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Questionnaire A for National Reporters of LIDC Brazil 2017

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The issue:

"What are the major competition/anti-trust issues generated by the growth of online sales platforms, and how should they be resolved?"

Background /Introduction

The International League of Competition Law is gathering information relating to the “new economy” antitrust questions below ahead of its October 2017 Congress in Brazil.

"What are the major competition/anti-trust issues generated by the growth of online sales platforms, and how should they be resolved?"

This issue is about the effects of the “new economy” over competition law, and more specifically upon the internet-related business and enterprises.

The term constructed by the literature, the notion of “new economy” over competition law reach three specific and related industries. The top element of this set of businesses and companies is the (1)

manufacture of computer software; the second is (2) services by internet-based business; and, finally, (3) communication service and equipment as production factor for both business.

The new technology industries are different from the traditional industries dedicated to the production and sale of material goods. Antitrust doctrine has developed standards for the traditional economy, for example, automobiles, clothes, steel, coffee, cigarettes, etc., considering their specific market characteristics. But outputs of the new economy are different from the output of that first group of traditional industries and in the ordinary sale of material goods through physical distribution. In that scenario, intellectual property concepts play an important role.

Antitrust literature identifies the features of traditional industries in static competition through price disputes. Some of these features include multi-plant or multi-firm production, complex industrial organization, high capital investment, reduced allocation of investment in innovation, stable markets, and limited flux of entry and exit of players.

But new economy businesses do not share these features. Operating in this new economic environment supports business with a broad range of output, less capital requirements, high levels of innovation, and fewer barriers to entry, and quick entry and exit into these special markets.

These new economy companies seem to be born and die more easily than before. And this unstable market demands that these internet-based industries search for business stability, and for this reason, their business model often includes trying to arrive first in a new market and establish a monopoly or seek cooperation between competitors in standards setting.

This is why network externality is a goal in this kind of business. It is natural that the company that invents a landmark invention or a new business process establishes a new standard and builds a new market doesn't tend to let competitors reproduce its methods, products or services so easily. These phenomena show the importance of copyright and industrial rights for the new economy and the competitiveness of the internet-based industries.

As far as we know, competition law does not forbid a monopoly position acquired through efficiency. Another question is the task of defining up to which point a monopolist may compete in order to keep its monopoly position.

A common aspect from the both economies is vertical integration. The question are the standards of antitrust analysis the same for the “old economy” and the “new economy”?

Many of answers to the questions below about the information highway and high technology industries, as debates on them over the last 20 years show, depend on the definition – or perhaps the redefinition - of the objectives of antitrust law

In this sense, see for e.g. the results of the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy, fifteenth session - Round Table on Examining the interface between the objectives of competition policy and intellectual property, occurred in Geneva, the 19th October 2016.

Note to national reporters

The following list of sections and questions should be understood as a reminder of issues that may rise in the relevant jurisdiction, not as questions to be answered one by one. National reporters are free to structure the report as they wish and to deal only with issues of relevance for their jurisdiction. The wording of the questions below should be removed from the text after having dealt with the relevant issue.

1. Positive Law

A definition of the digital platforms was introduced in French law, in 2015¹ then was modified in 2016²; it appears in the following terms today : « Any natural or legal entity is qualified as operator of on-line platform proposing, professionally, in a paid way or not, a service of communication to the on-line public basing on :

1 ° The classification or the referencing, by means of computing algorithms, of contents, of the goods or services proposed or put on-line by third parties ;

2 ° Or the getting in touch of several parties with the aim of the sale of the good, the supply of a service or an exchange or a sharing of a contents, a good or a service»³.

Such as formulated, the question A carries only on the " platforms of on-line sales " what excludes the digital platforms say " collaboratives ". The analyse will only deal with the main problems of competition related to the activity of the sites of intermediation of sale of products or services between a professional and a consumer (BtoC) or between two professionals (BtoB). Those platforms are concerning *market places* (as Amazon or PriceMinister), platforms of hotel and tourism reservation (as Booking.com or Hotels.com) or media platforms (as Spotify ou Netflix).

1. What are the relevant competition rules in your jurisdiction?

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French competition law is governed by the following provisions:

- Article L. 420-1 of the Commercial Code prohibiting anticompetitive agreements ⁴ ;

¹ Law of August 6, 2015 for growth, activity and equal economic opportunities (known as the Macron Law).

² Loi n° 2016-132, 7 October 2016 for a digital Republic

³ Art L. 111-7 French Consumer Code

⁴ « *Common actions, agreements, express or tacit undertakings or coalitions, particularly when they are intended to: 1° Limit access to the market or the free exercise of competition by other undertakings; 2° Prevent price fixing by the free play of the market, by artificially encouraging the increase or reduction of prices; 3° Limit or control production,*

- Article L. 420-2 of the Commercial Code prohibiting any abuse of dominant position or economic dependency⁵ ;
- Article L. 430-1 and subsequent of the Commercial Code related to the control of concentrations;
- Article L. 442-6 of the Commercial Code pertaining to restrictive practices⁶.

2.What are the major decisions, court judgments and authorities guidelines dealing with issue of online sales platform (infringement, mergers)?

The main decisions of the French competition Authority (hereinafter referred to as the « Authority » or « FCA ») regarding online sales platforms are the followings:

- Decision No 15-D-06 of 21 April 2015 regarding practices used by Booking.com B.V., Booking.com France SAS and Booking.com Customer Service France SAS in the online hotel reservation sector⁷ ;
- Decision No 14-D-18 of 28 November 2014 regarding practices used in the event-driven online sales sector⁸;

opportunities, investments or technical progress; 4° Share out the markets or sources of supply, shall be prohibited, even through the direct or indirect intermediation of a company in the group established outside France, when they have the aim or may have the effect of preventing, restricting or distorting the free play of competition in a market. »

⁵ « *The abuse of a dominant position by an undertaking or group of undertakings on the domestic market or a substantial part of the market is prohibited, pursuant to Article L. 420-1. This abuse may include a refusal to sell, a tie-in of sales or discriminatory terms of sale as well as the termination of established commercial relationships, for the sole reason that the partner is refusing to accept unjustified commercial terms.[...]* »

⁶ Only the two following practices have resulted in opinions and decisions regarding online sales platforms : « *I. - Any producer, trader, manufacturer or person recorded in the trade register⁴⁸ who commits the following offences shall be held liable and obliged to make good the damage caused: [...]2° Subjecting or seeking to subject a trading partner to obligations that create a significant imbalance in the rights and obligations of the parties; [...]d) Benefit automatically from more advantageous terms granted to competing undertakings by the co-contracting part [...].* »

⁷ Decision upon which relies the following Judgement: Paris Court of Appeal, Pole 5 Chamber 7, 8 October 2015, RG 2015/11953 SYNHORCAT, FAGIHT v Booking.com B.V., Booking.com France SAS and Booking.com Customer Service France SAS

⁸ Decision upon which relies the following Judgement: 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

- Decision No 14-D-11 of 2 October 2014 regarding practices used in the train ticket distribution sector;
- Decision No 14-D-04 of 25 February 2014 regarding practices used in the online horserace betting sector;
- Decision No 09-D-06 of 5 February 2009 regarding practices used by SNCF and Expedia Inc. in the online travel sales sector⁹ ;
- Decision No 07-D-07 of 8 March 2007 regarding practices used in the distribution of cosmetics and personal hygiene products sector.

The main merger decisions issued by the French competition Authority regarding online sales platforms are the followings:

- 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.

The judicial judge issued two important decisions regarding online sales platforms on matters of selective distribution¹⁰.

Finally, the main guidelines dealing with online sales platforms are the following:

- Commercial Practices Study Commission (CPSC), Opinion No 13-10, of 16 September 2013 on business relationships between hoteliers and companies operating the main hotel reservation websites;

⁹ Decision upon which relies the following Judgement: Paris Court of Appeal, Pole 5 Chamber 7, 23 February 2010, RG 2009/05544, Expedia Inc., Karavel v SNCF, Voyages-SNCF.com, l'Agence Voyages-SNCF.com, VFE Commerce, iDTGV and Lastminute.

¹⁰ Paris Court of Appeal, Pole 3 Chamber 1, 2 February 2016, RG 15/01542, eNova Santé v Caudalie; Paris Court of Appeal, Pole 5 Chamber 4, 25 May 2016, RG 14/03918, France Télévisions v Valentina Colombo, Coty France and Marvale LLC

- French Competition Authority, Opinion No 12-A-20 of 18 September 2012 on the competitive operation of electronic trade;
- French Competition Authority, Opinion No 10-A-29 of 14 December 2010 on the competitive operation of online advertising.

3. What is the criterion for market definition?

The criteria used by French competition authorities to define the relevant market are varied and naturally depend on the nature of the relevant products or services.

The abovementioned cases are recent illustrations of the competition authorities' position concerning the definition of relevant markets when online sales platforms are involved.

In the case of *Voyages-sncf.com* (2009), the Authority analyzed the substitutability between the services provided by traditional and virtual travel agencies¹¹.

In order to analyze the demand side substitutability, the Authority found that: « travel agencies' customers are, above all, price-sensitive and use the Internet to find out about the different offers »¹²

Similarly, to analyze the supply-side substitutability, the Authority stated that: « both traditional and online distribution channels offer the same products at the same price », 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 »¹³. Moreover, the Authority has 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.

¹¹ FCA, No 09-D-06 of 5 February 2009 regarding practices used by SNCF and Expedia Inc. in the online travel sales sector, § 95-98.

¹² FCA, Decision No 09-D-06 (aforementioned), § 10

¹³ FCA, Decision No 09-D-06 (aforementioned), § 10

The Authority 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.

In 2009, the *Venteprivée.com* case raised difficulties related to the definition of the relevant market. The Authority had been seized by Brandalley for potential abuses of dominant position by Venteprivée.com. The investigation services had identified a relevant market for event-driven online sales on which Venteprivée.com held more than 80% and therefore had a dominant position.

In this case, the Authority has considered that the existence of a 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 they were in other distribution channels of unsold (price, confidentiality, high-end position, stocks), and other should be tempered (“impulse buying” logic). Hence, the Authority has considered that “the possibility for other distribution channels of destocking products [stores or filing factories, physical stores primarily selling seasonal products but have, on an ancillary basis, a destocking area, physical destocking networks, physical showrooms, e-commerce sites, mail-order selling operators] to exercise competitive pressure on event-driven online sales should be examined”¹⁴. However, given the changing characteristics and specificities of the event-driven online sale from the date the events (2005-2011), the Authority has considered that it no longer makes sense – at the time it takes its decision- to analyze the demand side substitutability for the reporting period : “« Given the changing characteristics and specificities of the event-driven online sale in the reporting period, notably with the development of e-commerce sites offering destocking services, the substitution possibilities on the demand side are likely to change. As a consequence, the analysis of the demand side substitutability for the period covered by the grievance, does no longer make sense to date. Indeed, the market players’ contemporary representation of the possibilities of substitution which are offered to them or which they considered as such nearly a decade ago, could not be considered today as reliable enough”¹⁵.

¹⁴ Competition Council, Decision No 14-D-18 of 28 November 2014 regarding practices used event-driven online sales sector, §113.

¹⁵ Decision No 14-D-18 (aforementioned), §115.

In the geographical market, the Authority found that, even if the event sales companies conducted their sales through their websites, the fact that they established specific websites for each country pointed to the existence of a local market. The Authority also considered that language barriers and the continuing national variations in consumption patterns indicated the existence of a national geographic market.

This analysis was subsequently confirmed by the Paris Court of Appeal in its judgement of 12 May 2016¹⁶. This is currently under appeal at the Court of Cassation. However, 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 consumers¹⁷.

In the Booking.com decision (2015), the Authority noted that only nights were different from tour packages which are composed of various different products, and that Meta search engines have a vertical relationship with online travel agencies (OTA), since they marginally compete with the latter 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”.

After having taken into account the views of the hoteliers who did not regard these different channels as substitutable to OTAs and Booking.com channels, and who argued that most hotels did not have the means to ensure their internet visibility by registering themselves directly with meta search engines and search engines, the Authority concluded that “In case of 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

¹⁶ 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

¹⁷ FCA, Opinion No 12-A-20 of 18 September 2012 on the competitive operation of electronic trade, § 201

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 engines¹⁸. The market is therefore limited to the online sales.

In the FNAC-Darty merger (2016), the Authority took into account the competitive pressure exercised by online sale operators by means of examination of the demand redirections if the FNAC or Darty increase their prices, whether this pressure comes from pure players (e.g. Amazon, 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 online sales platforms in the retail market for brown goods (TV, photographic cameras, audio products: MP3, DVD and Blu-ray players ...) and grey products (communication and multimedia: tablets, laptop computers, smartphones, etc.) which has been limited until now to traditional in-store distribution.

Indeed, the Authority has 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 products and in-store products. This decision is currently under appeal at the State Council.

4. What is the criterion for market power (individual analysis and market power in merger context)?

In the FNAC-Darty merger, the Authority took into account for the first time online sales in assessing market power. Indeed, in this decision, the Authority has chosen 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 a dominance, in order to identify the areas where the concentration is likely to affect competition.

¹⁸ Decision No 15-D-06 (aforementioned), § 100

The Authority stated that the consideration of a higher threshold was justified by the integration of online sales in the local competitive analysis. Indeed, 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 they have relatively high market shares in some local areas, by giving consumers an alternative for their purchases. Moreover, “Internet sales account for an increasing share of the electronic products sales”.

5. What are the types of infringement in your jurisdiction?

5.1. Retail Price Maintenance (RPM) and Refusal to Deal or Supply

To the best of our knowledge, to this day, there are no specific cases for this type of infringement involving online sales platforms.

5.2. IPR restrictions

Again, to the best of our knowledge, to this day, there are no specific cases for this type of infringement.

5.3. Other virtual restraints

Under the French law, it exists another type of practices qualified as "restrictive practices of competition"¹⁹ which may trigger the liability of their authors, render null and void the concerned clauses and lead to a fine. As such, the Booking.com platform has been fined for having violated two provisions of restrictive practices of competition²⁰ (see Question 7).

Besides, the French legislator choose to adopt a special provision dedicated to online sales platforms, not through competition law but included in article L. 111-7 II of the French Consumer Code. It provides that every digital platform operator has a duty to provide fair, clear and transparent

¹⁹ See Question n° 1.

²⁰ Commercial Court of Paris, 29 November 2016, RG n° 2014/027403.

information to the user. Any breach of this obligation is sanctioned by an administrative fine up to €75.000 for a natural person and € 375.000 for a legal person²¹.

6. Is there any precedent in your jurisdiction regarding abuse of dominant position in the area of online sales platforms?

Hereinafter are described the major decisions in the decision-making practice of the FCA.

In the case Voyages-sncf.com, in 2009, the FCA considered that SNCF had abused of 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), by operating the voyage-sncf.com website while being exempted from using the charged essential facility (discriminatory practice), by preventing access to voyages-sncf.com' competitors to the "Printed Ticket" feature, by settling discriminatory conditions for the distribution of "Last Minute" tickets and iDTGV tickets (low cost offer), and by applying discriminatory terms of remuneration through commissions paid for the supply of its train tickets²². SNCF didn't contest any of these competition concerns and proposed commitments²³ in order to remedy the competition concerns. The following legal actions taken in this case were not destined to challenge these competition concerns and remedies²⁴.

In the case of the online horse-riding bets, in 2014, the FCA considered that PMU had, through its online platform dedicated to horse-riding bets, implemented a practice known as pooling²⁵ of its online and offline stake masses. Such a practice could be characterized as abuse of a dominant

²¹ Art. L. 131-4 of the French Consumer Code.

²² FCA, n° 09-D-06 from 5 February 2009, relating to practices implemented by SNCF and Expedia Inc. in the sector of online travel sales.

²³ 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" to online travel agencies, to allow the display of the iDTGV offers on the same web pages as the other SNCF's railway offers, and to no longer apply discriminatory conditions of remuneration.

²⁴ Appeal Court of Paris, 23 February 2010, RG n° 2009/05544; Cassation Court, 10 May 2011, n° R 10-14.866 (withdrawal); Cassation Court, 10 May 2011, n° H 10-14.881 (requests for preliminary ruling of the CJEU); CJEU, 13 December 2012, case C-226/11; Cassation Court, 16 April 2013, n° H 10-14.881 (reject); Cassation Court, 11 June 2013, n° H 10-14.881 (correction).

²⁵ The practice of pooling consisted in, for the PMU, to pool in a single mass for each bet and for each race online bets made on Pmu.fr with those made under its monopoly "offline".

position²⁶. Indeed, the FCA admitted that this practice could have, on the competitive functioning of the online horse-riding bets 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 the mass of online bets from the offline one.

Finally, in the Booking.com case, in 2015, the FCA considered that the parity clauses on the prices²⁷ and on the availability²⁸ provided by the general terms and conditions of the online hotel booking platform of Booking.com may be deemed as (especially) a potential abuse of eviction within the meaning of the prohibition of abuse of domination regulations²⁹. The FCA accepted the commitments made by Booking.com to amend the parity clause on the prices and to remove any clause imposing parity obligations in terms of availability of rooms or commercial terms.

7. Is there any jurisprudence on the acceptability of most favoured nation (MFN) conditions in the context of online sales platforms?

Most favoured nation conditions or « parity clauses » have not been recognized as lawful either before the FCA or before the French commercial courts. Both on the basis of competition law and restrictive practices of competition.

As indicated above, parity clauses on the prices and on the availability were considered to be possibly constituting an abuse of a dominant position. Moreover, in that decision, the FCA did not rule out

²⁶ French competition authority, n° 14-D-04 of 25 February 2014 relating to practices implemented in the online horse-riding betting sector.

²⁷ The clause on the prices is a clause whereby the hotelier undertakes to ensure that its offer (price, settlement and booking) on the Booking.com website are at the most equal to that which can appear on any other advertisement price, whether it comes from a competitor, the establishment or a third party.

²⁸ The clause on the availability is the clause allowing Booking.com to ensure that the site offers a number of accommodations of at least equivalent to that offered to the competitors or to other third party partners of the hotel.

²⁹ FCA, n° 15-D-06 of 21 April 2015 on practices implemented by companies Booking.com BV, Booking.com France SAS and Booking.com Customer Service France SAS in the online hotel booking sector.

the possibility that these parity clauses may also constitute an anti-competitive agreement prohibited by Article L. 420-1 of the French Commercial Code.

In addition to this decision, the Commercial Court of Paris considered that the parity clauses on the prices³⁰ and on the availability provided in Booking.com's general terms and conditions of service are contrary to the provisions of Articles L. 442-6 II d) and L. 442-6 I 2 ° of the French Commercial Code as regards automatic match with the conditions applied by the hotelier himself³¹. The Tribunal then concluded that these clauses were null and void and ordered Booking.com to cease this practice for the future.

Question 8: In your jurisdiction, is there the possibility of tort private suits or legal actions in order to award compensatory damages or unfair competition damages in cases of antitrust violations and of non-compliance with a consent decree or cease-and-desist agreement?

Yes, 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 payment of compensatory damages.

Compensation for the damage suffered can be obtained in two cases. On the one hand, the victim may bring a tort private action based on articles 1240 and 1241 of the French Civil Code. This action is brought either autonomously before the civil judge ("stand alone action") or following the public action of the French Competition Authority ("follow-on action")³². On the other hand, 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 Authority³³.

³⁰ See definition hereinabove.

³¹ Commercial Court of Paris, 29 November 2016, RG n° 2014/027403.

³² CA Paris, 2 July 2015, n°13/22609, EDF / Nexans ; Cass. Com., 3 June 2014, n°12-29482, en *follow-on action*, also, Cass. Com., 13 January 2015, n° 13-21886 ; CA Paris, 14 December 2011, n° 09/20639, en *stand alone action*.

³³ Art. L. 623-1 à L. 623-32 Consumer Code, introduced by the Law n° 2014-344, 17 March 2014 and its implementing decree n°2014-1081, 24 September 2014.

These actions are brought before the specialized courts of the judicial order, provided that the provisions of Articles L. 420-1 to L. 420-5 of the Commercial Code are invoked³⁴, or before the administrative courts, where the offender or the victim of the competition violations is a public person³⁵.

In view of the limited number of tort actions for damages actually implemented³⁶, European Directive 2014/104 / EU of 26 November 2014 defines new rules to encourage private actions by victims³⁷. The transposition of this directive into French law introduces into the Commercial Code articles L. 481-1 et seq. and R. 481-1 et seq., which include rules relating to the communication and production of documents, the effect of the Authority's decisions, the passing-on of additional costs or the joint and several liability³⁸.

It should be noted in this regard that the new Article L. 481-2 of the Commercial Code introduces an irrefutable presumption of fact giving rise to liability, provided that the existence of the competition violation and its assignment have been established by a decision of the Authority not subject to ordinary appeal. This includes sanction decisions as well as decisions made in the context of a non-contestation procedure or a settlement.

However, decisions to accept commitments entered into by the undertaking concerned do not fall within the presumption, since they do not find a competition violation³⁹. In such a case, as in the case of non-compliance with commitments or in a stand-alone action, the victim may still seek redress for his injury, but must prove the existence of an infringement of competition law.

8.2 In your jurisdiction, is there the possibility of cases where competition law is used as a defense against allegations of breach of contract (by arguing that the obligation breached is in fact unlawful)? If so, is it possible to defend an action for breach of contract by arguing that the

³⁴ Articles L. 420-7 Commercial Code, R. 420-3, R.420-4 et R.420-5 Commercial Code for the metropolitan France and R.914-1, R.924-1 et R. 954-1 Commercial Code for the Overseas Collectivities ; also, Cass. Com., 9 November 2010, n° 10-10937.

³⁵ Cass. Civ., 29 September 2004, n° 02-18335, EDF c/SNIET.

³⁶ Circulaire du 23 March 2017, BOMJ n° 2017-03 du 31 mars 2017.

³⁷ Directive 2014/104/UE du 26 November 2014.

³⁸ Ordonnance n° 2017-303 du 9 March 2017 et Decree n° 2017-305 du 9 March 2017.

³⁹ Circulaire du 23 mars 2017, BOMJ n° 2017-03 du 31 March 2017, Fiche n° 4.

provision breached contravenes the competition rules? Are there any examples of such cases in the area of online sales platforms?

Yes, in France a defendant can use as a defense against allegations of breach of contract the argument that the contractual obligation might have an anticompetitive object or an anticompetitive effect⁴⁰.

However, to the best of our knowledge, there are no decision to date regarding online sales platforms in which a defendant would have used for his defense competition law as an argument against allegations of breach of contract.

2. Common Market, Customs Union and Free Trade Zone

2. Is there any conflict or gap between the standards of the national system and the supranational legal system to which your country may be subject?

There is no major conflict between French and European competition law On the contrary, French competition law draws heavily from European competition law⁴¹ and the FCA applies the European Commission case law in its decisions⁴².

3. The Competition Law in the Context of the New Economy

3.1 Application of General or Specific Criteria to the New Economy

10. Should they be reviewed in the context of the new economy and in relation to its application

⁴⁰ See for example the following decisions: Court of Cassation, commercial chamber February the 18th, 1992 n°87-12.844 ; November the 4th, 2014 n°12-25.419 ; Court of Cassation, commercial chamber September the 16th, 2014 n°13-18.710 on Paris Court of Appeal April the 3rd 2013 n°10/24013 ; Metz Court of Appeal January the 27th 2015 n° 12/02421 ; Court of Cassation, commercial chamber May the 15th 2012 n° 11-17.431.

⁴¹ Notably though to the European Network of Competition Authorities.

⁴² FCA's decisions apply European law and rulings (Treaty on the Functioning of the European Union, regulations, communications, guidelines, etc.) and frequently refer to the European Commission case law.

in general?

The National Digital Council (CNNum) initiated a reflexion about the adaptation of the notion of dominant position beyond the market share criterion "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 "⁴³. Finally, the decisions of the Competition Council and of the Authority show that the concepts and arguments of competition law are highly adaptable to the digital sector⁴⁴.

For example, if the French Authority uses the criterion of market shares as first indication of the dominant position, the practice shows that other elements are used to appreciate the position of company of the digital sector.

As such, the detention of databases appears as an important criterion, but not specific to the digital sector. If databases realised for their own use cannot be held to characterise the dominant position, they can be nevertheless taken into account in the analysis of the power of market of the company in cause⁴⁵.

11. Do exclusionary practices occur in the internet related business markets? What are the criteria or standards to determine if a practice is exclusionary?

In addition to the restrictive practices resulting from the agreements envisaged below, operators in the digital sector may engage in abuse of exclusion and exploitation.

Some are linked to the two-sided nature of the market in which they operate. Thus, the position of

⁴³ CNNum, Report on the neutrality of platforms put back(handed) to Minister of Finance of the Industrial recovery and the Digital technology and to Secretary of State in charge of the Digital technology, 2014, p. 28.

⁴⁴ V. B. 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.

⁴⁵ ADLC, dec. n° 14-D-06, 8 July 2014 regarding practices implemented by Cegedim in medical database sector.

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. Such is the case of Google challenged by the European Commission in a first statement of objections sent on 15 April 2015 followed by a second on 14 July 2016 to promote its Google shopping service by its search engine.

Other abuses may include denying access to data. It is anti-competitive if the data at issue constitute an essential facility, a concept delimited by the European and French authorities⁴⁶. In its decision Cegedim, the French Authority was very cautious in qualifying the bases of essential facilities, considering in the present case 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 other alternative solution⁴⁷.

Nevertheless, even if a database is not characterised as an essential facility, refusing access, even implicitly⁴⁸, in a discriminatory manner by a dominant company may constitute an abuse of a dominant position, since it significantly distorts competition⁴⁹. The Authority may, therefore, order the holder of the database to make available consumer data, provided that they do not object⁵⁰, which shows the interactions between competition law and the protection of personal data.

Some contractual abuses can still be observed, such as the inclusion of an Across Platform Parity Agreements (APPA). It tends 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 centers imposing hoteliers referenced not to offer on their own site services on more favourable terms and at prices lower than those displayed by the platforme. In addition to the

⁴⁶ V. ADLC et Bundeskartellamt, Competition law and data, op. cit., p. 20. – AFEC, Report on digital economy, February 2016.

⁴⁷ ADLC, dec. n° 14-D-06, 8 July 2014 regarding practices implemented by Cegedim in medical database sector. – Questioned about this qualification of essential facilities, the Court of Appeal of Paris avoided the issue in the motive for inadmissibility of the request (CA Paris, Pôle 5, Ch. 5-7, 24 Sept. 2015, RG 2014/17586).

⁴⁸ 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.

⁴⁹ ADLC, déc. n° 14-D-06, op. cit., § 192 et s.

⁵⁰ ADLC, déc. n° 14-MC-02, 9 Sept. 2014 regarding a Request of conservation measures presented by Direct Energie in the sectors of the gas and the electricity.

competition between platforms that is asphyxiated, suppliers are also deprived of any commercial autonomy, especially pricing. The Authority considered that the parity clauses could lead to a reduction in competition between booking.com and other competing platforms and to squeeze out new entrants to the market. It has accepted the commitments of Booking aimed in particular at the abolition of tariff parity clauses⁵¹. Unlike the Paris Commercial Court ruling on the basis of Article L. 442-6 I 2 ° of the Commercial Code⁵², the Authority considered that the clause concerning the availability of shares should be deleted.

The Law of August 6, 2015 for growth, activity and equal economic opportunities (known as the Macron Law) introduced in the Tourism Code an article prohibiting parity clauses in the hotel sector (article L. 311- 5-1). The result, however, remains mixed, 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 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"⁵³, which has sometimes been criticised⁵⁴.

12. In the case of an antitrust suit, is efficiency of the defendant relevant for the competition analysis?

The question has not yet arisen as far as the online sales sector is concerned.

13. Are there any guidelines or directives about vertical restraints in your national system? If

⁵¹ ADLC, déc. n° 15-D-06, 21 April 2015 regarding practices used by Booking.com B.V., Booking.com France SAS and Booking.com Customer Service France SAS in the online hotel reservation sector.

⁵² TC Paris, 13e ch., 7 May 2015.

⁵³ ADLC., dec. n° 13-D-07, 28 February 2013, e-Kanopi, pt. 47.

⁵⁴ ADLC., dec. n° 10-MC-01, 30 June 2010 regarding a Request of interim measures from Navx. – ADLC., déc. n° 10-D-30, 28 October 2010 regarding practices implemented in online advertising sector.

so, are these rules or guidelines relevant to the internet-related and computer-software enterprises?

The French Authority applies Regulation No. 330/2010 of 20 April 2010 on the application of Article 101 (3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices as well as its guidelines for agreements affecting trade between Member States, but also as an "Analysis guide" for agreements affecting only the French market.

The Regulations may apply to vertical agreements containing ancillary provisions on the assignment or use of intellectual property rights (IPRs), as may be the case with software. According to the guidelines (paragraph 31), five conditions are required:

- (a) The IPR provisions must be part of a vertical agreement, that is, an agreement with conditions under which the parties may purchase, sell or resell certain goods or services;
- (b) The IPRs must be assigned to, or licensed for use by, the buyer;
- (c) The IPR provisions must not constitute the primary object of the agreement;
- (d) The IPR provisions must be directly related to the use, sale or resale of goods or services by the buyer or its customers. In the case of franchising where marketing forms the object of the exploitation of the IPRs, the goods or services are distributed by the master franchisee or the franchisees;
- (e) The IPR provisions, in relation to the contract goods or services, must not contain restrictions of competition having the same object as vertical restraints which are not exempted under the Block Exemption Regulation.

Restrictions concerning the assignment or use of IPRs can be covered when the main object of the agreement is the purchase or distribution of goods or services.

With respect to software covered by copyright, the guidelines state that:

(40) Resellers of goods covered by copyright (books, software, etc.) may be obliged by the copyright holder only to resell under the condition that the buyer, whether another reseller or the end user, shall not infringe the copyright. Such obligations on the reseller, to the extent that they fall under Article

101(1) at all, are covered by the Block Exemption Regulation.

(41) Agreements, under which hard copies of software are supplied for resale and where the reseller does not acquire a licence to any rights over the software but only has the right to resell the hard copies, are to be regarded as agreements for the supply of goods for resale for the purpose of the Block Exemption Regulation. Under that form of distribution, licensing the software only occurs between the copyright owner and the user of the software. It may take the form of a 'shrink wrap' licence, that is, a set of conditions included in the package of the hard copy which the end user is deemed to accept by opening the package.

(42) Buyers of hardware incorporating software protected by copyright may be obliged by the copyright holder not to infringe the copyright, and must therefore not make copies and resell the software or make copies and use the software in combination with other hardware. Such use-restrictions, to the extent that they fall within Article 101(1) at all, are covered by the Block Exemption Regulation.

14. The antitrust and the competition law doctrine and decisions in your national system demand changes in order to deal more sensibly with the “new economy” of the so called “internet- related” and “computer-software” enterprises?

The contentious practice of the French authority does not seem to develop a specific sensitivity for the new economy compared to other sectors.

On the other hand, this "sensitivity" is manifested in the Authority's advisory function (advocacy). Some of the Authority's opinions are required by the Government prior to the enactment of a text on a competition⁵⁵ or price issue or by sectoral regulators⁵⁶.

It is above all the referrals of the Minister of the Economy or the self-referrals on global approaches

⁵⁵ AdIC, Opinion n° 13-A-12, 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.

⁵⁶ AdIC, Opinion n° 17-A-09, 5 May 2017 regarding a demand of opinion of 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.

of the sector that demonstrate the particular attention of the French Authority. Since 2010, it has delivered 2 global opinions on the issue⁵⁷, with a third expected⁵⁸.

In addition, there are two studies on the sector, conducted jointly with two European competition authorities⁵⁹:

- Study of 16 December 2014 on "Economic analysis of open and closed systems", carried out with the Competition & Market Authority.

- Study of 10 May 2016 on "Competition law and data", carried out with the Bundeskartellamt. This mode of regulation, intervening upstream and therefore before irreversible situations, allows globalisation approaches, faster and more flexible, adapted to the sector. Nevertheless, questions can be raised as to the binding force of this "soft law" tool.

3.2 Restriction of Online Sales

15. How does your national system treat bans on sales through third-party internet platforms in selective distribution systems?

The French Competition Authority and national courts' position has progressively evolved on this matter, but remains fluctuant.

In a decision n°07-D-07 of March 4th 2007 regarding the distribution of personal care and cosmetic products⁶⁰, the Competition Council considered that a producer could reasonably refuse to grant authorisation to linking platforms, since at the time of the facts this distribution channel still caused "*serious issues*", because those platforms did not provide sufficient guarantees regarding the quality and identity of sellers. This lack of sufficient guarantees could, according to the Council,

⁵⁷ Adlc, Opinion n° 10-A-29, 14 December 2010 regarding the competitive functioning of the on-line advertising (Demand of the Minister) ; Opinion n° 12-A-20, 18 September 2012 regarding the competitive functioning of the e-commerce sector (Decision n° 11-SOA-02, 1 July 2011 concerning a self-referral for an opinion on the e-commerce sector).

⁵⁸ Self-referral, Decision n° 16-SOA-02, 23 May 2016 concerning a self-referral for an opinion on the exploitation of data in the on-line advertising sector.

⁵⁹ Study of the 16th December, 2014 on « The economics of open and closed systems », with the Competition & Market Authority ; Study of the 10th May, 2016 on « Competition law and data », with the Bundeskartellamt.

⁶⁰ FCA, decision n° 07-D-07 of March 8th 2007

facilitate illegal sales outside the selective distribution network or the sale of counterfeit goods, and thus harm the affected network's image.

However, the 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. On the contrary, it proceeded to a concrete analysis of guarantees offered by the platforms at the time of the facts, 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 October 2011, the ECJ, in the judgment *Pierre Fabre v President of the French Competition Authority*⁶¹ 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 objective and the 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.

On September 18th 2012, in its opinion n°12-A-20 about e-commerce⁶², the French Competition Authority nevertheless 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, some manufacturers apply agreement conditions which forbid sales through third-party internet platforms. The Authority thus considered that such a prohibition, if it caused a restriction of competition on the relevant markets, 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.

⁶¹ Judgement of the Court (3rd chamber) of October 13th 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)

⁶² FCA, opinion n° 12-A-20 of September 18th 2012 regarding the competitive functioning of e-commerce

This issue was brought again before the French Competition Authority, with two decisions concerning requests for interim measures in the field of brown products distribution, particularly televisions⁶³, but the Authority did not rule on this issue⁶⁴. Indeed, in these cases, the Authority deemed that the plaintiff company did not provide evidence that the clause prohibiting sales on e-marketplaces caused the deterioration of its financial position or immediate damages to its interests.

Moreover, on September 30th 2014, the 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.

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 at that time, which suggested that the financial deterioration was not linked to the clause prohibiting the sale of the brand's products on e-marketplaces.

Finally, in a press release of November 18th 2015, the French Competition Authority indicated that it closed the investigation on Adidas regarding such clauses, in exchange for Adidas' commitment to remove from its contracts all clauses forbidding distributors to use these marketplaces, as long as they meet certain qualitative criteria, allowing them to be authorised by the manufacturer.

Therefore, to this day, the French Competition Authority never had the opportunity to adopt a final decision, following a contentious procedure, regarding the validity of clauses that generally prohibit licensed distributors from commercialising products on e-marketplaces.

By contrast, commercial courts have adopted a stricter position, in the specific context of evidence in emergency interim proceedings.

⁶³ FCA, decision n° 14-D-07 of July 23rd 2014 ; ADLC decision n° 15-D-11 of June 24th 2015

⁶⁴ Indeed, on September 30th 2014, the Commission indicated that it would take up a part of this case, in the context of an ongoing 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 (FCA, decision n° 15-D-11 of June 24th 2015, para. 8)

The company eNova Santé created the platform 1001pharmacie.com, allowing pharmacists to sell their product on a marketplace.

The company Caudalie, which distributed its products within a selective distribution network approved by the French Competition Authority in 2007⁶⁵, prohibited its licensed 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 (Code de commerce), which forbids participating in the violation of a prohibition against sales outside the network by a distributor bound by a selective distribution agreement. The Paris Commercial Tribunal's President, in an order of December 31st 2014, granted Caudalie's requests and ordered eNova Santé to cease all commercialisation of Caudalie's brand 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 February 2nd 2016 1001Pharmacie/ Caudalie⁶⁶, the Paris Court of appeal set aside the order of December 31st 2014 of the Paris Commercial Tribunal's President⁶⁷, by taking into account the evolution of law and jurisprudence⁶⁸, in particular:

- the French Competition Authority's decisions regarding practices in the field of brown products distribution, particularly televisions, n° 14-D-07 of July 23rd 2014 et n° 15-D-11 of June 24th 2015;
- Adidas' commitment decision before the Competition Authority;
- various Bundeskartellamt decisions (Adidas and Asics in 2014 and 2015); and

⁶⁵ Decision n° 07-D-07 of March 8th 2007 regarding practices implemented in the field of personal care and cosmetic products distribution

⁶⁶ Paris Court of Appeal, Pole 1 – Chamber 3, judgement of February 2nd 2016

⁶⁷ RG n° 2014060579.

⁶⁸ The considered criteria are : (1) Competition Authority's decisions regarding practises in the field of brown products distribution, particularly televisions n° 14-D-07 of July 23rd 2014 et n° 15-D-11 of June 24th 2015, (2) Adidas' commitment decision before the Competition Authority (3) various Bundeskartellamt decisions (Adidas and Asics in 2014 and 2015) and (4) a law professor consultation

- a law professor consultation.

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.

Nevertheless, it must be noted that 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 a manifestly illicit trouble⁶⁹.

Furthermore and in substance, as mentioned above:

- the Competition Authority did not take a decision on this matter during the brown products cases of 2014 and 2015, anticipating an upcoming decision from the European Commission;
- to this day, the Competition Authority's practice regarding this subject is limited to a commitment procedure and an opinion;
- the Bundeskartellamt's practice is limited to commitment procedures, since the German Authority did not take a decision on this topic in the Asics case;
- eNova Santé also filed a complaint before the Competition Authority, which is still pending;
- the European Commission is also investigating this matter;
- in its final report published on 10th May 2017 concerning a sector inquiry on e-commerce, the European Commission indicated 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”*

⁶⁹ Article 873 1st paragraph of the French Code de procédure civile.

– a preliminary ruling on this issue was also referred to the European Unions Court of Justice, in a case between Coty Germany GmbH against Parfümerie Akzente GmbH.

To this day, the question of the validity of clauses that completely ban sales on e-marketplaces of products distributed in a selective distribution system is thus still not conclusively settled in France.

16. In your national system, may a supplier require that customers do not visit the distributor’s website through a site carrying the name or logo of the third party platform?

To our knowledge, this question has never been answered by the French Competition Authority, or by French national courts. Cases cited in the previous answer to question 15 seem to be using a case-by-case approach, in which the Authority and courts would assess objective justifications to such clauses.

17. Does the competition law in your country or system allow a supplier operating a selective distribution system to impose such obligations on authorized dealers? If so, are there limits to such a business method?

See the above answer to question 16.

18. Is this type of restriction or exclusivity considered exclusionary?

See the above answer to question 16.

19. Do sales through third-party internet platforms in selective distribution systems restrict “intra-brand” competition? If so, does it affect small and medium-sized dealers?

Such clauses could indeed, in the effect assessment, be looked at on a case-by-case analysis as restrictive of intra-brand competition, particularly at the expense of small and medium-sized firms.

Indeed, the European Commission itself pointed out, in its Final Report of May 10th 2017 on e-commerce, 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 %).

20. Do sales through third-party internet platforms in selective distribution systems create a barrier to entry from the point of view of the SME?

In a case-by-case effects analysis, a prohibition of sales on marketplaces could be considered as creating a barrier to entry from the point of view of SMEs, which do not necessarily have sufficient resources to develop mobile applications with secure payment systems.

20.1. If so, may these practices raise rival's cost by restricting intra-brand competition or blocking new entries of SME into the chain?

See the above answer to question 19.

21. Does the protection or defense of a prestigious or a well-known trademarks justify an obligation upon distributors not to sell the licensed product on another platform or associated trademark of the third-party platform?

In the Caudalie case cited above (question 15), which referred to a request for interim measures, the Paris Court of appeal concluded that a general resale prohibition of sales on an online sales platform, notwithstanding its features, could be qualified as a hardcore unjustified competition restriction, unless an objective justification is provided.

In view of Pierre Fabre ECJ judgement's conclusions, according to which 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, we can nevertheless wonder whether the aim of protecting or defending a prestigious or well-known brand could be a sufficient objective justification for an absolute prohibition of marketplaces sales.

According to the Commission's conclusions in its Final Report of 10th May 2017 on e-commerce, competition authorities should conduct a case-by-case analysis according to the relevant market situation.

Furthermore, in a judgement of June 29th 2016 SAS Coty – Division Prestige c/SA Brandalley France⁷⁰, the Paris Court of Appeal, which questioned the legality of Coty's selective distribution network, concluded that Coty could not accuse Brandalley, an online platform for catalogue retail and "flash" sales, of harming Coty's selective distribution network, nor of usurping the title of licensed distributor, since the sold products' packaging did not include a "licensed distributor" labelling.

22. Do restrictions or bans imposed to authorized sellers not to sell through a third-party platform affect consumer interests?

In a case-by-case effects assessment, a prohibition to sell on marketplaces could be considered as harming consumers' interests, in particular:

- if it significantly increases their research costs;
- if the product is not broadly available by other means through a wide selective distribution network;
- if the product is subject to little inter-brand competition.

4. The Structures of the Markets

23. Is it possible to restrict sales through third-party internet platforms in selective distribution systems that affect the structures of certain traditional market up stream?

See answer to question 15 above.

⁷⁰ CA Paris, Pole 5 Chamber 4, judgement of June 29th 2016 SAS Coty – Division Prestige c/SA Brandalley France

24. What is the structure prerequisite for an exclusionary practice? The structure criteria may be specifically relaxed – without legislation modification - in order to create a means of decentralizing analysis or not proceed the investigation.

Exclusionary conducts can arise from contractual mechanisms, particularly exclusivity mechanisms but also cumulative effects of selective distribution networks. The French Competition Authority, in its assessment, analyses competition features, particularly the market shares of the supplier and of authorised distributors; the cumulative effect of parallel selective distribution networks on the market; the potential exclusion of some distribution modes; the contenders' position which could compensate for the drop in intra-brand competition by inter-brand competition; the potential existence of non-competition clauses, of volume or turnover minimum requirements; or the markets' degree of maturity.

The Paris Court of Appeal, in a judgement of May 7th 2002 regarding practices (exclusivity clauses) implemented in the field of impulsion ice, thus considered that “ *The competition restrictive effect arising from a set of distribution agreements must be assessed in view of the nature and importance of contracts, the existence of real and concrete opportunities for a new competitor to penetrate the contractual network, and the operating conditions of the competitive process on the reference market, particularly the number and size of manufacturers on the market, the degree of market saturation, the customer loyalty to existing brands*”.

In a judgement of October 30th 2013⁷¹, Paris Court of Appeal also underlined that a selective distribution network is lawful if it fulfils three cumulative conditions:

- selection criteria shall be objective and precise;
- selection criteria shall be applied in a non-discriminatory manner;
- selection requirements shall not be disproportionate; and
- the system shall not have the object or effect of excluding certain specific forms of distribution

The French Competition Authority also underlined, in the opinion of September 18th 2012 regarding the competitive functioning of e-commerce, that in the context of a selective distribution network, the manufacturer could not impose an absolute prohibition of online sale of its products to its authorised

⁷¹ Paris Appeal Court, October 30th 2013, Pole 5 Chamber 4, RG n°11/06257

distributors, since such a ban would “*necessarily have the object of restricting competition, adding to the limitation of competition linked to the choice of a selective distribution system by the manufacturer*”⁷².

5. Consent Decrees and Cease Agreements

25. In your jurisdiction, are Consent Decrees applied to cases of exclusionary practices and in situations concerning e-commerce platforms?

French law offers two means of dispute resolution to companies subject to liability for anticompetitive practices: the settlement and commitment procedures.

The settlement procedure enables companies to acknowledge their involvement in anticompetitive practices and their liability for it. The transaction proposed by the FCA sets the maximal and minimal amount of the incurred fine, which, in theory, limits its amount⁷³. **The commitments procedure**, which results from Article L. 464-2 I of the Commercial Code, allows the FCA to accept commitments proposed by the companies, in order to waive all competition concerns that could be considered anticompetitive practices. 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 behavior change, 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 fine (for example in case of cartels or abuse of dominant position causing an important damage to the economy). If the FCA considers that the commitments proposed solve the competitive concerns identified by the instruction, the FCA rules on a decision making the commitments obligatory. This decision ends the instruction procedure.

The negotiated procedures (settlement and commitments procedure) are applicable to all sectors, including e-commerce⁷⁴ and may, in theory, be initiated whichever the infringements of competition

⁷² FCO opinion of 18th September 2012 regarding the competitive functioning of e-commerce,

⁷³ Article L. 464-2 III of the Commercial Code

⁷⁴ FCA decision n° 09-D-06 of the 5 February 2009 regarding practices implemented by SNCF and Expedia Inc. in the online travel sales sector

at stake. However, to our knowledge, no major decision of transaction has been issued by the FCA in the online sales sector.

Concerning the commitments procedure, the FCA keeps the possibility to refuse commitments proposed by the concerned companies when the damage caused to the economy is too important. The exclusionary practices are viewed as particularly serious⁷⁵. Hence, the commitments procedure is rarely carried out in this context.

For example, in a decision concerning the online sale of theater show tickets, the FCA accepted a certain number of commitments covering 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 penalty amount by 10%⁷⁶.

25.1.If so, do the Consent Decrees help or hinder the development of standards of analysis and controversy resolutions or do they terminate cases with robust evidence production to early and without a decision on merits that might have precedential value?

The settlement procedure has no real implication for the competitive analysis of the market. Indeed, the separation of the FCA's investigation and instruction activities guarantees the uniform implementation of standards of analysis, whether or not a settlement procedure has been requested. Nevertheless, the settlement procedure contributes, by nature, to ensure a faster and more predictable case management⁷⁷.

In terms of commitments, the decision by which the FCA's board accepts and renders proposed commitments obligatory can be preceded by a negotiation phase. Yet, it has a unilateral nature. This decision does not rule on the company's guilt. Neither does it prevents victims of the anticompetitive practices at stakes to take legal action in order to obtain compensation. Some authors believe that the

⁷⁵ "when the notified charges involve exclusionary practices on the part of a dominant company, 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", FCA, decision n° 17-D-06 of the 20 March 2017 regarding practices implemented in the natural gas- electricity-and energy service supply

⁷⁶. FCA, decision n° 12-D-27 of the 20 December 2012 regarding practices identified in the entertainment tickets sales sector.

⁷⁷ FCA, Proceedings press release of the 2 March 2012 concerning the undisputing of charges

commitments procedure weakens the legal content in the competition field. These authors consider that the probationary level of demand in this procedure is not satisfying. By the same token, the legal predictability is being threatened. Indeed, if the decision of commitments solves the situation on the market, it does not clarify the competition questions at stake⁷⁸. This analysis can however be tempered by the possibility to study the content of the commitments accepted by the FCA in order to identify the companies behaviors requirements.

25.2. Is the standard of analysis and proof different in cases of non-compliance with the agreement and of antitrust violations?

The FCA strictly controls the application of commitments taken by companies and may sanction their infringement by imposing a flat-rate monetary sanction or fines up to 5% of their average daily turnover for each day of delay. In addition, the Macron Law⁷⁹ introduced the possibility for the FCA to order injunctions or prescriptions to companies that have not fulfilled their commitments in the time intended. These measures may replace or extend the unfulfilled obligations.⁸⁰

The monitoring of the commitments compliance is not ruled by a classic competitive analysis, as those led in anticompetitive practices instruction procedures. Indeed, it is not necessary to prove the fraudulent intent of the wrongdoer, the existence of an anticompetitive practice, or the seriousness of the breach for the concerned market⁸¹.

5. Other Considerations

26. Are there any other aspects of the issues generated by the growth of online sales platforms and competition law in your jurisdiction that you consider likely to be relevant to a LIDC Report and Recommendations, please comment on your perspective?

⁷⁸ F. DE BURE, « « Engagez-vous, qu'ils disaient... » - Retour sur la politique d'engagements des autorités de concurrence, dix ans après », RLC, n°54, 1st oct. 2016.

⁷⁹ Law n° 2015-990 of the 6 August 2015, known as the « Law Macron »

⁸⁰ Article 430-8 IV 3° of the Commercial Code

⁸¹ FCA (before 2009) decision. n°08-D-24.