement procedure cumulatively) whereby it fined a cartel in the sector of commodity chemicals distribution, between Solvadis (the undertaking which was the first to submit...
information and pieces of evidence on the existence of the cartel), Brenntag, Caldic Est, Univar, a total amount of €79m (Solvadis was granted immunity from penalty). The anti-competitive agreement between these distributors of commodity chemicals restricted competition by allocating customers among the parties and coordinating prices in the Bourgogne and Rhône-Alpes regions, and in the North and the West of France. The French Competition Authority considered that these practices were part of a global and single strategy, and the undertakings concerned together represented more than 80% of the commodity chemicals distribution market in France.

In 2014, no decision has been issued by the French Competition Authority based on the leniency programme.

Is administrative settlement of cases (or plea bargaining, for court-driven enforcement regimes) a feature of the enforcement regime in this jurisdiction? How successful has it been?

The French Competition Authority published in February 2012 the procedural notice on the settlement procedure to explain how the procedure is implemented, and to synthesize the experiences built up over the past 10 years to improve transparency for companies (this procedure was introduced by law in 2001). It also describes how the French Competition Authority may reduce the penalties it imposes in its final decision if the company waives its right to challenge the statement of objections, and in view of any commitments made by the companies.

If a company decides not to contest the statement of objections and the settlement procedure seems appropriate, it will be granted a 10% reduction to reflect the procedural savings made. If the company also makes commitments, which may be behavioural commitments (to amend contractual clauses, general terms and conditions of sale, prices, etc.), structural commitments (account unbundling, creation of subsidiaries, etc.) or compliance commitments, the French Competition Authority may grant an additional 5 to 15% reduction in the penalties. The notice also explains that companies can combine the benefits of the leniency programme and the settlement procedure when this results in procedural savings for the Competition Authority. Note that this settlement procedure is not encouraged by the French Competition Authority in case of cartels (it should be more appropriate in case of abuse of dominant position or in case of vertical restraints) even if in 2013, as indicated above, the French Competition Authority issued three decisions relating to horizontal anti-competitive agreements in the context of the settlement procedure.

What is the procedure for third party complaints and to what extent do complaints tend to be taken up by the authorities or courts?

The French Competition Authority must consider all complaints it receives and which fall within the scope of its jurisdiction (cartels, abuse of dominance and predatory pricing) but the complaint must be adequately substantiated. Unlike some jurisdictions, the French Authority does not have discretionary prosecution. However, the Authority can prioritise in the schedule procedure cases that are most likely to affect competition.

What are the latest developments and key current issues in this jurisdiction in relation to (civil) penalties and sanctions imposed on the parties?

The French Competition Policy issued a Notice of 16 May 2011 on the method relating to the setting of financial penalties, knowing that the aim of the French Competition Authority
is to increase transparency and enrich the discussion with the parties.

The notice explains the method followed in practice by the Competition Authority when setting financial penalties imposed on a case-by-case basis pursuant to Section I of Article L.464-2 of the French Code of commerce. It also synthesizes the main features of the practice developed on the merits by the French Competition Authority under the judicial review of the Court of Appeal of Paris, which is itself subject to the judicial review of the French Supreme Court (“Cour de Cassation”).

The French Code of commerce provides that financial penalties are to be set in accordance with four criteria:

• the seriousness of the facts;
• the importance of the harm done to the economy;
• the situation of the sanctioned entity or undertaking, or of the group to which the undertaking belongs; and
• the reiteration, if any, of anti-competitive practices.

The method followed in practice by the French Competition Authority in order to implement these criteria on a case-by-case basis, in the order contemplated by the French Code of commerce, is the following. To start with, the French Competition Authority sets the basic amount of the financial penalty for each undertaking or entity at stake, in view of the seriousness of the facts and of the importance of the harm done to the economy, criteria which relate to both the infringement or infringements at stake. This basic amount is then adjusted to take into account factors relating to the specific behaviour and the individual situation of each undertaking or entity at stake, leaving aside the issue of reiteration which is treated as a distinct criterion by the law. Next, the amount is increased for each concerned undertaking or entity, in case of reiteration. The amount reached is then checked against the legal maximum, before being decreased to take into account a reduction awarded due to leniency or to a settlement, if applicable, and adjusted in view of the undertaking’s or entity’s ability to pay the fine, to the extent that such an adjustment is requested and warranted.

If criminal sanctions are available in respect of cartels infringements in this jurisdiction, to what extent and in what manner are these enforced?

Article L.420-6 of the French Code of commerce provides criminal sanctions, “if any natural person fraudulently takes a personal and decisive part in the conception, organisation or implementation of the practices referred to in Articles L.420-1 and L.420-2, this shall be punished by a prison sentence of four years and a fine of €75,000”.

In the French jurisdiction, these criminal sanctions have been enforced only in a few decisions (mostly in case of public tenders). To our knowledge, no decision has been issued in the past 12 months.

Cross-border issues

The French Competition Authority plays an active role in the International Competition Network (ICN) (the ICN was set up in 2001 and more than 120 national competition authorities are members), is an active contributor to working groups organised by the OECD’s Competition Committee, and is a member of UNCTAD’s International group of Experts on Competition Law and Policy.

The most interesting decision relating to cross-border issues is the decision N°12-D-09 of the French Competition Authority dated 13 March 2012 in which the Competition Authority
fined different anti-competitive agreements concerning packaged flour in the food retailing sector a total of €242.4m. An application for leniency was submitted in parallel before the French and German competition authorities (the “Autorité de la concurrence” and the “Bundeskartellamt”) by a German miller. Unannounced inspections were conducted both in France and in Germany (through the German Competition Authority) and these raids were followed by an in-depth investigation by the two competition authorities.

By a judgment dated 20 November 2014, the Paris Court of Appeal upheld the sanction of the Franco-German cartel to limit imports of flour between France and Germany. However, the Court of Appeal reformed the decision of the French Competition Authority regarding the cartel between French millers, considering that the French millers were not able to eliminate any form of competition between them through their joint ventures, “France Farine” and “Bach Mühle”. In other words, the Paris Court of Appeal considered that the French Competition Authority had not demonstrated the existence of a restriction by object, and did not take into account the economic and legal context at the time of the creation of the joint ventures by the French millers.

Developments in private enforcement of antitrust laws against cartels

Actions for damages for breach of EU and national competition law are based on the general provisions applicable to all actions for damages in France (i.e. Article 1382 of the French civil code). These provisions are not specific to competition law.

Private enforcement in France is not as “underdeveloped” as may have been said or written. French courts have to rule in a significant number of claims, counterclaims or defences based on antitrust law (including cartels).

The majority of case law is “stand alone” actions. Not only are there very few such actions brought to complement public enforcement, but their results also appear disappointing, as a significant part of them are unsuccessful.

“Stand alone” actions are more various, both regarding the use of competition law (claim, defence, counter claim), and the type of cases involved or the remedies sought. The failure encountered in a significant number of cases is sometimes due to an ignorance of these rules and a misuse of them, but also to difficulties caused by various factors in the implementation of antitrust law.

For example, in a judgment dated 8 October 2014, the Court of Appeal of Paris refused the claim for damages of SFR (“stand alone” action before the Paris Commercial Court) which had complained of being a victim of abuse of dominant position held by Orange on the fixed telecommunications market limited to second homes, “for the following reasons: the existence of this relevant market was not established and secondly, the exclusionary effect of the abuse conduct was not demonstrated”.

In the case of follow-on actions, there are difficulties relating to the identification of the recoverable damage. The flexibility of the French law of civil liability does not mean that the plaintiff will obtain compensation for all the damages he alleges. It is essential that the damage has some features – in particular that they are certain and direct – and directly relate to the violation (causal link).

The requirements concerning the damage and the causal link raise serious problems in the hypothesis of indirect purchasers, those injured by the passing-on of overcharge, but also, more surprisingly, in the case of direct customers of the infringer who paid an extra cost due to the cartel.
The French Supreme Court considered that passing-on of the overcharge in the selling price is the usual and common commercial practice and held that the plaintiff did not prove that he had not passed on. In its ruling – not published – (com. 15 May 2012, N°11-18495), the commercial chamber of the Court of Cassation considered that the Court of Appeal has been able to rule, as it did in the statement of these findings and assessments, in which it concluded that the plaintiffs did not establish their harm caused by the cartel. Recently, the Paris Court of Appeal recalled, in a judgment dated 27 February 2014 (aff. Doux vs Ajinomoto Eurolysine – N°10/18285), that the victims of infringement of antitrust rules who claim damages have to demonstrate, through concrete elements, that the additional costs had not been “passed on” to their buyers.

The quantification of damages awarded under the equivalent compensation is also quite difficult. In a significant proportion of decisions, the discussion on the assessment of damage is rather brief. For the moment, French judges have a large discretionary power for the assessment of damages, provided they do not violate the principle of full compensation.

Article 5.III of the French Law dated 20 November 2012 (so-called “Overseas Law”) introduced a second paragraph to Article L.462-3 of the French Commercial Code which provides: “The Autorité de la concurrence can transmit any proof it holds concerning anti-competitive practices, excluding evidence developed or collected from Section IV of Article L.464-2, to any jurisdiction that consults or asks it to produce documents that are not already available to a party to the proceeding. It can do [so] in the same limits when it produces its own observations before a court.” The systematic exclusion of elements collected during a leniency programme before the French Competition Authority seems contrary to the judgment of the Court of Justice in Case C-536/11 dated 6 June 2013 (Donau Chemie) seeking a balance in each case between private interests involved and the public interest (protection of leniency programmes).

By a decision dated 20 November 2013 (SAS Ma Liste De Courses c/Autorité de la concurrence), the Paris Court of Appeal states that the French Competition Authority is entitled to refuse the disclosure of material covered by the secret instruction when the plaintiff already has all these documents in question, having obtained them during the proceedings before the French Competition Authority. Indeed, the Paris Court of Appeal states that “the violation of professional secrecy shall be allowed only when it is necessary to exercise the rights of the defence, the Authority and its officers do not have to assume the risk of a breach of confidentiality in lieu of the party which is the best person to know exactly, when he/she has already the documents which are necessary for the exercise of his/ her rights; the Authority may therefore regularly invoke a legitimate impediment”.

Note that the recent final adoption (on 10 November 2014) of the directive on antitrust damages actions (which has been signed into law on 26 November 2014) will give victims of infringements of EU antitrust rules (such as cartels and abuses of dominant positions) easier access to the evidence they need to prove the damage suffered, and more time to make their claims. Once the directive is published in the Official Journal, member states will have two years to implement it their national legal systems.

Reform proposals

In France, reform on collective redress was adopted by the French Parliament on 13 February 2014 (validated on 13 March by the French Constitutional Council). The so-called “Hamon Law” N° 2014-344 of 17 March 2014 was formally promulgated on 18 March by publication in the Official Journal.
Under the new “Hamon Law”, the French class action is open to consumers and focuses exclusively on compensation for pecuniary loss resulting from damage, to the exclusion of physical and emotional harm. A consumer is defined in the “Hamon Law” as “any physical person who is acting for purposes which do not fall within the scope of his trade, industrial, craft or liberal profession”.

The collective action is still based on a strict opt-in principle (which implies the voluntary adhesion of the consumer to the group) unlike the opt-out system prevalent in the USA. Its introduction in the Consumer Code rules out legal persons in a mass harm situation of the mechanism, especially small businesses. To bring action is still reserved to 15 duly authorised French consumer associations (excluding lawyers) which are recognised as being representative at a national level (and not ad hoc associations formed to deal with a particular violation). In addition, in order to increase the attractiveness of leniency programmes, the “Hamon Law” provides that leniency applicants be protected from all or part of the risks associated with civil liability, and limit access to the information provided by them.

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**Endnotes**

1. A first notice relating to the French leniency programme was published on 11 April 2006.
3. Decision 13-D-12 of 28 May 2013 in the sector of commodity chemicals distribution.
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