DOMINANCE

France

LEXOLOGY
Getting The Deal Through

Consulting editor
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Dominance

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Quick reference guide enabling side-by-side comparison of local insights, including into the general legal framework and sector-specific rules, the definition of collective dominance, and relevance of dominant purchasers; abuse of dominance and related defences; specific forms of abuse, enforcement, sanctions, remedies and appeals; and current trends.

Generated 07 March 2022

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GENERAL FRAMEWORK

Legal framework

What is the legal framework in your jurisdiction covering the behaviour of dominant firms?

The rules covering the behaviour of dominant firms under French law are mainly set out in article L420-2, paragraph 1 of the French Commercial Code (FCC), which prohibits the abuse of a dominant position by an undertaking or group of undertakings on the domestic market or a substantial part of the market.

The provisions of article 102 of the Treaty on the Functioning of the European Union (TFEU) are applied cumulatively when the abuse of dominant position may affect trade between member states.

Law stated - 16 January 2022

Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Article L420-2 does not provide for a definition of dominance.

However, the French Competition Authority (FCA) uses the definition retained by the European courts and defines dominance as the position of economic strength enjoyed by an undertaking that enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently from its competitors, customers and ultimately from its consumers.

When assessing dominance, French case law takes into account not only the undertaking's market share but also several other factors such as the market positions of the next largest competitors, the undertaking's reputation, the existence of barriers to entry, the absence of countervailing buying power or the fact of holding a technological lead.

Law stated - 16 January 2022

Purpose of legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The purpose of the dominance legislation is to preserve the process of competition in order mainly to protect customers and consumers and also to stimulate innovation, competitiveness, employment and economic growth.

Therefore, according to article L420-4 of the FCC, practices that have the effect of ensuring economic progress, including by creating or maintaining jobs, and reserve for users a fair share in the resulting profit (without giving the undertakings involved the opportunity to eliminate competition for a substantial part of the products in question) are not subject to the provisions of article L420-2 and can be granted an exemption.

Law stated - 16 January 2022

Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

Article L420-2 applies to all economic sectors and links have been established between the FCA and French sectoral authorities in order to ensure the complementarity between competition rules and sectoral regulations.

The Regulatory Commission of Energy, the Regulatory Authority for electronic and postal communications, the Regulatory Authority for transport and the Regulatory Authority for audiovisual and digital communication must therefore refer to the FCA any abuse of dominant position of which they become aware in their sectors, especially if they consider that these practices are prohibited by article L420-2, and they can also consult the FCA on any questions falling within its competence.

For its part, the FCA communicates to these authorities any referral concerning their respective sector and requests their opinion on sector-related issues.

Law stated - 16 January 2022

Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The dominance rules apply to all production, distribution and service activities, including those that are carried out by public persons, in particular, in the context of public service delegation agreements (article L410-1 of the FCC).

Law stated - 16 January 2022

Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

Article L420-2 applies only to dominant firms. Transactions through which firms acquire a dominant position are, in principle, examined through an ex ante merger control procedure.

Law stated - 16 January 2022

Collective dominance

Is collective dominance covered by the legislation? How is it defined in the legislation and case law?

Collective dominance is covered by French legislation in article L420-2, which prohibits the abuse of a dominant position by a 'group of undertakings'.

Under French case law, such collective dominance is characterised when undertakings collectively hold a position of economic strength that gives them the power to behave to an appreciable extent independently from their competitors, customers and consumers.

In order to determine the existence of collective dominance, the FCA examines:

- whether the undertakings are united by structural links and have adopted the same course of action on the market; and
- alternatively, whether collective dominance may result from the market's oligopolistic structure, by applying the following criteria identified by the General Court in the
  - each member of the oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the same policy (market transparency);

- there must be an incentive not to depart from the common policy on the market (mechanism of retaliation); and
- the foreseeable reaction of current and future competitors and consumers does not jeopardise the results expected from the common policy (lack of competitive pressure from outsiders to the oligopoly).

In 2020, the FCA considered that the pharmaceutical companies Genentech, Roche and Novartis formed a 'single collective entity' enjoying a dominant position regarding treatment for age-related macular degeneration (AMD) insofar as they were tied by significant and strategic structural links (in particular licensing agreements) and cross-holdings, enabling them to implement a common strategy in the market (decision No. 20-D-11 of 9 September 2020).

Law stated - 16 January 2022

Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The prohibition of abuse of dominant position applies to dominant purchasers but the FCA's decisions relating to the subject are rare.

One example is the FCA's decision finding that cinema operator had abused its dominant position on the upstream market for the purchase of movie performance rights (decision No. 07-D-44 of 11 December 2007 GIE Ciné Alpes). Another example is the interim measures decision relating to the photovoltaic electricity sector, where the FCA found that EDF probably enjoyed a dominant position on the electricity-purchase market concerned because of its monopsony position (decision No. 13-D-04 of 14 February 2013).

In its commitment decision No. 17-D-12 of 26 July 2017, the FCA raised concerns about the possible foreclosure of the sugar beet procurement market in a particular geographic area due to practices implemented by Tereos, France's leading sugar producer and main beet purchaser in this area, towards the beet producers. Tereos committed to adopt a series of measures aimed at answering these concerns.

Law stated - 16 January 2022

Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

The FCA defines the relevant product market as the meeting place of supply and demand of certain products or services that are regarded as substitutable and also refers to the Commission Notice on the definition of relevant market, according to which a relevant product market comprises all those products or services that are regarded as interchangeable or substitutable by the consumer.

Principally from the demand side perceptive: to evaluate the degree of substitutability of products or services, the FCA conducts an estimation of their cross-price elasticities by using the 'hypothetical monopolist' test, also called SSNIP test ('small but significant and non-transitory increase in price'), when such data are available (eg, decision No. 16-D-14 of 23 June 2016 Umicore); the FCA also carries out a qualitative analysis by taking into account several criteria such as the products' or services' properties, their prices and conditions of use, the characteristics of the offer, etc; and also sometimes from the supply side perceptive (with an evaluation of the market entries possibilities).

The geographic market is defined as the area in which a monopoly power could be exerted effectively without being exposed to the competition of suppliers located in other geographic areas or other goods or services. The FCA also usually refers to the definition of the European Commission, according to which the geographic market comprises the territory on which the undertakings concerned are involved in the supply and demand of product and services, in which the conditions of competition are sufficiently homogeneous and that can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

Even if a market has already been defined in previous merger control cases, the FCA considers that such definition was restricted to these cases and is not necessarily transposable to the abuse of dominance case at hand. The FCA may therefore conduct a new market definition analysis in the context of the dominance investigation and, if necessary, reach a different view on the relevant market (eg, decision No. 16-D-14 of 23 June 2016 Umicore).

Even though dominance usually derives from the combination of several factors, it follows from French case law that an undertaking whose market share exceeds 50 per cent is presumed to hold a dominant position (decision No. 16-D-14 of 23 June 2016 Umicore).

Law stated - 16 January 2022

ABUSE OF DOMINANCE

Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Article L420-2 provides no definition of abuse but specifies (by referring to article L420-1) that the abusive exploitation of a dominant position is prohibited when it has as an object or may have as an effect to prevent, restrict or distort competition on the market and sets the following non-exhaustive list of examples of abuses: refusal to sell, tie-in sales, discriminatory selling conditions and termination of established commercial relationships solely on the ground that the partner refuses to comply with unjustified commercial conditions.

While some practices are presumed to be abusive, no conduct is subject to an absolute per se prohibition with the French Competition Authority (FCA) preferring to conduct a case-by-case analysis of the object and actual or potential effects of the alleged abusive practice and the potential grounds for exemption.

Law stated - 16 January 2022

Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Article L420-2 of the French Commercial Code (FCC) prohibits both exploitative and exclusionary practices, even though cases relating to exclusionary practices are more common.

Law stated - 16 January 2022

Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

A causal link must be demonstrated between the dominant position and the abuse of that position.

However, article L420-2 may apply even if the abuse takes place on an adjacent market to the dominant market provided that close associated links are demonstrated between the dominant and the related markets, and a link exists between the position held on the dominant market and the practice observed on the related market (decisions No. 17-D-02 of 10 February 2017 Obut and No. 17-D-08 of 1 June 2017 Ouibus).

Law stated - 16 January 2022

Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

According to article L420-4 of the FCC, the following abusive practices are not subject to the provisions of article L420-2 and may benefit from exemption:

- abusive practices that result from the application of a statute or a regulation adopted for its implementation;
- abusive practices for which the authors can prove that they have the effect of ensuring economic progress (including by creating or maintaining jobs) and that they reserve for users a fair share in the resulting profit, without giving the undertakings involved the opportunity to eliminate competition for a substantial part of the products in question; and
- certain categories of agreement or certain agreements that are recognised as meeting the above conditions by decree (in particular when their object is to improve the management of small or medium-sized undertakings).

However, individual exemptions are seldom granted by the FCA and the requirement to not eliminate competition on the market makes it difficult in practice for an exclusionary practice to meet the exemption conditions.

Law stated - 16 January 2022

SPECIFIC FORMS OF ABUSE

Types of conduct

Rebate schemes

The French Competition Authority (FCA) refers to the EU case law to divide rebate schemes granted by a dominant undertaking in three categories (decision No. 16-D-11 of 6 June 2016 TDF , confirmed on this point by the Paris Court of Appeal in its judgment of 21 December 2017, No. 16/15499, itself confirmed by the judgment of the Court of Cassation of 16 September 2020, No. 18-11.034):

- quantity rebates, linked exclusively to the volume of purchases from the dominant supplier, which do not usually fall under the scope of article 420-2 of the French Commercial Code (FCC) because they are deemed to reflect efficiency gains of the dominant undertaking;
- fidelity rebates that are presumed to have a foreclosure effect (in its decision No. 15-D-20 of 17 December 2015, the FCA imposed a €350 million fine on the telecommunications company Orange, in particular for putting into place an elaborate fidelity rebate scheme); and
- 'intermediary rebates' whose validity is assessed only on a case-by-case basis.

Law stated - 16 January 2022

Tying and bundling

Tying sales are listed by article L420-2 FCC as an example of abusive conduct.

In accordance with the European Commission Guidelines on abusive exclusionary conduct, the FCA stated that such conduct may be prohibited where an undertaking is dominant in the tying market and where, in addition, the tying and tied product are distinct products and the tying practice is likely to lead to anticompetitive foreclosure.

According to the FCA, pure bundling (where the products are only sold jointly) is, in principle, abusive when the tying product is essential, whereas the effects of mixed bundling are less harmful (Opinion 10-A-13 of 14 June 2010 relating to the cross-use of customers' databases).

In its commitment decision No. 14-D-09 of 4 September 2014, the FCA held in its preliminary assessment that Nespresso was likely to have abused its dominant position by adopting technical and commercial measures aiming at tying the sale of its coffee machines to its own capsules.

In 2017, Schneider Electric, which had refused to sell spare parts to third-party maintenance providers without the associated maintenance services performed by its own employees, has taken commitments before the FCA to ease the conditions under which these providers could buy its parts (decision No. 17-D-21 of 9 November 2017).

Law stated - 16 January 2022

Exclusive dealing

To assess whether exclusive dealing arrangements entered into by dominant undertakings are likely to lead to a foreclosure effect, the FCA takes into account several factors, such as the scope of the exclusive obligation, its duration, its technical or economic justification, the economic compensation given to the customer and the market positions of the competitors.

In its decision No. 16-D-14 of 23 June 2016, the FCA considered that the exclusive purchasing obligations of the Belgian group Umicore, a dominant supplier on the coated zinc covers and zinc rainwater drainage products markets in France, aimed at excluding competitors from the market.

In commitment decision No. 17-D-12 of 26 July 2017, Tereos, France's leading sugar producer, faced the FCA's competition concerns about the possible foreclosure of a local sugar beet procurement market. According to the FCA's investigators, Tereos, the main beet purchaser on this market, was offering its cooperative partners complicated contractual terms. Tereos committed to take measures enabling the beet producers to benefit from a greater freedom in choosing the sugar groups they supply, in particular by clarifying that they were not linked to Tereos by exclusive supply agreements.

Law stated - 16 January 2022

Predatory pricing

In order to determine whether a dominant undertaking has abused its dominant position by its low-price policy, French case law usually applies the Akzo test and the European Commission's Guidelines on abusive exclusionary conduct, according to which:

- prices above average total costs for a single product undertaking or average incremental costs for a multi-product company are not presumed to be predatory;

- prices below average avoidable costs must, in principle, be regarded as abusive; and
- prices below average total or incremental costs but above average avoidable costs must be regarded as abusive if the prices are part of a plan for eliminating competitors or are likely to cause potential or actual eviction effects.

These principles have been recently recalled by the Paris Court of Appeal (in its Direct Energie/Engie judgment of 28 July 2016, No. 2016/11253 and its SNCF Mobilités judgment of 20 December 2018, No. 17/01304, confirmed by the Court of Cassation in its judgment of 9 June 2021, No. 19-10943) and by the FCA, in particular in its decisions No. 17-D-16 of 7 September 2017, Engie and No. 18-D-07 of 31 May 2018, Vedettes vendéennes .

In 2021, the FCA refused to issue urgent interim measures requested by an electricity supplier against EDF but decided to investigate into the merits to determine whether EDF had charged predatory prices (decision No. 21-D-03 of 18 February 2021).

Law stated - 16 January 2022

Price or margin squeezes

Price (or margin) squeeze occurs where a vertically integrated firm holding a dominant position on the upstream market charges prices on the upstream market which, compared with the prices it charges on the downstream market, do not allow an equally efficient competitor to operate profitably and, on a lasting basis, on the downstream market.

According to the FCA, a price squeeze has an anticompetitive effect when an equally efficient competitor can only enter the market by suffering losses and such effect can be presumed when the services provided by the dominant undertaking to its competitors are essential for them to compete against it on the downstream market.

In its assessment of a price squeeze, the FCA conducts a test comparing the difference between the revenues generated on the downstream market by the dominant undertaking and the costs incurred on this same market with the wholesale price it invoiced to its competitors for the access to the intermediary good (eg, decision No. 15-D-10 of 11 June 2015, TDF , confirmed by the Court of Appeal of Paris in its judgment of 12 October 2017, No. 15/14038).

Law stated - 16 January 2022

Refusals to deal and denied access to essential facilities

The FCA applied the essential facilities doctrine for the first time in 1996 in its decision Héli-Inter Assistance (decision No. 96-D-51 of 3 September 1996) and has since defined the cumulative conditions under which denying access to an essential facility is considered an abuse of a dominant position (in particular, Opinion No. 02-A-08 of 22 May 2002 Association pour la promotion de la distribution de la presse and, more recently, decision No. 14-D-06 of 8 July 2014, Cegedim):

- the essential facility is controlled by a dominant undertaking;
- access to the facility is necessary or essential to compete with the dominant undertaking on an upstream, downstream or adjacent market;
- the competitor is unable to reasonably duplicate the essential facility;
- the use of the facility is denied or granted under restrictive and unjustified conditions; and
- access to the facility by competitors is feasible.

Even in the absence of such essential facility, a refusal to supply can constitute an abuse, in particular if:

- the refusal relates to a product or service that is necessary to be able to compete on an adjacent market;
- the refusal is likely to eliminate all effective competition on the adjacent market;
- the refusal is likely to prevent the undertaking requesting supply from bringing innovative goods or services to the market; and
- the refusal cannot be legitimately justified.

In its decision No. 14-D-06 of 8 July 2014 (confirmed by the Court of Cassation in its judgment of 21 June 2017, No. 15-25941), the FCA considered that Cegedim had infringed article L420-2 of the FCC by refusing to sell its database to the clients of a competitor in a discriminatory manner and without a lawful and objective justification.

Law stated - 16 January 2022

Predatory product design or a failure to disclose new technology

Product innovation can, in certain circumstance, be considered as predatory.

For example, in its commitment decision No. 14-D-09 of 4 September 2014, the FCA found that the several technical changes made by Nespresso to its coffee machines affected the compatibility of competing capsules. Therefore, this series of product design changes was likely to infringe article 420-2 FCC by tying the sale of the Nespresso coffee machines to its own capsules.

In its decision No. 18-D-10 of 27 June 2018, the FCA has stopped the procedure initiated by Econocom, according to whom IBM, HP and Oracle had implemented a strategy of eviction of third-party maintainers by refusing to allow them, or some of their customers, access to updates of microcodes necessary for the maintenance of the hardware, servers and storage solutions that they market.

Law stated - 16 January 2022

Price discrimination

Discriminatory selling conditions are expressly covered by article L420-2 FCC and price discrimination may be found abusive by the FCA in two cases (eg, decision No. 13-D-07 of 28 February 2013, E-kanopi):

- when the discrimination has as an object or may have as an effect the exclusion of a competitor by artificially strengthening the dominant undertaking on the dominant market or another market (exclusionary abuse); and
- when the dominant undertaking artificially provides its customers with an advantage or disadvantage on their own market by unjustified difference in treatment (exploitative abuse).

In its decision No. 15-D-17 dated 30 November 2015, the FCA fined SFR for abusive price discrimination between its on-net and off-net phone calls on mobile services for non-residential customers markets of La Réunion and Mayotte insofar as this practice made an increase in competition more difficult on these markets.

Moreover, in its decision No. 17-D-13 of 27 July 2017, the FCA imposed a fine on the funeral company Comtet for practising price discrimination by charging its competitors an extra fee that did not correspond to any additional service.

Law stated - 16 January 2022

Exploitative prices or terms of supply

An excessive price may be an exploitative abuse if there is a lack of proportionality between the price of the product or service and the production cost or service value or this price seems to be excessive compared to those of undertakings in a similar situation (unless there is an economic justification). Cases relating to these kinds of practices are relatively rare.

Practices limiting the commercial freedom of the dominant undertaking's economic partner (such as unilateral limitation of liability clause) may also be considered exploitative.

In 2019, the Paris Court of Appeal overturned decision No. 18-D-17 of 20 September 2018 of the FCA, which had sanctioned Sanicorse for imposing abusive price increases on its customers in a brutal, long-lasting, significant and unjustified way (judgment of 14 November 2019, No. 18/23992). The Paris Court of Appeal reminded that, for trading conditions to be considered as an exploitative abuse, the FCA has to prove that (1) the dominant position of the concerned undertaking has allowed it to obtain benefits from the transaction and (2) these benefits are unfair, which implies that the trading conditions between the dominant undertaking and its economic partners can be objectively qualified as unfair. According to the Paris Court of Appeal, this second condition was not met. This decision has been confirmed by the Court of Cassation (judgments of 7 July 2021, Nos. 19-25586 and 19-25602).

Several recent exploitative abuse cases have concerned Google.

In its decision No. 19-D-26 of 19 December 2019, the FCA considered that Google had abused its dominant position in the search advertising market as the operating rules of its Google Ads advertising platform were established and applied under non-objective, non-transparent and discriminatory conditions. Therefore, the FCA fined Google €150 million and ordered Google to clarify these operating rules and its account suspending procedures. Similarly, the Paris Commercial Court has judged that some of Google Ads' commercial rules had been established and applied in non-transparent and discriminatory conditions and ordered Google to pay approximately €1 million by way of damages to a telephone information services company and to re-establish the access of the claimant to Google Ads' services (judgment of 10 February 2021).

Moreover, in its decision No. 20-MC-01 of 9 April 2020, the FCA imposed interim measures on Google under which Google had to negotiate in good faith with the publishers and new agencies that requested it, and according to transparent, objective and non discriminatory criteria, the remuneration due to them for any re-use of protected content. The FCA found that:

- Google was likely to hold a dominant position on the French market for general search services.
- The practices implemented by Google on the occasion of the entry into force of Law of 24 July 2019 on related rights were likely to be qualified as abuses of dominant position and had caused a serious and immediate harm to the press sector: the FCA considered in particular that Google may have imposed on publishers and news agencies unfair transaction conditions allowing it to avoid any form of negotiation and remuneration for the re-use and display of protected content under related rights and may have implemented a discriminatory practice by imposing a principle of zero remuneration on all publishers without examining their respective situations, thereby treating in the same way economic actors in different situations without any objective justification.

Following that decision, the FCA has issued a €500 million fine against Google for having disregarded several of its injunctions and ordered it to comply with the injunctions under periodic penalty payment (decision No. 21-D-17 of 12 July 2021).

In 2021, the FCA also examined a request for interim measures against measures implemented by Apple to reinforce

the framework of consent of users for the use of their personal data, introduced by online advertising players claiming that Apple had imposed on them unfair transactions conditions and added additional undue obligations. The FCA rejected the request as Apple's strategy did not appear at that stage to be abusive but to fall within the legitimate exercise of its commercial strategy concerning the protection of personal data. However, the FCA decided to continue the investigation into the merits of the case in order to assess whether the implementation by Apple of this new framework can be regarded as a form of discrimination or 'self-preferencing' (in particular whether Apple applied more binding rules on third-party operators than those it applies to itself for similar operations without justification) (decision No. 21-D-07 of 17 March 2021).

In decision 21-D-25 of 2 November 2021, the FCA fined the sugar and molasses producer Tereos Océan Indien for abusing its dominant position by inserting clauses into its contracts that limit its clients' ability to withdraw from their contractual relationship.

Law stated - 16 January 2022

Abuse of administrative or government process

According to the FCA, a dominant undertaking is entitled to use legal and administrative proceedings to defend its interests. As a result, the mere fact that a dominant undertaking lodges patents and introduces legal recourse in order to protect its intellectual property rights cannot, in itself, be deemed abusive.

However, a legal action can, exceptionally, be characterised as an abuse (eg, decision of the FCA No 11-D-15 of 16 November 2011, Sogarel Coyote judgment of the Court of Appeal of Paris of 19 December 2018, No. 17/00219) if it is:

- manifestly without foundation (and cannot reasonably be considered as an attempt to assert the dominant undertaking's rights); and
- part of a plan aiming at preventing, restraining or distorting competition on the market.

In this decision No. 17-D-25 of 20 December 2017, the FCA stated that the interference of a dominant undertaking in the decision process of a public authority could be considered as abusive if such interference is undue as it has no legal basis and aims at convincing the public authority to adopt a decision that it should not take. In application of this principle, the FCA imposed on the laboratory Janssen-Cilag, and its parent company Johnson & Johnson, a €25 million fine in particular for abusing its dominant position by repeating legally unjustified approaches to the French health agency for the purpose of convincing the authority to refuse to grant generic status to competing medicinal products. In 2019, the Paris Court of Appeal confirmed this decision but lowered the amount of the fine to €21 million (judgment of 11 July 2019, No. 18/01945).

Law stated - 16 January 2022

Mergers and acquisitions as exclusionary practices

In a decision No. 20-D-01 of 16 January 2020 following a complaint lodged by Towercast concerning the abusive nature of TDF's takeover of Itas (a transaction that was not subject to clearance by the FCA because the notification thresholds were not met), the FCA has ruled that it could not consider that a concentration constitutes, in itself, an abuse of dominant position.

Following an appeal by Towercast, the Paris Court of Appeal decided in 2021 to refer to the Court of Justice of the European Union for a preliminary ruling to clarify whether a concentration that does not meet the national merger control notification thresholds and has not been referred to the European Commission in application of article 22 of

Council Regulation No. 139/2004 could be analysed by a national competition authority as an abuse of dominant position (judgment dated 1 July 2021).

It should be noted that abusive conducts that are detachable from the merger itself may be sanctioned, in particular under article L430-9 of the FCC according to which, in the event of an abuse of a dominant position, the FCA may enjoin the undertakings involved to amend, supplement or cancel all agreements and all acts by which the concentration of economic power allowing the abuse has been carried out, even if these acts have already been subject to the merger control procedure (article L430-9 of the FCC).

Law stated - 16 January 2022

Other abuses

No comprehensive list of potentially abusive conduct can be provided.

The other practices that may fall under the prohibition of article L420-2 FCC include, in particular:

- termination of established commercial relationships on the sole ground that the partner is refusing to accept unjustified commercial conditions (listed as an example of abuse by article L420-2); or
- acts of defamation when a link is established between the defamation and the undertaking's dominant position, resulting generally from the undertaking's reputation or the confidence it enjoys from the market participants (conviction decisions of the FCA No. 13-D-11 of 14 May 2013, Sanofi, No. 16-D-11 of 6 June 2016 ,TDF and No. 17-D-25 of 20 December 2017, Janssen-Cilag and judgment of the Court of Cassation of 8 June 2017, No. 15-26151). In 2020, the FCA imposed fines of a total of €444 million to the pharmaceutical companies Genentech, Roche and Novartis for abusive practices aiming at sustaining the sales of a drug for age-related macular degeneration (AMD) treatment, Lucentis, to the detriment of a competitive and cheaper medicinal product, Avastin (decision No. 20-D-11 of 9 September 2020). Novartis was fined for disparaging practice and the three companies were considered to have abused their collective dominant position by spreading an alarmist, and sometimes misleading, discourse before the public authorities about the risks linked to the use of Avastin.

The FCA also requires operators who benefit from a legal monopoly to avoid any cross-subsidies between its public service activities and its competitive activities that could result in predatory or exclusionary prices (decision No. 17-D-09 of 1 June 2017, INRAP). In 2020, the FCA fined PMU for not complying with a commitment taken in the FCA's decision No. 14-D-04 of 2014 to separate, on the horse betting sector, the betting pools of its physical outlets and of its website: indeed, while online betting is open to competition, PMU still enjoys legal monopoly for betting at points of sale and the FCA had considered that PMU used the resources of its monopoly to reinforce the attractiveness of its offer on a market open to competition (Decision No. 20-D-07 of 7 April 2020).

Law stated - 16 January 2022

ENFORCEMENT PROCEEDINGS

Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The French authority responsible for the public enforcement of the dominance rules is the French Competition Authority (FCA), which has decision-making power over abuses of dominant cases and also enjoys power of

investigations.

In order to assess whether a practice falls within the scope of article L420-2 of the French Commercial Code (FCC), the officials of the FCA's investigation services are authorised to carry out two types of inquiries:

- in a 'simple' investigation, the officials may access all premises or means of transport for professional use and places of performance of services, require communication and take copies of books, invoices and all other professional documents and also collect any necessary information, proof or justification; and
- in the context of investigations requested by the European Commission, the Ministry of economy or the FCA's general rapporteur and authorised by judges, these officials may conduct inspections at any premises, seize documents and any information medium and place any commercial premises, documents and information media under seal for the duration of the inspection of those premises.

The French Ministry of Economy has the power to issue injunctions and to offer settlement when the abusive practices only affect a local market and do not concern facts covered by article 102 of the Treaty on the Functioning of the European Union, on condition that the turnover generated in France by each of the undertakings concerned during the last financial year does not exceed €50 million and that their aggregate turnover does not exceed €200 million.

Moreover, the French commercial, civil and administrative courts are responsible for the private enforcement of the dominance rules and the criminal courts also have jurisdiction to impose criminal sanctions to individuals.

Law stated - 16 January 2022

Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

The FCA is notably empowered to:

- order the dominant undertaking to cease its abusive practices within a specified period of time;
- impose structural or behavioural corrective measures necessary to put an end to the infringement and enjoin the undertakings involved to amend, supplement or cancel, within a specified period, all agreements and all acts by which the concentration of economic power allowing the abuse of dominant position has been carried out;
- accept the dominant undertaking's behavioural or structural remedies to end the competition concerns; and
- impose a financial penalty (either immediately or in the event of non-compliance with the injunctions imposed or the remedies accepted).

The maximum amount of the financial penalty that may be imposed on a company is 10 per cent of the highest worldwide turnover, net of tax, achieved in one of the financial years ended after the financial year preceding that in which the practices were implemented (if the accounts have been consolidated or combined, the turnover taken into account is that shown in the consolidated or combined accounts).

The financial penalties shall be assessed taking into account the seriousness of the abuse, the duration of the infringement, the situation of the dominant undertaking and the possible repetition of the practices.

The dominant undertaking has the possibility to propose commitments that will be made binding by the FCA if they are likely to put an end to its competition concerns. Moreover, when the dominant undertaking does not contest the allegations made against it in the statement of objections, the general rapporteur of the FCA may submit a settlement

offer fixing the minimum and the maximum amounts of the contemplated financial penalty. If the dominant undertaking agrees to modify its conduct in the future, the general rapporteur may take this commitment into account in its settlement submission.

The highest fine ever imposed on a single company for an abuse of dominance was the €350 million fine pronounced by the FCA in 2015 against Orange, a French telecommunications group, in particular for putting into place fidelity rebate schemes in the electronic communications sector (decision No. 15-D-20 of 17 December 2015).

In 2020, the FCA imposed fines of a total of €444 million on the pharmaceutical companies Genentech, Roche and Novartis for abusing their collective dominant position regarding treatment for age-related macular degeneration.

In 2021, the FCA fined Google up to €500 million for non-compliance with injunctions issued in decision No. 20-MC-01 of 9 April 2020 relating to r emuneration of related rights for press publishers and agencies (decision No. 21-D-17 of 12 July 2021).

Besides the financial penalty, a natural person who has fraudulently taken a personal and decisive part in the design, organisation or implementation of abusive practices may be punished by a prison sentence of four years and a fine of €75,000.

Law stated - 16 January 2022

Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The FCA is empowered to impose sanctions directly to the abusive undertakings without petitioning a court or another authority (article L464-2 FCC).

Law stated - 16 January 2022

Enforcement record

What is the recent enforcement record in your jurisdiction?

The FCA issues several decisions each year relating to abusive practices.

The processing of a case by the FCA takes on average 18 months after the lodging date of the complaint, but abuse of dominance cases may take longer.

The abuses that are most commonly prosecuted are exclusionary practices such as predatory pricing, rebates schemes, refusals to deal and denied access to essential facilities, defamation and discrimination, but several exploitative practices were examined in 2021.

Law stated - 16 January 2022

Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

Any agreement or contractual clause referring to a practice prohibited by article L420-2 is invalid (article L420-3 of the FCC). This nullity may be declared by the courts having jurisdiction.

Law stated - 16 January 2022

Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

French law does not provide a basis for a court or other authority (except the FCA) to order a dominant firm to grant access, supply goods or services or conclude a contract, but private enforcement is possible before French courts having jurisdiction in order to obtain compensation from the dominant undertaking or the invalidity of an agreement or contractual clause referring to a practice prohibited by article L420-2 FCC.

The plaintiff can bring either a follow-on or stand-alone action (depending on whether the alleged abuse has already been the subject of an infringement decision of the FCA or not).

The private enforcement actions have been facilitated by the transposition into French law in March 2017 of Directive 2014/104 of 26 November 2014 on antitrust damages actions aiming at removing practical obstacles to compensation for victims of infringements of antitrust law.

In 2018, the Paris Court of Appeal confirmed the judgment of the Paris Commercial Court which had condemned Orange to pay SFR damages amounting to approximately €50 million for the loss of revenue due to Orange's abusive price squeeze practice (judgment of 8 June 2018, No. 16/19147).

In 2021, the Paris Commercial Court judged that some of Googles Ads' commercial rules were abusive and ordered Google to pay approximately €1 million by way of damages to a telephone information services company and to re-establish the access of the claimant to Google Ads' services (judgment of 10 February 2021).

Moreover, a system of class action has been introduced in French law in 2014, but its scope of application is restricted to consumers (article L623-1 of the French Consumer Code).

Law stated - 16 January 2022

Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Companies harmed by abusive practices have a claim for damages before the national civil and commercial courts having jurisdiction on the basis of French tort law, which requires the demonstration of a fault, a damage and a causal link between them.

Article L481-2 FCC provides that an anticompetitive practice is presumed to be irrebuttably established once its existence and imputation have been established by a decision of the FCA that can no longer be subjected to ordinary review for the part relating to this finding.

According to article L481-3 FCC, the harm suffered by the claimant includes in particular the loss incurred (owing, notably, to the surcharge paid), the loss of profits, the loss of opportunity and the moral damage.

Damages are assessed by the judge on a case-by-case analysis, on the day of the decision, taking into account the evolution of the prejudice (article L481-8).

Law stated - 16 January 2022

Appeals

To what court may authority decisions finding an abuse be appealed?

The FCA's decisions finding an abuse may be appealed to the Paris Court of Appeal, which has sole jurisdiction in this matter, in order to obtain either the annulment of the decision or its reformation.

If the Paris Court of Appeal annuls the FCA's decision without annulling the prior proceedings, the Court is required to review both the facts and the law. By contrast, if the Court annuls the decision for insufficient investigation, the case may be referred to the FCA for additional investigations.

Law stated - 16 January 2022

UNILATERAL CONDUCT

Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

French law provides several rules applying to the unilateral conduct of non-dominant firms, which include the prohibition of:

- the abusive exploitation of the state of economic dependency of a client or supplier if it is likely to affect the functioning or the structure of competition (article L420-2, paragraph 2 of the French Commercial Code (FCC));
- price offers or selling prices to consumers that are excessively low compared with production, processing and marketing costs if they have as an object or may have as an effect to eliminate an undertaking or one of its products from the market or to prevent it from accessing a market (article L420-5 FCC) and the resale of a product in the same condition at a lower price than its effective purchase price (article 442-5 FCC); and
- the imposition of a minimum resale price or trade margin (article L442-6 FCC).

Moreover, the liability of an undertaking may be engaged in cases of restrictive practices such as obtaining from a commercial partner any advantage that is clearly disproportionate compared with the value of the service provided or submitting the other party to obligations that create a significant imbalance in the parties' rights and obligations (article L442-1 FCC).

Law stated - 16 January 2022

UPDATE AND TRENDS

Forthcoming changes

Are changes expected to the legislation or other measures that will have an impact on this area in the near future? Are there shifts of emphasis in the enforcement practice?

The priorities of the French Competition Authority (FCA) include digital challenges. The FCA has notably created a new digital economy department, which is responsible for developing in-depth expertise in this area and for providing support in cases with a significant digital dimension.

Moreover, Ordinance 2021-649 of 26 May 2021 on the transposition of Directive (EU) 2019/1 'ECN+' came into force in 2021 and strengthens the FCA's powers.

In 2021, the FCA published a new procedural notice on the method for determining fines and intends to publish a new framework document on competition compliance programmes.

Law stated - 16 January 2022

Jurisdictions

Australia	Gilbert + Tobin
Austria	Schima Mayer Starlinger
Belgium	Cleary Gottlieb Steen & Hamilton LLP
Brazil	Mattos Filho Veiga Filho Marrey Jr e Quiroga Advogados
Bulgaria	Wolf Theiss
Canada	Baker McKenzie
China	DeHeng Law Offices
Denmark	Bruun & Hjejle
Ecuador	Robalino
European Union	Cleary Gottlieb Steen & Hamilton LLP
France	UGGC Avocats
Germany	Cleary Gottlieb Steen & Hamilton LLP
Greece	Nikolinakos & Partners Law Firm
Hong Kong	Eversheds Sutherland (International) LLP
India	Shardul Amarchand Mangaldas & Co
Indonesia	ABNR
Ireland	Matheson
Italy	Rucellai & Raffaelli
Japan	Anderson Mōri & Tomotsune
Morocco	UGGC Avocats
Nigeria	Streamsowers & Köhn
Norway	Advokatfirmaet Thommessen AS
Poland	Linklaters LLP
Portugal	Gómez-Acebo & Pombo Abogados
Saudi Arabia	Al Tamimi & Company

Slovenia	Odvetniska druzba Zdolsek
South Korea	Yoon & Yang LLC
Spain	.
Switzerland	CORE Attorneys Ltd
Turkey	ELIG Gurkaynak Attorneys-at-Law
United Kingdom	Cleary Gottlieb Steen & Hamilton LLP
USA	Cleary Gottlieb Steen & Hamilton LLP