

A Guide to Competition Law for Foreign Companies

In keeping with our guide to competition law for foreign companies, we take a look from a French perspective, and in particular, the sector inquiries that the French Competition Authority has announced it will conduct this year. To this end, *Lawyer Monthly* speaks to Anne Servoir from one of France's competition law leading law firms, Intuity.

Please describe briefly the main provisions regulating competition in France

The two main types of infringements are anti-competitive agreements between companies (articles 101 of the TFEU and L. 420-1 of the Commercial Code) and abuses of dominant position (articles 102 of the TFEU and L. 420-2 of the Commercial Code). Competition law is enforced by the Competition Authority, an independent collegial institution, which replaced, in 2009, the former Competition Council.

It is vested with the full spectrum of competition regulatory and enforcement powers.

Since 2009, competition investigations are mostly conducted by the investigators of the Competition Authority, under the sole supervision of the chief case-handler.

Nevertheless, the minister of economy retains certain powers regarding merger control.

In case of competition law infringements, the Competition Authority can impose on companies interim measures, injunctions or penalties of up to 10 % of their consolidated global turnover.

What is your opinion on the sector inquiries the French Competition Authority announced it will conduct in 2013?

The two sectors concerned by the inquiries are, on the one hand, the pharmaceutical sector and, on the other hand, the coach transport sector.

Under French Law, those inquiries are part of Competition Authority's "advisory" competences. In this regard, the Authority has the power to initiate the inquiries on its own in order to "render an opinion on any matter related to competition".

In France, sector inquiries are conducted informally since the procedure itself is not described by the Code. Generally, the first step would consist in the Authority sending questionnaires to the concerned parties. It may then hear some of them.

For both inquiries, the Competition Authority indicated that it will publish its preliminary report in order to gather the stakeholders remarks before rendering its final opinion on its findings. The opinion may also contain recommendations to the stakeholders or to the Government to implement legal measures aiming at improving competition in the concerned sectors.

What impact will these inquiries have on the sectors concerned?

Although the inquiries do not constitute contentious procedures by themselves, they are a sign of the "interest" of the Competition Authority for the sectors concerned. They are also a way, for the Authority, to gather an extensive amount of information, it can then use to open contentious procedures against some of the undertakings in these sectors during or after the inquiries themselves, as did the European Commission in 2008 and 2009 in the pharmaceutical sector.

In the opinion it publishes after the inquiry, the Authority does not take position regarding conformity with competition of individual behaviors. However, the opinion is aimed to be used as guidance by the stakeholders and as quasi case law by the Authority in the framework of subsequent contentious matters. It is thus essential, for the undertakings consulted to pay close attention to the answers they formulate orally or in writing.

Regarding the pharmaceutical sector, the Authority announced it will investigate each level of the pharmaceutical supply chain:

- the pharmaceutical firms, especially prices and the way originator firms handle generic pre-entry phase,
- the wholesalers, in particular the possible impact of direct sales on wholesalers and their role regarding imports/exports on prices, and
- the pharmacies, especially their behavior regarding reimbursable or non-reimbursable medicines.

The Authority also indicated its intention to monitor the newly authorized sales on the Internet for non-reimbursable medicines. Although the new text's provisions have recently been suspended by the Supreme public Court, this inquiry will in particular allow to ensure that the opening up of online sales for medicinal products would benefit everyone, in the form of price reductions, increased services and innovation.

Concerning the interregional coach transport sector, the Competition Authority announced it will seek to understand the reasons why this transport mean is not as well-developed in France as it is among other European countries and will investigate:

- whether the authorization scheme for opening new lines has blocked the entry of coach operators into the market,
- to what extent the market could be opened up more extensively to domestic lines for the benefit of consumers,
- whether the equality of opportunity is guaranteed between all potentially interested operators, and
- under what conditions coach operators could regroup.

What are the main challenges involved in protecting foreign companies against competition and antitrust law infringements in your country?

Under French Law, there are no provisions specific to foreign companies. Consequently, they must comply with general provisions as mentioned in the answer to question 1 and French authorities' case law in this field.

The Competition Authority is competent on practices carried out abroad in the case where such practices have effects on the French territory. It is also competent on the basis of articles 101 and 102 of the TFEU on practices affecting trade between Member States, even though such practices do not have any effect on the French territory. It may also investigate cases upon request of a competition authority from another EU member states within the framework of the European Competition Network.

The risk of engaging in anticompetitive practices has become one of the major business risks foreign companies must be aware of. Fines may indeed reach tens, even hundreds, of millions of euros.

Consequently, foreign companies doing business in France, even if there are not located in the country, have to take into account French competition rules when operating in France and within the European Union.

How can they be navigated?

To avoid the main risks, foreign companies should seek advice regarding the application of these rules and case law in France before implementing behaviors that would potentially put them at risk.

They also should run a legal audit of their major contracts, of their commercial practices, in order to adjust their actual practices and adapt their future strategies.

They may also implement internal programs aiming to ensure compliance with competition rules.

Such programs are taken into account by the Competition Authority when dealing with competition law infringements and under certain conditions when setting the fines' amount.

What are the key legal issues within competition law that foreign companies need to be aware of?

French competition law enforcement provides to companies suspected of infringement alternative means to resolve competition issues.

Firstly, before notifying an actual statement of objections, the Authority may indicate a company that it has "competition concerns" regarding some of its behaviors. The said company may then propose commitments in order to resolve such concerns and thus avoid being fined.

Furthermore, even having received a statement of objections, companies may initiate a settlement procedure enabling them to obtain a fine reduction between 10 % and 25 % if they agree to waive their right to challenge the statement of objections and propose behavioral or structural commitments.

Finally, French law also provides a leniency program under which companies may report anticompetitive practices to the Authority before or after the opening of a contentious procedure against them. They may thus obtain either full immunity or a reduction of the fine they would otherwise have incurred in consideration for handing over evidence to the Authority and for their cooperation during the investigation phase. **LM**

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