French Report

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1. Introduction

A definition of the digital platforms has been introduced in French law in 2015,[1] then modified in 2016.[2] It reads as follows: *"Is qualified as operator of on-line platform, any natural or legal entity offering, on a professional basis, whether against remuneration or not, an online service of communication to the public relying on:*
1 ° The classification or the referencing, by means of computing algorithms, of contents, of goods or services offered or put online by third parties;
2 ° Or the connection between several parties with the aim of the sale of a good, the supply of a service or an exchange or a sharing of a content, a good or a service".[3]

Online sales platforms are distinct from so called collaborative digital platforms. The following analysis is limited to the main competition law issues related to the activity of the websites devoted to the intermediation for the sale of products or services between a professional and a consumer (BtoC), or between professionals (BtoB). This category of online sales platform includes *market places* (Amazon, PriceMinister), platforms of hotel and tourism reservation (Booking.com, Hotels.com) or media platforms (Spotify, Netflix).

[1] Law 2015-990 of 6 August 2015 for growth, activity and equal economic opportunities (the "Macron Law").
[2] Law no 2016-132 of 7 October 2016 for a digital Republic.
[3] Article L. 111-7 of the Consumer Code.

While French courts issued two important decisions regarding online sales platforms within the field of selective distribution,[4] the French Competition Authority (the "Authority") dealt with online sales platforms in many decisions involving anticompetitive practices[5] or merger control.[6]

2. Implementation

2.1. Restriction of Online Sales

Bans on sales through third-party internet platforms in selective distribution systems could be looked at on a case-by-case analysis focussing on the effects of the practice as hindering intra-brand competition, particularly at the expense of small and medium-sized enterprises (SMEs). In its Final Report of 10 May 2017 on e-commerce, the European Commission pointed out that marketplaces are more important as a sales channel for smaller and medium-sized retailers while they are of lesser importance for larger retailers, and that Member States with the highest proportion of retailers experiencing marketplace restrictions are Germany (32%) and France (21%). Such a prohibition could be considered as creating a barrier to entry from the point of view of SMEs, that do not necessarily have the sufficient resources to develop mobile applications with secure payment systems.

In a case-by-case effects assessment, a prohibition to sell on marketplaces could also be considered as harming consumers' interests, in particular if it significantly increases their research costs (i); or if the product is not broadly available by other means through a wide selective distribution network (ii); and if the product is subject to little inter-brand competition (iii).

The position of the Competition Authority (**2.1.1**) and of French courts (**2.1.2**) has progressively evolved on this matter, and currently remains fluctuant.

2.1.1. Position of the French Competition Authority

In a decision of 2007 regarding the distribution of personal care and cosmetic products,[7] the Competition Council (former designation of the Competition Authority) considered that a producer could reasonably refuse to appoint online sales platforms in its selective distribution network, since at the time of the facts this distribution channel still caused "*serious issues*". The concerned platforms failed at the time to provide sufficient guarantees regarding the quality and identity of the sellers. According to the Competition Council, such lack of guarantee could facilitate illegal sales outside the selective distribution network or the sale of counterfeit goods, thereby harming the image of the network.

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[4] Paris Court of Appeal, Pole 3 Chamber 1, 2 February 2016, RG no 15/01542, eNova Santé v Caudalie; Paris Court of Appeal, Pole 5 Chamber 4, 25 May 2016, RG no 14/03918, France Télévisions v Valentina Colombo, Coty France and Marvale LLC.

[5] Competition Authority, Decision No 15-D-06 of 21 April 2015 concerning practices implemented in the online hotel reservation sector (Decision upon which relies Paris Court of Appeal, Pole 5 Chamber 7, 8 October 2015, RG no 2015/11953 Synhorcat, Fagiht v. Booking.com B.V., Booking.com France SAS and Booking.com Customer Service France SAS); Decision No 14-D-18 of 28 November 2014 regarding practices implemented in the event-driven online sales sector (Decision upon which relies Paris Court of Appeal, Pole 5 Chamber 7, 12 May 2016, RG no 2015/00301, Brandalley v Showroomprivé.com, Vente-Privée.com, Autorité de la concurrence, Ministre de l'économie, de l'industrie et du numérique); Decision No 14-D-11 of 2 October 2014 regarding practices implemented in the train ticket distribution sector; Decision No 14-D-04 of 25 February 2014 regarding practices implemented in the online horserace betting sector; Decision No 09-D-06 of 5 February 2009 regarding practices implemented by SNCF and Expedia Inc. in the online travel sales sector (Decision upon which relies Paris Court of Appeal, Pole 5 Chamber 7, 23 February 2010, RG no 2009/05544, Expedia Inc., Karavel v SNCF, Voyages-SNCF.com, l'Agence Voyages-SNCF.com, VFE Commerce, iDTGV and Lastminute); Decision No 07-D-07 of 8 March 2007 regarding practices implemented in the sector of cosmetics and personal hygiene products.

[6] Competition Authority, Decision No 16-DCC-111 of 27 July 2016 on the acquisition of sole control of Darty by Fnac; Decision No 11-DCC-87 of 10 June 2011 on the acquisition of sole control of Media Concorde SNC by High Tech Multicanal Group.

[7] Competition Council, Decision No 07-D-07, 8 March 2007 relative to practices implemented in the sector of cosmetic and personal hygiene products.

However, the Competition Council acknowledged that, subject to this limitation, platforms had the "*ability […] to meet the products' qualitative criteria*", for example with the creation of virtual shops dedicated to authorised sellers. The Competition Council thus did not validate clauses prohibiting all sales on e-marketplaces in general. It carried out a concrete analysis of the guarantees offered by the platforms, and suggested, as early as in 2007, that its position could change on that matter, provided that marketplaces adapt in order to meet the selective distribution systems' qualitative criteria.

In 2011, the ECJ, in the judgment Pierre Fabre v. President of the French Competition Authority[8] ruling on the broader matter of internet sales ban to authorised distributors, considered that such a restriction would constitute a restriction by object if, following an individual and specific examination of the content and the objective and legal and economic context, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified. The Court added that the aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU.

Some saw this judgment as the end of general clauses prohibiting sales on e-marketplaces.

In 2012, in its opinion about e-commerce,[9] the Competition Authority adopted a less rigid position, directed towards an analysis of potential restrictive effects of such a clause rather than an analysis by object. It held that, in selective distribution networks, the prohibition imposed by some manufacturers to their distributors to sell through third-party online platforms, as a condition to be approved in the distribution network, would need to be proportionate to the objective pursued, whether it is the respect of the brand's image or the prevention of the sale of counterfeit goods or illegal resale outside of the network, when it caused a restriction of competition on the relevant markets,.

This issue has been brought again before the Competition Authority, with two decisions concerning requests for interim measures in the field of brown products distribution (consumer electronic products, particularly televisions).[10] But the Authority did not rule on this issue, considering that the plaintiff company failed to provide evidence that the clause prohibiting sales on e-marketplaces caused the deterioration of its financial position or immediate damages to its interests, which constitutes a condition to grant interim measures.

On 30 September 2014, the European Commission indicated that it would take up a part of this case, in the context of an on-going investigation about various commercial practices and contractual restrictions in the field of consumer electronics sales, including the question of clauses banning sales on e-marketplaces.[11]

In this context, the Competition Authority rejected the requests for interim measures, noticing that the plaintiff's economic situation (the company Concurrence) had deteriorated even though it was commercialising products on marketplaces, which suggested that the financial deterioration was not linked to the clause prohibiting the sale of the brand's products on e-marketplaces.

In a case involving similar practices carried out by the sports brand company Adidas, the Competition Authority indicated in a press release dated 18 November 2015 (the decision is not available) that it closed its investigation in exchange for Adidas' commitment to remove from its contracts all clauses forbidding distributors to sell through marketplaces, provided that such marketplaces met certain qualitative criteria allowing them to be approved by the manufacturer.

[8] CJEU, Judgement of the Court (3rd chamber) of 13 October 2011, Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité and Ministre de l'Économie, de l'Industrie et de l'Emploi, Case C-439/09.

[9] Competition Authority, Opinion No 12-A-20 of 18 September 2012 regarding the competitive functioning of e-commerce.

[10] Competition Authority, Decision No 14-D-07 of 23 July 2014 relating to practices implemented in the sector of brown products distribution, in particular televisions; No 15-D-11 of 24 June 2015 relating to a request of interim measures concerning practices implemented in the sector of brown products distribution, in particular televisions.

[11] Competition Authority, Decision No 15-D-11 of 24 June 2015 relating to a request of interim measures concerning practices implemented in the sector of brown products distribution, in particular televisions, §8.

Therefore, to this day, the Competition Authority never had the opportunity to adopt a final decision, following a litigation process, regarding the validity of clauses that prohibit approved distributors from commercialising products on e-marketplaces.

2.1.2. Position of French Courts

By contrast, French Courts have adopted a stricter position, also in the specific context of evidence provided in emergency interim proceedings.

In a case involving the cosmetics brand Caudalie, the company eNova Santé created the platform 1001pharmacie.com, allowing pharmacists to sell their products on a marketplace. Caudalie, which distributed its products within a selective distribution network approved by the French Competition Authority in 2007,[12] prohibited its authorised distributors to sell their products on marketplaces. When it noticed that its products were on sale on 1001pharmacie.com, Caudalie filed a summons for urgent proceedings on the ground of article L. 442-6-I-6° of the French Commercial Code, which forbids participating in the violation of a prohibition against sales outside the network by a distributor bound by a selective distribution agreement exempted under competition law.

The Paris Commercial Court, in an order of 31 December 2014,[13] granted Caudalie's requests and ordered eNova Santé to cease all commercialisation of Caudalie's products and to delete all mentions of these products on the website 1001pharmacie.com, along with all referencing and links from other websites redirecting to its server and making reference to Caudalie's brand product range.

eNova Santé appealed this decision, arguing that the general prohibition to sell on online selling platforms had become contrary to competition rules.

In a judgment of 2 February 2016,[14] the Paris Court of appeal annuled the order of the Paris Commercial Court on the ground of the evolution of law and case law, in particular the Competition Authority's decisions regarding practices in the field of brown products distribution, particularly televisions (See Section 2.1.1 above) (i); the commitments taken by Adidas before the Competition Authority (See Section 2.1.1 above) (ii); the Bundeskartellamt decisions (Adidas and Asics in 2014 and 2015) (iii); and a law professor's legal opinion (iv).

The Court of appeal concluded that a general reselling prohibition on an online sales platform, notwithstanding its features, could constitute, unless an objective justification is provided, a hardcore competition restriction excluded from the benefit of the EU individual exemption referred to in article L. 442-6-I-6° of the French Commercial Code.

This judgment was given on the sole ground of the required standard of proof that the Court had to apply for an interim measure request, i.e. the possibility for the judge, even in the presence of a serious dispute, to order precautionary and rehabilitation measures necessary to prevent an imminent harm or to stop an obviously illicit trouble.[15]

On 13 September 2017, the Court de Cassation (French Supreme Court) quashed this judgment. According to the Cour de cassation, the Court of Appeal failed to explain how the decisions and legal advice quoted in its judgment could lead to consider that the hindering of Caudalie's selective distribution network, which had been approved by the Competition Council in 2007, did not create an obviously illicit trouble.[16]

Furthermore, as mentioned above, to this day, the Competition Authority's practice regarding this subject is limited to a commitment procedure and an opinion, since it did not make a decision on this matter in the brown products cases of

[12] Competition Council, Decision No 07-D-07 of 8 March 2007 regarding practices implemented in the field of personal care and cosmetic products distribution.
[13] Paris Commercial Court, President, Ordinnance of 31 December 2014, RG no 2014060579, Caudalie v. eNova Santé.
[14] Paris Court of Appeal, Pole 1 – Chamber 3, judgement of 2 February 2016, 1001Pharmacie v. Caudalie, RG n° 2014060579.
[15] Article 873 of the Code of Civil Procedure.
[16] Cour de cassation, Commercial Chamber, Caudalie / eNova Santé, no 16-15.067.

2014 and 2015, anticipating an upcoming decision from the European Commission (i); the Bundeskartellamt's practice is also limited to a commitment procedure, since it did not make a decision either on this topic in the Asics case[17] (ii); the complaint filed by eNova Santé on the merits of the case is currently pending (iii); the European Commission is currently investigating this matter[18] (iv); in its final report published on 10 May 2017 concerning a sector inquiry on e-commerce, the European Commission stated that "*without prejudice to the pending preliminary reference, the findings of the sector inquiry indicate that (absolute) marketplace bans should not be considered as hardcore restrictions within the meaning of Article 4(b) and Article 4(c) of the Vertical Block Exemption Regulation. This does not mean that absolute marketplace bans are generally compatible with the EU competition rules. The Commission or a national competition authority may decide to withdraw the protection of the Vertical Block Exemption Regulation in particular cases when justified by the market situation*"[19] (v); a preliminary ruling on this issue was also referred to the Court of Justice in a case opposing Coty Germany GmbH to Parfümerie Akzente GmbH[20] (vi).

2.2. Abuse of a Dominant Position

In addition to the anticompetitive practices resulting from the agreements referred to above, online sales platforms have been found to engage in abusive exclusionary practices by French competition authorities (**2.2.2**). The relevant market should, on the beforehand, be assessed (**2.2.1**).

2.2.1. The Relevant Market

French competition authorities resort to various criteria in order to define the relevant market, which naturally depend on the nature of the relevant products or services involved. The cases mentioned below constitute recent illustrations of the competition authorities' position concerning the definition of relevant markets when online sales platforms are concerned.

In the Voyages-sncf.com case (2009), the Competition Council analysed the substitutability between the services provided by traditional and virtual travel agencies.[21]

In order to analyse the demand-side substitutability, the Competition Council found that *« travel agencies' customers are, above all, price-sensitive and use the Internet to find out about the different offers »*[22].

Similarly, to analyse the supply-side substitutability, the Competition Council stated that: *« both traditional and online distribution channels offer the same products at the same price »*, and recalled that *« traditional and online travel agencies exert competitive pressure on each other, in terms of price since the consumers are very price-sensitive and use the Internet to find out about the different offers »*.[23] Moreover, the Competition Council noted the absence of barriers to entry into the online sales market (*« the technological supports and internet access services used are accessible to any potential entrant »*), since travel agencies generally adopt a multi-channel strategy.

The Competition Council concluded that the services provided by online travel agencies do not constitute a separate product market and identified the relevant market as the market for services provided by travel agencies for leisure trips, therefore including online sales. This analysis has not been contested in the subsequent decisions issued in this case.

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17 Bundeskartellamt, Restriction of online sales of Asics running shoes, Press release of 28 August 2015.

18 Competition Authority, Decision No 15-D-11 of 24 June 2015 relating to a request of interim measures concerning practices implemented in the sector of brown products distribution, in particular televisions, §8.

19 EU Commission Final report on e-commerce sector inquiry, published on 10 May 2017, §42.

20 Request for a preliminary ruling from the Oberlandesgericht Frankfurt am Main (Germany), lodged on 25 April 2016, Coty Germany GmbH v Parfümerie Akzente GmbH, Case C-230/16.

21 Competition Council, Decision No 09-D-06 of 5 February 2009 regarding practices used by SNCF and Expedia Inc. in the online travel sales sector, §95-98.

22 Competition Council, Decision No 09-D-06 of 5 February 2009 regarding practices used by SNCF and Expedia Inc. in the online travel sales sector, §10.

23 Competition Council, Decision No 09-D-06 of 5 February 2009 regarding practices used by SNCF and Expedia Inc. in the online travel sales sector, §10.

In 2009, the Venteprivée.com case raised difficulties in the definition of the relevant market[24]. The case had been referred to the Authority by the company Brandalley for potential abuses of its dominant position by Venteprivée.com. The investigation services had identified a relevant market for event-driven online sales of which Venteprivée.com held more than 80% and therefore had a dominant position.

The Authority considered that the existence of an event-driven online sales market was not established. According to the Authority, the differentiating elements identified were not specific to the event-driven online sales, since such differentiating elements were also present in other distribution channels of unsold products (price, confidentiality, high-end positioning, stocks), and other should be tempered ("impulse buying"). The Authority considered that *"it should be examined whether other distribution channels of destocking products [stores or factory warehouses, physical stores primarily selling seasonal products but having, on an ancillary basis, a destocking area, physical destocking networks, physical showrooms, e-commerce websites, website of mail-order selling operators] are likely to exercise competitive pressure on event-driven online sales"*.[25] However, given the changing characteristics and specificities of the event-driven online sales since the date of the events (2005-2011), the Authority considered that it no longer made sense – at the time it made its decision - to analyse the demand side substitutability for the period at stake: *« Given the changing characteristics and specificities of event-driven online sales in the period at stake, notably with the development of e-commerce websites offering destocking products, the substitution possibilities on the demand side are likely to have changed. Therefore, it is not conceivable on this day to analyse the demand-side substitutability for the period covered by the statement of objections notified. As a matter of fact, the market players' contemporary representation of the possibilities of substitution which were offered to them or which they considered as such nearly a decade ago, could not be considered today as reliable enough."*[26]

Concerning the geographical market, the Authority found that, even if the sales are made via their website, the fact that event sales companies had established specific websites for each country pointed to the existence of a local market. The Authority also considered that language barriers and the consumption habits from one country to the other showed the existence of a national geographic market.

This analysis was subsequently confirmed by the Paris Court of Appeal in its judgement of 12 May 2016.[27] The judgment is however currently under review by the Cour de Cassation.

In its opinion on the competitive operation of electronic trade, the Authority found that *"Despite the increasing convergence between the channels, differences still remain between e-commerce websites and stores in terms of assortment and services provided to the clients"*, while admitting the competitive pressure exercised by online selling players on traditional distributors for some categories of products and for some consumers.[28]

In the Booking.com decision (2015), the Authority noted that the sale of hotel "overnight stays" were distinct from tour packages which are composed of various products, and that Meta search engines have a vertical relationship with online travel agencies (OTA), since they only marginally competed with them in their relationship towards the hotels. The Authority has identified *"the market for the supply of "overnight stays only" reservation services by French hotels on OTAs (online hotel booking platforms and online travel agencies), with the exception of the hotels' direct channel and notably their website, meta search engines and search engines"*.

[24] Competition Authority, Decision No 14-D-18 of 28 November 2014 regarding practices used event-driven online sales sector.
[25] Competition Authority, Decision No 14-D-18 of 28 November 2014 regarding practices used event-driven online sales sector, §113.
[26] Competition Authority, Decision No 14-D-18 of 28 November 2014 regarding practices used event-driven online sales sector, §115.
[27] Paris Court of Appeal, Pole 5 Chamber 7, 12 May 2016, RG 2015/00301, Brandalley v Showroomprivé.com, Vente-Privée.com, Autorité de la concurrence, Ministre de l'économie, de l'industrie et du numérique.
[28] Competition Authority, Opinion No 12-A-20 of 18 September 2012 on the competitive operation of electronic trade, §201.

After having taken into account the views of the hoteliers who did not regard these different channels as substitutable to OTA channels, and to Booking.com, who argued that most hotels did not have the means to ensure their internet visibility by registering directly with meta search engines and search engines, the Authority concluded that *"In case of a small but permanent increase in OTAs' commission rates, the redirection of hoteliers' demand to these other channels would not be sufficient to make this price rise unprofitable for an hypothetical monopolist."* Thus, the Authority restricts the market definition to the supply of "overnight stays only" reservation services by French hotels on OTAs, with the exception of the hotels' direct channel and notably their website, meta search engines and search engines.[29] The market is therefore limited to online sales.

In the FNAC-Darty merger case (2016)[30], the Authority took into account the competitive pressure exercised by online sales operators, examining the demand redirections if FNAC or Darty increased their prices, whether this pressure comes from pure players (such as Amazon or Cdiscount) or from the websites of traditional retail stores which extend online their physical in-store selling. Then, the Authority included for the first time that online sales platforms in the retail market for brown products (consumer electronic products such as TVs, photographic cameras, audio products: MP3, DVD and Blu-ray players …) and grey products (consumer electronic products such as communication and multimedia: tablets, laptop computers, smartphones, etc.) which has been limited until now to traditional in-store distribution.

The Authority observed a standardization of product lines and services available online, a standardization of prices between both distribution channels, and that most customers make their purchase decision by arbitrating between online and in-store products. This decision is currently under review by the Conseil d'Etat (Administrative Supreme Court).

2.2.2. The Dominant Position

The National Digital Council (Conseil National du Numérique, CNNum) initiated a reflexion about the adaptation of the notion of dominant position beyond the market share criterion *"in order to take into account more generally the power to exclude or to damage innovation: control of key resources, critical points of access, visibility, information, etc. "*, advocating the integration, by the conceptual tools of regulation, (*" the fact that the platform sometimes constitutes itself a market"*).[31] However, some important criteria in the digital sector (i.e. detention of databases[32]) are not specific to the digital market.

The decisions of the Competition Council, and then of the Competition Authority, show that the concepts and reasoning of competition law are adaptable to the digital sector.[33]

In the FNAC-Darty merger case[34], the Competition Authority took into account for the first time online sales in assessing market power. The Authority chose a 50% market share threshold for brown and grey products - instead of the 40% market share threshold it traditionally used in its previous practice - to presume the existence of dominance, in order to identify the areas where the concentration was likely to affect competition.

The Authority stated that the consideration of a higher threshold was justified by the integration of online sales in the local competitive analysis. According to the Authority, *"the increased use of internet, inasmuch as it makes the market far more transparent, in particular as regards prices and products, limits broadly the players' market power even when*

[29] Competition Authority, Decision No 15-D-06 of 21 April 2015 regarding practices implemented by Booking.com B.V., Booking.com France SAS and Booking.com Customer Service France SAS in the online hotel reservation sector, §100.
[30] Competition Authority, Decision No of decision 16-DCC-111 regarding the acquisition of the Darty company by the Fnac group.
[31] CNNum, Report on the neutrality of platforms, 2014, p. 28.
[32] Competition Authority, Decision No 14-D-06 of 8 July 2014 regarding practices implemented by Cegedim in medical database sector.
[33] Bruno Lasserre, Hearing by the Committee of reflection and proposals on the law and the liberties for the age of the digital technology, 7 July 2015.
[34] Competition Authority, Decision No of decision 16-DCC-111 regarding the acquisition of the Darty company by the Fnac group.

they have relatively high market shares in some local areas, by giving consumers an alternative for their purchases." Moreover, *"online sales account for an increasing share of the electronic products sales"*.

2.2.3. The Abuse

Some abuses are linked to the two-sided nature of the market in which the dominant undertaking operates. Thus, the position of platforms on the Internet has sometimes led them to develop an activity on a third side of the market placing them in a situation of competition. This is the case of Google that has been condemned by the European Commission on 27 June 2017 for favouring its Google shopping service with its search engine.[35]

Other abuses may include denying access to data, which is anti-competitive if the data at stake constitute an essential facility, a concept delimited by the European and French authorities.[36] In its decision Cegedim, the Competition Authority was very cautious in qualifying the database as essential facilities, considering that they were technically feasible by competitors, even if this was not easy because of the reference value of the tool in question and not essential to the point of rendering impossible any alternative solution.[37]

Nevertheless, even if a database is not characterised as an essential facility, denying access, even implicitly,[38] in a discriminatory manner by a dominant company may constitute an abuse of a dominant position, since it significantly distorts competition.[39] The Authority may, therefore, order the holder of the database to make available consumer data, provided that said consumers do not object to such disclosure,[40] which shows the interactions between competition law and the protection of personal data.

Some contractual abuses include Across Platform Parity Agreements (APPA), that tend to organise the alignment of the offers of one party with that of a third party and the subsequent amendment of the contract. It obliges the debtor not to present better offers (in particular tariffs) than those offered by his partner. The practice was common in hotels, the reservation centres imposing hoteliers referenced not to offer on their own website services on more favourable terms and at lower prices than those displayed by the platform. In addition to the competition between platforms that is asphyxiated, suppliers are also deprived of any commercial autonomy, especially as far as pricing is concerned. The Authority considered that the parity clauses could lead to a reduction in competition between Booking.com and competing platforms and to squeeze out new entrants to the market. It has accepted the commitments offered by Booking aimed in particular at the abolition of tariff and room availability parity clauses.[41] Likewise, the tribunal de commerce de Paris (Paris Commercial Court), ruling on the basis of Article L. 442-6 I 2 ° of the Commercial Code, that condemns significant imbalanced clauses in contracts concluded between commercial partners, considered that the tariff parity clause was null and void[42].

The Law of 6 August 2015 for growth, activity and equal economic opportunities (known as the Macron Law) introduced

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[35] European Commission, Press release 27 June 2017, IP/17/1784.

[36] Competition Authority and Bundeskartellamt, Competition law and data, 16 May 2016; AFEC, Report on digital economy, February 2016.

[37] Competition Authority, Decision No 14-D-06 of 8 July 2014 regarding practices implemented by Cegedim in the medical database sector. Questioned about this qualification of essential facilities, the Court of Appeal of Paris avoided the issue, acknowledging the inadmissibility of the request (Paris Court of Appeal, Pôle 5, Chamber 5-7, 24 September 2015, RG No 2014/17586); Cour de cassation, 21 June 2017, No 15-25941.

[38] Comm. CE, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 24 February 2009.

[39] Competition Authority, Decision No 14-D-06, of 21 April 2015 regarding practices implemented by Booking.com B.V., Booking.com France SAS and Booking.com Customer Service France SAS in the online hotel reservation sector, §192 et seq.

[40] Competition Authority, Decision No 14-MC-02 of 9 Sept. 2014 regarding a request for interim measures submitted by Direct Energie in gas and electricity sectors.

[41] Competition Authority, Decision No 15-D-06 of 21 April 2015 regarding practices implemented by Booking.com B.V., Booking.com France SAS and Booking.com Customer Service France SAS in the online hotel reservation sector.

[42] Tribunal de commerce de Paris, 13e ch., 7 May 2015, RG No 2015/000040.

in the Tourism Code an article prohibiting parity clauses in the hotel sector (article L. 311- 5-1). The result, however, is not very satisfactory, as shown in the *"Assessment of the effectiveness of commitments undertaken by Booking.com before the Authority"* of 9 February 2017.

The conditions of referencing on a digital platform and in particular a search engine, an essential factor of visibility for any company, can also prove to be abusive. For example, Google's terms and conditions for its AdWords service have been examined in several cases. It has been considered that if Google is free *"to define its AdWords content policy"*, it is not exempt *"from the obligation to implement this policy under objective, transparent and non-discriminatory conditions"*,[43] which has sometimes been criticised.[44]

In the case Voyages-sncf.com in 2009, the Competition Authority considered that SNCF had abused its dominant position by requiring online travel agencies to use a license to access the essential facility at a very high cost (barrier to access to the market) (i), by operating the voyage-sncf.com website while being exempted from using the charged essential facility (discriminatory practice) (ii), by preventing access to voyages-sncf.com' competitors to the "Printed Ticket" feature (iii), by setting discriminatory conditions for the distribution of "Last Minute" tickets and iDTGV tickets (low cost offer) (iv), and by applying discriminatory terms of remuneration through commissions paid for the supply of its train tickets (v).[45] SNCF did not challenge these accusations and proposed commitments[46] in order to remedy the competition concerns. The following legal actions taken in this case were not destined to challenge these competition concerns and remedies.[47]

In the case of the online horserace betting, in 2014, the Competition Authority considered that PMU had, through its online platform dedicated to horserace betting, implemented a practice known as betting pools[48] of its online and offline stakes. Such a practice could be characterized as abuse of a dominant position.[49] Indeed, the Authority admitted that this practice could have, on the competitive functioning of the online horserace betting market, an effect of capture of the demand, a hindering effect for new entrants and an eviction effect on alternative operators already present. Competitors which do not benefit from the resources of the offline monopoly, are not in a position to offer such an attractive offer. PMU proposed commitments aimed in particular at separating online and offline bets.

3. Consent Decrees and Cease Agreements

French law offers two means of dispute resolution to undertakings subject to liability for anticompetitive practices: the settlement and commitment procedures. These negotiated procedures are applicable to all sectors, including e-commerce[50] and may, in theory, be initiated whatever the infringements of competition at stake. The commitments procedures applied

[43] Competition Authority, Decision No 13-D-07 of 28 February 2013, e-Kanopi, pt. 47.
[44] Competition Authority, Decision No 10-MC-01 of 30 June 2010 regarding a Request of interim measures from Navx; 10-D-30 of 28 October 2010 regarding practices implemented in online advertising sector.
[45] Competition Council, Decision No 09-D-06 of 5 February 2009 relating to practices implemented by SNCF and Expedia Inc. in the sector of online travel sales.
[46] SNCF committed to enable online travel agencies to distribute SNCF train tickets under the same technical conditions as the voyage-sncf.com website, to enable the function "Ticket Printed" for online travel agencies, to allow the display of the iDTGV offers on the same web pages as other SNCF railway offers, and to no longer apply discriminatory conditions of remuneration.
[47] Paris Court of Appeal, 23 February 2010, RG No 2009/05544; Cour de cassation, 10 May 2011, No R 10-14.866 (withdrawal); Cour de cassation, 10 May 2011, No H 10-14.881 (requests for preliminary ruling of the CJEU); CJEU, 13 December 2012, case C-226/11; Cour de cassation, 16 April 2013, No H 10-14.881 (rejection); Cour de cassation, 11 June 2013, No H 10-14.881 (amendment).
[48] The practice of pooling consisted in, for PMU, to pool in a single mass for each bet and for each online bets made on Pmu.fr with those made under its monopoly "offline".
[49] Competition Authority, Decision No 14-D-04 of 25 February 2014 relating to practices implemented in the online horserace betting sector.
[50] Competition Authority, Decision No 09-D-06 of 5 February 2009 regarding practices implemented by SNCF and Expedia Inc. in the online travel sales sector.

in the online platform sector are mentioned above. However, to our knowledge, no major decision of transaction has been issued by the Competition Authority in the online sales sector.

The settlement procedure enables undertakings to acknowledge their involvement in anticompetitive practices and their liability for it. The transaction proposed by the Authority sets the maximal and minimal amount of the incurred fine, which, in theory, limits its amount.[51]

The commitments procedure, provided for in Article L. 464-2 I of the Commercial Code, allows the Competition Authority to accept commitments proposed by undertakings, aiming at remedying the competition concerns identified. The commitments can be proposed in addition to a settlement procedure or autonomously. The commitments procedure normally applies to situations raising competition concerns which can easily be waived by a simple behavioural modification, such as unilateral or vertical practices of refusal or of insufficient competitive tendering. It does not apply in cases where the offence against the economic public order requires a financial penalty (for example in case of cartels or abuse of dominant position causing an important damage to the economy). If the Authority considers that the commitments proposed solve the competitive concerns identified by the instruction, the Authority issues a decision making the commitments mandatory. This decision ends the instruction procedure.

The Authority also has the possibility to refuse commitments proposed by the concerned undertakings when the damage caused to the economy is too important. The exclusionary practices are viewed as particularly serious.[52] The commitments procedure is rarely carried out in this context.

For example, in a decision concerning the online sale of theatre show tickets, the Authority accepted a number of commitments including the implementation of compliance program on competition rules in the e-commerce sector. The proposed commitments did not put an end to the instruction procedure, but lowered the amount of the penalty by 10%.[53]

The decision by which the Competition Authority accepts and makes proposed commitments mandatory can be preceded by a negotiation phase. Yet, it has a unilateral nature. This decision does not rule on the undertaking's liability. Neither does it prevent victims of the anticompetitive practices at stake to take legal action in order to obtain compensation. Some authors believe that the commitments procedure weakens competition law as the level of evidence provided is not satisfactory, which affects legal predictability. Indeed, if the commitments decision solves the situation on the market, it does not clarify the competition questions at stake.[54] This analysis can however be tempered by the possibility to study the commitments accepted by the Authority in order to identify the behaviour required by the Competition Authority in similar cases.

The Competition Authority strictly controls the implementation of commitments taken by undertakings and may sanction their infringement by imposing a flat-rate financial penalty up to 5% of their average daily turnover for each day of infringement. In addition, the Macron Law[55] introduced the possibility for the Authority to order injunctions or prescriptions to undertakings that have not fulfilled their commitments in the time intended. These measures may replace or extend the unfulfilled obligations.[56]

The monitoring of the commitments compliance is carried out according to a simplified procedure, different from the classic competitive analysis led in anticompetitive practices instruction procedures. It is not necessary to prove the

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[51] Article L. 464-2 III of the Commercial Code.

[52] *"when the notified charges involve exclusionary practices on the part of a dominant undertaking, these are generally viewed as serious since they are capable of having the effect of hindering the access and the development of competitors on the market by means which do not constitute competition on the merits"*, Competition Authority, Decision No 17-D-06 of 21 March 2017 regarding practices implemented in the sector of gas, electricity and energy services, §172.

[53] Competition Authority, Decision no 12-D-27 of 20 December 2012 regarding practices identified in the show ticketing sector.

[54] F. DE BURE, « *« Engagez-vous, qu'ils disaient… »* - *Retour sur la politique d'engagements des autorités de concurrence, dix ans après* », RLC, n°54, 1 October 2016.

[55] Law No 2015-990 of 6 August 2015 for growth, activity and equal economic opportunities ("Macron Law").

[56] Article L 430-8 IV 3° of the Commercial Code.

fraudulent intent of the wrongdoer, the existence of an anticompetitive practice, or the seriousness of the breach for the concerned market.[57]

4. Private Enforcement

French law includes provisions allowing the victim of an infringement of competition law to bring a private action against the offender in order to obtain damages.

Compensation for the damage suffered can be obtained in two situations. In the first case, the victim may bring a tort private action based on articles 1240 and 1241 of the Civil Code. This action is brought either autonomously before the civil judge ("stand alone action") or following the public action of the Competition Authority ("follow-on action").[58] In the second case, where the victim is a consumer, it may join a group litigation initiated by an approved consumer association as a result of the sanction of the infringement by the Competition Authority.[59]

These actions are brought before courts of the judicial order that are specialized in the implementation of competition law, provided that Articles L. 420-1 to L. 420-5 of the Commercial Code are invoked,[60] or before the administrative courts, where the offender or the victim of the competition violations is a public person.[61]

In view of the limited number of tort actions for damages implemented,[62] European Directive 2014/104/EU of 26 November 2014 introduced rules to encourage private actions by victims.[63] The transposition of this directive into French law introduced new articles L. 481-1 et seq. and R. 481-1 et seq. in the Commercial Code, which include rules relating to the communication and production of documents, the effect of the decision of the Competition Authority, the passing-on of additional costs or the joint and several liability.[64]

Article L. 481-2 of the Commercial Code introduces an irrefutable presumption of breach and liability when the existence of the anticompetitive practice and the attributability of the infringement have been established by a final decision of the Competition Authority. This includes decisions imposing penalties to undertakings as well as decisions made in the context of a non-challenge or a settlement procedure.

However, decisions to accept commitments made by the undertaking concerned do not fall within the presumption, since the decision does not characterise a competition law violation.[65] In such a case, as in the case of non-compliance with commitments or in a stand-alone action, the victim shall bear the burden to prove the existence of an infringement of competition law.

5. Conclusion

[57] Competition Council, Decision No 08-D-24 of 22 October 2008 relating to the water leasing and distribution and purification in Saint-Jean-d'Angély.
[58] Paris Court of Appeal, 2 July 2015, No 13/22609, EDF / Nexans ; Cour de cassation, Commercial Chamber, 3 June 2014, no12-29482, for *follow-on actions*, also, Cour de cassation, Commercial Chamber, 13 January 2015, no 13-21886 ; Court of Appeal of Paris, 14 December 2011, No 09/20639, for *stand alone actions*.
[59] Articles L. 623-1 to L. 623-32 of the Consumer Code, introduced by Law no 2014-344 of 17 March 2014 and its implementing Decree No 2014-1081 of 24 September 2014.
[60] Articles L. 420-7 of the Commercial Code, R. 420-3, R.420-4 and R.420-5 of the Commercial Code for mainland France and R.914-1, R.924-1 and R. 954-1 of the Commercial Code for the Overseas Collectivities; also, Cour de cassation, Commercial Chamber, 9 November 2010, no 10-10937.
[61] Cour de cassation, Civil Chamber No 1, 29 September 2004, no 02-18335, EDF c/SNIET.
[62] Circular of 23 March 2017, BOMJ No 2017-03 of 31 March 2017.
[63] Directive 2014/104/UE of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.
[64] Ordinance No 2017-303 of 9 March 2017 and Decree No 2017-305 of 9 March 2017.
[65] Circular du 23 mars 2017, BOMJ No 2017-03 of 31 March 2017, Sheet No 4.

At first sight, the contentious practice of the French Competition Authority does not seem to reflect a specific sensitivity for the new economy as compared to other sectors. However, such sensitivity seems to be developing in the Authority's advisory function (advocacy). A few of the Authority's opinions are issued after a binding referral by the Government prior to the enactment of an administrative or legal text involving competition[66] or price issues, or by sectoral regulators.[67] But most of the opinions issued by the Authority are those resulting from a referral by the Minister of the Economy, or resulting from self-referrals made by the Authority, which shows the particular attention of the French Authority. Since 2010, it has delivered two global opinions on the issue,[68] and a third one is underway.[69]

In addition, there are two studies on the sector, conducted jointly with two other European competition authorities:[70] Study of 16 December 2014 on *"Economic analysis of open and closed systems"*, carried out with the Competition & Market Authority (i), and Study of 10 May 2016 on *"Competition law and data"*, carried out with the Bundeskartelamt (ii).

This mode of regulation, intervening upstream and therefore before irreversible situations, allows globalising, faster and more flexible assessments, that are adapted to the sector. Nevertheless, questions can be raised as to the binding force of this *"soft law"* tool.

[66] Competition Authority, Opinion No 13-A-12 of 10 April 2013 regarding a project of order of Minister of Social Affairs and health concerning the best practice of dispensation of medicine by electronic way.
[67] Competition Authority, Opinion No 17-A-09 of 5 May 2017 regarding a request from the Authority of Regulation of the Electronic Communications and the Posts concerning the fifth cycle of analysis of the wholesale markets of the high-speed and very high-speed.
[68] Competition Authority, Opinion No 10-A-29 of 14 December 2010 regarding the competitive functioning of the on-line advertising (request from the Minister); Opinion No 12-A-20 of 18 September 2012 regarding the competitive functioning of the e-commerce sector; Decision No 11-SOA-02 of 1 July 2011 concerning a self-referral for an opinion on the e-commerce sector.
[69] Competition Authority, self-referral, Decision No 16-SOA-02 of 23 May 2016 concerning a self-referral for an opinion on the exploitation of data in the on-line advertising sector.
[70] Study of 16 December 2014 on *« The economics of open and closed systems »*, with the Competition & Market Autority; Study of 10 May 2016 on *« Competition law and data »*, with the Bundeskartelamt.