Interview

Benoît Cœuré
President
French Competition Authority, Paris

Interview conducted by Charlotte Colin-Dubuisson, Partner, Linklaters, Paris and Gildas de Muizon, Managing Partner, Deloitte, Paris

Benoît Cœuré: Fundamentals and novelties in competition policy

January 2022
President of the Autorité de la concurrence

2019
Head of the Innovation Hub of the Bank for International Settlements

2012-2018
Member of the Executive Board and of the Governing Council of the European Central Bank

2009-2011
Deputy Director General of the Treasury, Economy Ministry

You are the first president of the French Competition Authority (FCA) who was not previously at the French Administrative Supreme Court (Conseil d'État). Can you tell us more about your background and how it helped you during the first eight months of your presidency? Are certain specific aspects of your previous professional experiences particularly relevant and helpful?

I was trained as an economist and served the French government in various policy domains ranging from debt management to international finance and domestic economic policy. I then spent eight years with the European Central Bank (ECB) in Frankfurt, as a member of the Executive Board in charge of market operations, European and international relations, and financial market infrastructures. After leaving the ECB, I established the Bank for International Settlements' new Innovation Hub, a fintech lab working for central banks, with operations in seven jurisdictions. Over the years, I had to delve into the details of various industries, from finance to manufacturing and energy. This helps me a great deal with the competitive analysis that underpins the cases the French Competition Authority (hereinafter the "Autorité") handles, both in antitrust and merger control.

My background is also a regulatory one: I have been part of the post-crisis effort to overhaul financial regulation, and I have chaired the Committee on Payments and Market Infrastructures, the global standard setter for payment systems and clearing houses. Last but not least, my ECB experience has proven valuable in steering an independent institution at the right distance from politicians. What I do lack is formal training in competition law, but in the last months, I have been on a steep learning curve!

You joined the FCA eight months ago with major cases handled in that period, including *Google / related rights*, *EDF* or *TF1/M6*. What is your assessment of this first period? Can you give us some indication about the FCA's upcoming activities and priorities in terms of sectors?

These last eight months have been quite hectic, and I discovered how broad the array of activities covered by the Autorité was. You are mentioning three high-profile cases, but they are only the tip of the iceberg. Since the start of 2022, we have published 18 decisions, 4 opinions, 211 merger decisions, and imposed around €386 million in fines.

The Autorité's upcoming activities and priorities are closely linked to the upheavals our economy is enduring, which are a mix of long-term trends (such as digitalisation and decarbonation) and short-term shocks (such as the Covid-19 pandemic and the war in Ukraine). It is key that the Autorité understands them in order to tackle the ongoing disruptions and mutations at stake.

As acknowledged recently by the International Competition Network, competition law cannot be the only answer to the economic crisis, but it can be part of the solution. To achieve that, we must mobilise all our skills.

By detecting and sanctioning cartels, as the Autorité did in the past with everyday products such as laundry detergents, cleaning and hygiene products, household appliances or eyeglasses, competition authorities can give some purchasing power back to consumers. During the crisis, certain companies may be tempted to coordinate in order to take advantage of a windfall effect to overly increase their prices. Our action may also benefit public finances by fighting bid rigging, as we did recently in the school bus and medical transport sectors.

The merger control tool is, in essence, of use since it is designed to prevent market concentration and potential price increases that would derive from the operation in the markets concerned. We have also been able to factor in the consequence of the economic crisis in our assessment (for instance, by using the failing firm defence for the first time since the creation of the Autorité in the *But/Conforama* case).

The Autorité must also stand ready to use its advisory capacity to answer requests from public authorities in the context of drafting laws or regulations, preparing reforms or in the event of crisis situations. Additionally, we will keep conducting market investigations on our own initiative in order to identify market failures and recommend measures that could improve purchasing power, such as opening up industries with high barriers to entry.

> "By detecting and sanctioning cartels, competition authorities can give some purchasing power back to consumers."

Digital issues will remain at the top of our agenda. The *Google / related rights* and *Meta* decisions published before summer demonstrate that the Autorité is still at the forefront of enforcement of competition law in that field. So far, we have focused on the functioning of digital platforms. Enforcers still have a lot to understand. In addition, the Autorité is now undertaking a sector inquiry into the cloud sector that will come to a conclusion in the spring of 2023. However, the focus on digital platforms should not hide the fact that almost every activity includes a digital component. I expect the new frontier of antitrust enforcement to be about data collection, hoarding and usage in traditional industries such as the healthcare or automobile sectors and in the internet of things (IoT). To address this new challenge, we will have to cooperate closely with industry regulators and data protection authorities.

At the Autorité, we are also deeply committed to cooperating with the Commission in order to implement the Digital Markets Act (DMA) in an effective way.

Last but not least, we are working to integrate sustainability considerations in every dimension of our action. The new sustainability chapter in the revised and expanded Horizontal Guidelines of the Commission is a useful first step that will allow European enforcers to build their decisional practice up. I am sure we will have the opportunity to discuss it in more detail.

Tech sector – DMA / DSA

The FCA has been very active in the tech sector, with no less than 13 opinions and 43 decisions in the digital sector since its creation in 2008. The FCA has invested a lot of effort, with a dedicated task force, and it has intervened in key cases—including very recently the landmark *Google / related rights* case, Meta's commitments in the online advertisement sector or the ongoing investigation in the mobile app advertising sector. How do you see the role of the FCA in a context where the European Commission will be in charge of implementing the Digital Markets Act and the Digital Services Act? What will these texts mean for dominance cases against gatekeepers by national competition authorities (NCAs) in the EU? How do you see the coordination of the cases in the digital sector at EU level, in a practical sense and going forward in a context where one of the most recurring objections against the European Commission and NCAs is the lack of consistency when applying competition rules?

As I mentioned, the Autorité will continue to resolutely focus its action on the digital sector. Our commitment is manifold. Of course, strong and decisive enforcement is paramount: the numerous opinions and cases (*Google / related rights*, Meta's commitments, *Google / News Corp*, *Apple's ATT* investigation, etc.) demonstrate our commitment to strong competition enforcement in such a key sector.

However, to reinforce and complement this intervention, the Autorité has also been involved in promoting and shaping new tools to better address anticompetitive practices in the context of the digital economy, along with challenges pertaining to merger control.

In this regard, the revised policy on the application of Article 22 of the European Merger Regulation was a turning point in addressing the possible enforcement gap in merger control. The Autorité had publicly called for a renewed approach to it and, therefore, was very satisfied with the outcome. Over the years 2020–2022, we have also been particularly involved in the DMA negotiations, with the aim of ensuring maximum complementarity and coordination between national and European competition law and the DMA.

Antitrust will remain fully relevant in digital markets, especially with respect to practices and services that are not covered by the DMA. In complex and ever-changing markets, new practices and services will appear, and their effects on the market will need to be assessed on a case-by-case basis by competition law enforcers. By addressing well-identified behaviours in a streamlined manner, the DMA should allow us to reallocate resources to tackle emerging practices under competition law. And there will be positive feedback: future enforcement decisions under national and European law will help adapt the DMA by pointing to behaviours and activities not yet covered by

it. Furthermore, the DMA will usefully reinforce merger control. Gatekeepers will have to inform the European Commission of their acquisition plans. Such information will be shared with national competition authorities, which will be able to refer cases to the Commission under Article 22.

In addition, the Autorité will support the Commission in the implementation of the DMA as foreseen by the Regulation. The French Parliament should vest us with relevant investigation powers in the course of 2023.

> "Antitrust will remain fully relevant in digital markets, especially with respect to practices and services that are not covered by the DMA."

It is worth noting that both the DMA and competition law could, in theory, be applicable to the same practices implemented by digital gatekeepers. It is therefore paramount that the European Commission and NCAs agree on smooth mechanisms to ensure strong consistency and tight coordination between both sets of rules. In this regard, it is important to note that the DMA has established a principle of cooperation and exchange of information via the European Competition Network, a network that has already proven its effectiveness in the context of the application of Regulation 1/2003. The Autorité is currently actively involved in discussions with its ECN counterparts, in order to design the most adequate framework. I am confident we will agree on mechanisms ensuring active—and proactive—cooperation and coordination.

One of the major workstreams at the FCA currently is the cloud sector inquiry, launched in January 2022. When can we expect the results of this inquiry? Can you elaborate on the reasons that motivated the launch of this sector inquiry? How does this articulate with the work of the European Commission following the complaint launched by OVHcloud at EU level or the Commission initiative on cloud computing and, in particular, the European Alliance for Industrial Data, Edge and Cloud launched in 2020? How does the FCA work with the European Commission and other NCAs on this topic?

The Autorité launched its sector inquiry into the cloud sector in January 2022. On July 13, we opened a public consultation to gather comments from relevant stakeholders, be they active players or third-party activity undertakings. This public consultation ended on September 19, and our investigation services are currently reviewing the answers. While this review is still ongoing, we should be able to publish the results of our inquiry in the spring of 2023.

The results will be particularly relevant in helping us adequately understand the functioning of competition in such critical infrastructure: cloud services have indeed become paramount to consumers, companies and governments, offering easy and fast access to computing resources. These markets are strategic, complex, and particularly important in several aspects (including aspects going beyond competition law, such as data protection and data sovereignty considerations). This sector is, moreover, bound to extend significantly, with average annual growth expected to exceed 25% over the next few years, resulting in strong value-creation challenges for the economy.

The inquiry covers the functioning of the sector, the activities of the players in the various segments of the value chain, the relevant markets, and the commercial practices put in place. Following such analysis, we may, if appropriate, make proposals to improve the competitive functioning of the sector, and use all the tools at our disposal to address potential competitive issues.

Several other public initiatives and procedures are currently undergoing concerning cloud services. The market study recently published by the Dutch Authority for Consumers and Markets (ACM) is a case in point. We maintain regular contacts and exchanges with the European Commission and our counterparts.

New topics

Eight out of ten French people say they took note of the effects of climate change. The climate crisis, and more generally, the environmental crisis, requires strong changes in our behaviour, particularly as consumers. Shouldn't the FCA's objective of protecting consumer welfare alone be reviewed to include this dimension?

The good news is it does already include it. But we can do better.

Sustainability features high on the roadmap of the Autorité. Because sustainability has become a criterion for consumer choice, and a criterion for product differentiation, we hold it to be a competition parameter.

There is a full spectrum to cover when factoring sustainability into competition intervention. On the enforcement side, we should make it clear to companies that anticompetitive practices that actively hinder the ecological transition will be sought out, investigated to the full and, as the case may be, severely punished.

A decision by the Autorité in 2017 illustrates this. The three leading manufacturers of floor coverings, together with their trade association, had entered into a non-competition agreement that aimed to bar each undertaking involved from advertising the environmental performance of its products—they went so far as to formalise it in a "charter" that candidly spelt out their goal was to prevent "*reckless green marketing.*" As a consequence, retailers and end consumers were deprived of the chance to make fully informed choices, and this agreement also discouraged innovation. The Autorité fined the undertakings and association concerned in the amount of more than €300 million.

Beyond this landmark case, in September 2021, the Autorité found hindering environmental efficiency to be an aggravating factor in a collective boycott case. We found that the boycott of a digital platform in the road haulage sector, implemented by carriers that ran a

competing platform, was anticompetitive. This behaviour was found to be all the more serious as one of its effects was to limit efficiencies related to the development of such platforms in terms of, inter alia, the limitation of empty returns that entail a reduction of the cost of transportation and also of environmental costs.

While the case is possibly not so frequent to date, unilateral conduct can also run contrary to sustainability, especially when a dominant market player hinders the entry of innovative rivals. When Nespresso made it unnecessarily difficult for competitors to produce coffee pods compatible with its own leading brand coffee machines, not only did it limit choices for consumers, it also slowed down or barred altogether market entry for market players keen to innovate, including through enhanced sustainability of their products. When accepting commitments by Nespresso to modify its processes, the Autorité, in its 2014 decision, indirectly facilitated such progress.

> "We should make it clear to companies that anticompetitive practices that actively hinder the ecological transition will be sought out, investigated and, as the case may be, severely punished."

On the other end of the spectrum, we are also eager to make sure that we provide the right kind of encouragement, within our mandate and through the use of our own tools, to those undertakings that genuinely seek to move towards a more environmentally friendly behaviour.

To that effect, there are circumstances where several undertakings may wish to cooperate in this regard—most commonly, with a view to reaching a standardisation agreement. The Commission has launched, together with the support and contribution of the members of the European Competition Network, a revision of its Horizontal Guidelines—a workstream the Autorité has actively taken part in. The new chapter dedicated to sustainability agreements included in the soon-to-be-released Guidelines will no doubt be of much use for market players in identifying agreements they can safely embark on, as they would fall out of the scope of the prohibition set out by Article 101(1) of the Treaty on the Functioning of the European Union (TFEU). It will also offer greater clarity and consistency for enforcers on the characterisation of agreements that may qualify for an exemption under Article 101(3) TFEU, in particular regarding the assessment of the sustainability benefits—whether individual or collective—passed on to consumers. The Guidelines may need to be enhanced in the future based on experience, but the priority is now to identify practical cases. To this effect, a special coordinator, Élise Provost, is now leading a sustainable development network within the Autorité.

Antitrust

One of the seven priorities of the FCA is the fight against anticompetitive practices affecting public resources. Can you elaborate some more on this strategic focus? The immediate reaction is to think about the early days of the Competition Council and all the cases in the construction industry or market with public tenders. Do you have specific sectors in mind when referring to public resources? We are also very curious to understand more about "*the digital tools allowing to detect efficiently this type of practices*" referred to in the FCA roadmap. Can you tell us some more about this?

The fight against anticompetitive practices affecting public resources is indeed one of the Autorité's priorities for 2022–2023. And you are right to say that this area of focus is not something new for the Autorité, since it has for many years paid particular attention to cartels that distort public procurement processes. However, the current economic crisis, which has a direct impact on public resources and citizens' purchasing power, as well as the growing level of public debt, makes this effort even more relevant at the moment. The Autorité will therefore keep on working closely alongside the Ministry of Economy (DGCCRF) in this area, where local detection of anticompetitive practices is key.

Another important aspect of the fight against anticompetitive practices affecting public resources is, most certainly, private enforcement. Indeed, actions for damages help strengthen the effectiveness and deterrent effect of public enforcement, and the Autorité strongly encourages victims of anticompetitive practices, including public authorities, to seek damages. The 2014 Damages Directive was an important step forward in this area. Since its transposition into French law in 2017, there has been an increase in damages actions before French courts. However, such a possibility remains underused and could be further developed. In this regard, I hope that the new applicable provisions whereby the courts may seek the opinion of the Autorité regarding the assessment and the amount of damage suffered will further encourage the development of these actions in the future. It is interesting to note in this respect that the first case in which the Autorité was asked by a court to issue an opinion under this provision concerned a follow-on action successfully brought about by the European Collectivity of Alsace in the wake of the Autorité's 2016 cartel decision in the school bus transport sector in the Bas-Rhin area. At the end of the proceedings, the administrative court of Strasbourg ordered several of the companies involved in the cartel to pay this public entity €2 million, with interest, for the damage suffered.

Lastly, as you pointed out, the Autorité, and its digital economy unit in particular, is developing a tool to detect this type of practice, and in particular price fixing and market sharing, in public procurement. Our starting point was that technological innovation can definitely benefit competition agencies in carrying out their tasks more effectively, including in terms of detection. We therefore decided to work on a screening tool, using APIs and scraping methods, to collect the data on tenders

that are publicly available. As a second step, we are developing a visualisation module that shows the results of the collection according to relevant indicators that were defined beforehand. At this stage, the connection to the databases feeding the tool is already operational; however, this is, of course, a long-term project and the results are not expected in the very short run.

In the current context, which is marked by a strong focus on more sustainable supply chains and around climate change, will consumers' buying power and the short-term interests of consumers remain the focus of antitrust authorities? Do you believe that other objectives shall prevail?

The Autorité is the one competition expert in France endowed with all prerogatives with respect to competition enforcement and policy—unlike a number of other NCAs, it does not combine this role with such other functions as consumer protection or sector regulation—and conversely, it enforces competition rules in every market. Therefore its mandate is both clearly defined and limited in scope, which I feel is a cause for satisfaction because it secures its independence and accountability.

Yet, while our objective is to ensure the competitive functioning of markets, in the ultimate interest of consumer welfare, this notion is not to be construed narrowly. More often than not, the victims of anticompetitive practices are companies. And in any case, there is more to consumer welfare than price effects.

> "The Autorité is willing to explore, within its remit, how it can help reduce the level of prices."

There is a reference to quality, variety and innovation in the merger guidelines of the Autorité, like in those of the Commission, and non-price effects of merger transactions were expressly accounted for in many merger control decisions. It has oftentimes been the case in the media sector—whether the printed press or broadcasting—where the notion of diversity of editorial content is key, but also for instance in healthcare, in the case of hospital mergers that may reduce the quality of ancillary services or the range of specialised medical care available (such as in the case, among others, of the takeover of Hexagone Santé Méditerranée by Elsan, cleared conditionally in February 2020).

Because the sustainability of goods and services is a feature of their quality, which comes into play on the demand side in the course of consumer choice and on the supply side as part of businesses' strategies to differentiate their respective offers, it is a competition parameter. For instance, in two merger control decisions in January and October 2021 in the energy sector, the Autorité considered there could be a specific segment for the supply of green electricity, in view of consumer demand for this particular type of offer, and its declining substitutability with "traditionally" sourced electricity.

When consumers, or a substantial fraction of them, express an interest in an aspect of quality that is not short termed, competition analysis does follow suit. Here again, consumer welfare is able to accommodate this new feature, without questioning the ultimate *raison d'être* of antitrust enforcement as enshrined in the European treaties.

In a context marked by cost increases, commercial negotiations have become more complicated, and this can have negative impacts on consumers with shortages and price increases. How do you see the role of the FCA in this context?

Consumers are certainly affected by a general price hike, much less so by shortages. The latter seem to concern only a handful of products, mostly for reasons that are unrelated to commercial negotiations but rather in connection with international trade issues.

In any case, the Autorité is willing to explore, within its remit, how it can help reduce the level of prices. Nothing suggests that inflation rates being observed in France and elsewhere could be put down to a lack of competition. The primary cause would rather lie in the rising costs of energy and food commodities due to the situation in Ukraine, and in an excess demand over supply in the recovery phase after the pandemic (although arguably less so in Europe than in the US). These are obviously not factors we can act upon. Moreover, the current focus is on curbing inflation, defined as the rate of change of prices, while competition policy acts on price levels at a longer horizon. Nevertheless, competition authorities still have a role to play in the distribution along the value chain. A topical illustration can be found regarding the agri-food industry.

Commercial relations and the role of distributors, having undergone reshuffling through a series of joint purchasing agreements, have attracted several legislative reforms. Every time, the Autorité has expressed scepticism regarding price control and rather encouraged market mechanisms. In its 2018 opinion, the Autorité underlined major imbalance, due to fragmented supply, concentrated demand and asymmetric information on prices to the detriment of producers. The Autorité then voiced reservations on the legislation enacted shortly thereafter—the law of 30 October 2018 for balanced trade relations in the agricultural and food sector and healthy, sustainable food accessible to all, the so-called Egalim law—on aspects such as the increase of the resale at a loss threshold and the regulation of discounts, which we felt could cause an increase in prices by distributors, with no guarantee of a positive effect on farmers' income. The Autorité even sought to estimate this inflationary effect, which we found to be in the range of an extra €10 to €78 per year for every household.

The above-mentioned opinions ought to be looked at in combination with our interventions regarding joint purchasing agreements. Since the 2015 "Macron law"—more formally, the law of 6 August 2015 for growth, activity and equal economic opportunities—as later modified by the Egalim law, the Autorité has been entrusted with a new power to look into these agreements prior to their implementation, and also to carry out a competitive assessment of such agreements and to take action on its own initiative, with a view to ordering interim measures concerning an agreement in force.

Overall, I feel that the Autorité has an appropriately broad and ambitious mandate regarding a sector that is central to the budget of households, particularly those less well off, and has the means to play a meaningful role.

Merger control

The pandemic had significant impacts on the economy, particularly on offline distribution networks. So far, the concrete effects have been largely mitigated by huge financial aid granted by the government, but we can expect a wave of bankruptcies in the coming months. Are you already seeing an increase in the number of requests for derogations to the suspensive effect of merger control? How is the economic situation integrated into the analyses of the FCA? In particular, shouldn't the FCA adopt a more permissive line when companies are facing major difficulties?

In the field of merger control, so far, the effects of the pandemic have been seen in two main areas.

First, in terms of number of merger control notifications, filings declined in 2020, with a collapse in notifications between March and June, followed by a strong recovery at the end of the year, which was confirmed in 2021 and 2022. To provide some figures, the Autorité received 280 merger filings in 2019, 209 in 2020, 268 in 2021 and 234 so far in 2022. The same pattern emerges in terms of number of decisions issued by the Autorité in the last three years.

The second consequence of the pandemic was the number of requests for derogation to the suspensive effect that the Autorité received, which consist of requesting the Autorité's approval to proceed with the implementation of all or part of the transaction, without waiting for the final decision on the merits. Before the pandemic, the Autorité generally received approximately 10 requests per year; in 2020, there was a significant increase, and the Autorité issued 28 decisions granting a derogation. In 2021 and 2022, we have continued to work in this area but at lower levels.

> "The But/Conforama case shows the Autorité's willingness to implement all the instruments available in its toolbox and to apply competition law in the most relevant and pragmatic manner"

Among the notifications and requests for derogation received during the pandemic, many concerned offline distribution networks, in particular in the clothing and home furnishings sectors, which have been particularly affected by the crisis and are more generally suffering from a weakening of their economic model as compared to online networks: *Burton*, *Pimkie*, *Jules*, *Camaïeu*, *Cyrillus*, *La Halle*, *Caroll*, *Gap*, *Go Sport*, *Minelli*, *But/Conforama* are some examples of merger control cases that the Autorité has dealt with recently in these sectors.

I do not share the idea that the Autorité should adopt a more permissive line when companies are facing major difficulties. I believe that the Autorité has the appropriate instruments to take those difficulties into account and should apply those tools when the conditions are met—but the competitive assessment should remain rigorous even in those circumstances.

From a procedural standpoint, as I mentioned, the Autorité can exceptionally grant a derogation to the suspensive effect, which is a key tool in times of economic crisis and in the context of bankruptcy proceedings. It is important to stress, however, that the granting of such derogations does not alter or prejudge the assessment of the transaction on the merits and the final decision that will be issued by the Autorité. In this respect, it is worth noting that in several recent cases where a derogation was granted, the Autorité identified competitive concerns, and the final decision was subject to divestitures by the parties: in 2021, *King Jouet/Maxi Toys*, *Chausseal/La Halle* and *Carrefour/Bio c' Bon* are relevant examples of this scenario. Even in the *But/Conforama* case, the failing firm defence exception was only accepted following an in-depth examination where competition concerns had been identified. Another example of a phase 2 review after an initial derogation is the *Parfait/E. Leclerc* case for the acquisition of a supermarket in Martinique.

In a recent decision (22-DCC-78 of 28 April 2022, *Conforama/Mobilux Group*), the FCA has applied, for the first time, the failing firm defence exception to authorise the transaction despite anticompetitive effects. Does this reflect a change in the FCA's approach?

The *But/Conforama* case is indeed a good illustration of what the Autorité can do when significant economic difficulties are put forward by the merging parties.

In July 2020, in the wake of the Commission's referral of the case to the Autorité, we granted a derogation to the suspensive effect given the serious financial difficulties encountered by Conforama, therefore allowing the acquirer, But, to immediately proceed with the implementation of the transaction, without waiting for the final decision on the merits.

Then the merger unit started its review of the case, which raised competition concerns (subsequently confirmed by the Autorité's Board) in a number of catchment areas in the market for the distribution of furniture products, where the parties are direct competitors with over 460 stores in France and €3.5 billion in total turnover, as well as on the upstream market for bed production, and in relation to licensed retailers in overseas departments.

Despite the risks that were identified, a detailed investigation and a broad market test allowed the Autorité to confirm that the three conditions of the failing firm defence were met: (i) the difficulties of the target company would lead to its rapid disappearance in the absence of the takeover; (ii) there was no other takeover offer that would be less damaging to competition; (iii) the disappearance of Conforama would not be less damaging to consumers than the proposed takeover (note that the latter condition set by the French Administrative Supreme Court in its 2004 *Seb/Moulinex* decision is somewhat stricter than European case law and guidelines).

On this basis, the Autorité decided to clear the transaction without commitments in April 2022. This case was the first application of the failing firm defence in France since 2004, and it is true that this instrument is rarely applied in Europe because the conditions are quite strict. I do not think, however, that this case reflects a change in the Autorité's approach, or a less strict application of the criteria of the failing firm defence on our part. In this particular case, all the elements were there to apply this line of reasoning. I do think, however, that this case shows the Autorité's willingness to implement all the instruments available in its toolbox and to apply competition law in the most relevant and pragmatic manner according to the circumstances of each case. In a way, *But/Conforama* makes the point that we shall not only use the new, shiny instruments lawmakers have offered us. Sometimes we need to get deeper into the toolbox and dust off our old tools.

Energy sector

Europe is facing an unprecedented energy crisis. The FCA has strong expertise in this sector, with a number of cases involving energy market players. Has the FCA's expertise been solicited in the past few months in this respect? Is there a need to be particularly careful at the moment to ensure full compliance with competition law?

Energy, as a strategic sector, has always been on the radar of the Autorité, but it has caught our attention even more acutely in the current context of economic crisis. The price increases in the electricity and gas markets are one of the main drivers of inflation, resulting in less purchasing power for consumers. The Autorité is fully aware of the social and economic consequences of the energy crisis and is therefore committed to promoting and protecting competition in this sector.

Against this background, the Autorité issued in February 2022 an opinion on a draft regulatory text aimed at temporarily modifying the regulated access mechanism for historical nuclear electricity (the "ARENH"), in order to increase the volumes of electricity available at competitive prices for alternative suppliers. While welcoming the general objective of protecting consumers from the unprecedented rise in electricity prices, the Autorité called for a strengthening of the control mechanisms in order to ensure that suppliers actually pass on the benefit of these competitively priced volumes to all and particularly to energy-intensive companies and vulnerable households. More generally, the Autorité considered that, while the mechanism contemplated was pursuing a short-term objective, justified by the unprecedented crisis in electricity prices, it was partly made necessary by the pre-existing dysfunctions of the ARENH, which are now exacerbated by the current situation. It therefore recommended that, should the crisis continue beyond 2022, consideration be given to medium-term measures as soon as possible, pending a general and permanent overhaul of the regulatory system. We intend to work closely with the energy regulator (CRE) on these matters.

Besides its advisory remit, the Autorité has also been very active in protecting consumers from abusive behaviour implemented by dominant players. In February 2022, as part of a negotiated procedure, it fined the former state monopoly Électricité de France €300 million for improperly using the means at its disposal as an electricity supplier offering regulated electricity tariffs in order to strengthen its own position in the related gas supply and energy services markets. In September 2022, the Autorité also imposed a fine of €1 million on a regional natural gas supplier, Gaz de Bordeaux, for the abusive use of its infrastructures and the commercial resources linked to its public service activity to develop its market offers.

"Energy, as a strategic sector, has always been on the radar of the Autorité, but it has caught our attention even more acutely in the current context of economic crisis"

The energy sector eventually plays a key role in the achievement of sustainable development goals. In this regard, noteworthy is the publication in May 2022 of an opinion on a draft decree on the classification of heating and cooling networks, in which the Autorité made a number of recommendations aimed at reconciling the objective of combating global warming and limiting restrictions on competition.

Procedures

Since the transposition of the ECN+ Directive in France in May 2021, the FCA can set its own priorities and decide whether to investigate a complaint or not (principle of discretionary prosecution). How has this new power changed the way the FCA sets its priorities and investigates cases? Over the past eight months, have you already decided to investigate certain cases and not others? How do you draw the line?

Indeed, since the transposition of the ECN+ Directive into French law, the Autorité can now set its own investigation priorities and decide to dismiss a complaint on the ground that it does not constitute a priority.

The ability to reject a complaint due to lack of priority is a major step forward for the Autorité, which will now be able to prioritise the significant number of complaints it receives and focus its action where it matters the most. This will allow a better allocation of its resources and a faster resolution of priority cases.

The possibility offered by the ECN+ Directive was implemented for the first time very recently, in relation to a complaint filed by Culture Presse (a professional organisation representing press resellers) against the French postal service for an alleged abuse of dominance in the sale of stamps sector.

The complaint was dismissed for lack of priority in October 2022 on four main grounds: (i) the limited economic impact of the alleged practice; (ii) the fact that this type of practice (a discriminatory abuse) has

already been the subject of both national and European decisions and did not raise any new issue; (iii) the fact that the complainant could bring an action before national courts; and lastly (iv) the fact that in light of the limited legal and economic interest at stake, the resources needed to further investigate the case could be more usefully allocated to other cases.

"The Autorité will now be able to prioritise the significant number of complaints it receives and focus its action where it matters the most."

Concurrently with the publication of this decision, the Autorité issued a procedural notice intended to provide economic stakeholders with a better understanding of the approach the Autorité will take when assessing the priority of a complaint. The notice explains, among other things, the balance that is struck between, on the one hand, the interest of the case, which the Autorité assesses on the basis of various factors set out in the notice, and, on the other hand, the resources and time required to process the complaint.

The factors taken into account by the Autorité include those mentioned in the *Culture Presse / La Poste* case, as well as others, such as the gravity of the practices at stake, the seriousness of the complaint or the fact that the Autorité is unable to assess the existence of anticompetitive effects, even potential. ■