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The International Comparative Legal Guide to:

Dominance 2009

A practical insight to cross-border dominance regulation

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1 Legislation

1.1 Please set out the basic elements of the offence(s) under your relevant laws?

Article L.420-2 (1) of the French Commercial Code (FCC) prohibits the "*exploitative abuse by an undertaking or a group of undertakings of a dominant position on the internal market or a substantial part thereof*, if such abuse has as its object or may have the effect of preventing, restricting or distorting competition within a market. *Such abuses could notably consist in refusal to sell, tied sales or discriminatory conditions of sale as well as the termination of an established commercial relationship, on the sole ground that the commercial partner refuses to submit to unjustified commercial conditions*".

The Competition Authority, as well as the French Courts, applies Article 82 of the EC Treaty together with Article L.420-2 FCC where trade between Member States is affected.

1.2 What is the underlying purpose of the competition legislation that applies to the conduct of dominant undertakings?

Article L.420-2 (1) FCC ensures that a dominant firm will not abuse its dominant position on a market to the detriment of said market, competitors, and ultimately consumers. In this respect, dominance in itself is not unlawful, only the abuse of a dominant position is caught by Article L.420-2 (1) FCC.

1.3 Does the legislation also apply to public bodies?

Article L.420 FCC applies to public bodies provided that their activities relate to production, distribution of goods or provision of services.

The Competition Authority, which replaced the Competition Council in January 2009 (hereafter collectively designated as the "Authority"), has no jurisdiction to review decisions taken by a public body for the implementation of a public service while acting on the basis of prerogatives of public power. Such decisions are to be reviewed by the administrative courts which also apply competition law (CE, *Société Million et Marais*, 1997).

1.4 Does the legislation apply to: (i) unilateral conduct of a non-dominant firm whereby such a firm seeks to acquire a position of dominance; (ii) collectively dominant undertakings; and (iii) dominant buyers as well as suppliers?

(i) Article L.420-2 (1) FCC does not apply to the unilateral conduct of a non-dominant firm. However, the unilateral conduct of a non-dominant firm may be caught by Article L.420-2 (2) FCC if it constitutes an abuse of economic dependence or if such conduct qualifies as a prohibited "*restrictive practice of competition*" (see question 3.5).

(ii) The concept of collective dominance is laid down in Article L.420-2 (1) FCC which prohibits the abuse of a dominant position by "*an undertaking or a group of undertakings*".

In order to establish collective dominance, the Authority applies the European case-law (*Kali & Saltz*, 1998; Gencor, 1999) by determining whether the undertakings are able together, in particular because of correlative factors which exist between them, to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and consumers (*Médiavision*, 2006). The Authority indicated that such correlative factors should be assessed objectively, i.e. without taking into account the respective interests of the undertakings, but rather the strength of the ties between them, their duration, their stability and if they are inclined to lead the undertakings to adopt a common line of action on the market (*Transport maritime Corse*, 2007).

In its *Médiavision* decision, the Authority clearly stated that a collective dominant position can result not only from the existence of structural ties between the undertakings (for instance equity or contractual ties, etc.) and of a common line of action but also, in the absence of such ties, from the market structure itself where the criteria set out by the CFI in its *Airtours* decision are met. For instance, the Authority referred to the Airtours criteria to establish a collective dominant position of two cement producers on the wholesale market for cement in Corsica (*Ciment Corse*, 2007). Interestingly, in this case, not only did the Authority demonstrate that the *Airtours* criteria were met, but it also highlighted the existence of structural links and a common strategy.

(iii) Article L.420-2 (1) FCC applies to dominant buyers as well as dominant suppliers. But in practice, the application of L.420-2 (1) FCC mainly concerns dominant suppliers. Besides, Article L.420-2 (2) FCC directly targets relationships between suppliers and buyers by prohibiting abuses by an undertaking of the economic dependence of a supplier or a buyer *vis-à-vis* that undertaking (see question 3.5).

1.5 Are there sector-specific regulations which apply to unilateral conduct and how do these relate to the general prohibition of abuse of dominance?

There are several sectorial regulators such as the Telecommunications and Postal Regulatory Authority (*Autorité de Régulation des Communications Électroniques et des Postes*, ARCEP), the Energy Regulatory Commission (*Commission de Régulation de l'Énergie*, CRE), or the High Council for the Audiovisual Sector (*Conseil Supérieur de l'Audiovisuel*, CSA). These sectorial regulators are entrusted with regulatory and network access issues (non-discriminatory and transparent access to facilities, monitoring of tariffs, etc.) while the Competition Authority is in charge of competition law issues.

Certain provisions of the law organise the coordination between the sectorial regulators and the Competition Authority. In particular, the chairmen of the ARCEP and the CRE refer any abuse of a dominant position of which they become aware in the telecommunications, postal or energy sector to the Competition Authority, whereas the Competition Authority informs the ARCEP and the CRE of any litigation within their realm of competence and seeks their legal opinion on said case. The Competition Authority must also consult the Banking Commission (*Commission bancaire*) in abuse of dominance cases involving credit institutions in the financial and banking sectors.

2 Dominance

2.1 How is dominance, or your equivalent concept, defined under national law?

The notion of dominance is not defined in the FCC. The Authority determines whether an undertaking is in the position to behave independently from its competitors and thus its analysis is similar to that of the European Court of Justice in United Brands (1978). Generally the French courts also rely on the definition given in United Brands.

2.2 How is dominance established / proven and what type of evidence is used?

To establish dominance, particular attention is paid to the undertaking's market share on the relevant market. An undertaking having a (*de jure* or *de facto*) monopoly, i.e. holding the totality or the quasi totality of the market shares, will be considered as dominant. In accordance with the European case-law, the Authority and the French courts consider that high market shares - i.e. above 50% - give rise to a presumption of dominance. Conversely, very low market shares allow them to rule out the existence of a dominant position. However, in most cases market shares alone are not sufficient to establish (or rule out) dominance. A variety of other factors are therefore used for the purpose of the competitive assessment, such as competitors' markets shares, the presence of the undertaking on related markets, the existence of barriers to entry, the technological lead of the undertaking concerned, etc.

2.3 How is the relevant market established to assess market power?

The relevant market is the place where offer and demand for products or services meet. In accordance with the European decision-making practice, the Authority and French courts seek to identify a relevant product market and a relevant geographic market (and, very seldom, a temporal market).

Two products or services are part of the same product market when they are considered as substitutable (*CA Paris, France Telecom and Transpac*, 1998), with respect to their characteristics, price, intended use, production or distribution mode. This descriptive method may be completed by a more economic analysis (SSNIP test).

The relevant geographic market comprises the area in which the conditions of competition are sufficiently homogeneous. Its delineation varies according to considerations such as the nature of the product, transport costs, or other regulatory barriers.

2.4 Is a safe harbour provided for low market shares and/or is there a presumption of dominance for high market shares? If so, what are the relevant market share thresholds?

There is no formal safe harbour. Low market shares can be used to rule out the existence of a dominant position (for instance the Authority has already held that a market share below 10% was not sufficient to provide market power, *La Française des Jeux*, 2001), but may not always be sufficient to do so. Similarly, a market share around 50% on a relevant market is an indication of dominance. However, high market shares alone are not always sufficient to establish the existence of a dominant position. At any rate, attention should also be paid to other factors (see question 2.2).

2.5 How is dominance assessed in relation to after-markets?

When assessing dominance with regard to after-markets, the Authority first defines the relevant market. In this respect, the question is whether complementary products (such as after-sale services and spare parts, toner cartridges, etc.) belong to the primary product market or, conversely, constitute a distinct market. The Authority tends to define after-markets narrowly. In its *Nikon* decision, the Authority considered the market for spare parts as a separate market and held that each camera manufacturer was dominant on the market for the sale of spare parts of its own brand since a camera can only be repaired with spare parts of the same brand (*Nikon*, 1993). Similarly, the Authority considered that there was a market for the Jaeger Lecoultre watches' spare parts and that, on account of its monopoly for the sale of its own spare parts, Jaeger Lecoultre held a dominant position on the said market (*Jaeger Lecoultre*, 2005). The Authority applied a similar reasoning in others cases (*MGE UPS Systems*, 2006, *Integral Process*, 2007). In the Nikon case however, the *Cour de cassation* indicated that such approach must be thoroughly justified.

3 Abuse

3.1 How is abuse defined? Is there a general standard? Is there a closed list of abuses?

The law does not provide any definition of the concept of 'abuse'. Article L.420-2 FCC only gives a non-limitative list of abuses such as refusal to sell, tied sales, discriminatory conditions of sale, or the termination of an established commercial relationship, on the sole ground that the commercial partner refuses to submit to unjustified commercial conditions. Other examples of abuses can be found in the case-law such as loyalty rebates, exclusivity provisions, predatory pricing, excessive pricing, cross-subsidies or refusal to grant access to an essential facility.

3.2 What connection must be demonstrated between dominance and the abuse?

One has to demonstrate a causal link between the abuse and the dominant position. In other words, the abuse must result from the undertaking using its dominant position (Competition Council, *Vidéocassettes préenregistrées*, 2005).

However, the abuse need not take place in the dominated market. An undertaking may for instance be guilty of abusing its position in a non-dominated market in order to reinforce its dominant position in the dominated market. Various markets may also be so closely related that an undertaking will be considered as dominant in all said markets (Cass com, *Glaxo*, 2009). For example, the Paris Court of appeal considered that there was a nexus between the market for supplying street furniture dominated by Decaux and the downstream market for street advertising where the abuse took place (*J.C. Decaux*, 2005).

3.3 Does certain conduct benefit from a safe harbour?

As in the European case-law, an undertaking enjoying a dominant position has a special responsibility not to allow its conduct to distort competition on the market. Against that background, there is no formal safe harbour for specific conducts. In practice, the qualification of abuse is generally based on a case-by-case analysis of the anticompetitive object or effect of the practice at stake.

3.4 Are certain types of conduct considered *per se* illegal, without a need to demonstrate actual negative effects on competition?

Yes. Article L. 420-2 (1) FCC prohibits the exploitative abuse of a dominant position when it has as its object or may have the effect of preventing, restricting or distorting competition within a market. The Authority does not use the "*per se*" terms but it results from its case-law that practices aiming at excluding a competitor necessarily presents an anticompetitive object (Competition Council, 2003 Annual Report). For instance, in its *Transport maritime* decision (2009), the Authority indicated that an anticompetitive object is sufficient regardless of the absence of effect and considered that the global and indivisible offer of the dominant undertaking SNCM in response to a tender had as its object to exclude its competitors who were not able to present a similar global offer. Nonetheless, the alternative between object/effect is not always clearly delimited, and the characterisation of the object may be linked to the analysis of the potential (or concrete) effects of the practice at stake. For instance, in its *Transport maritime* case, the Authority considered that the dominant operators concerned had committed an anticompetitive practice by object and by potentiality of effect.

3.5 Can the unilateral conduct of a non-dominant firm be abusive, e.g. does your national law provide for special obligations where a particular customer is in a relationship of dependency?

Yes. Unilateral conduct of a non-dominant firm may be caught by Article L.420-2 (2) FCC which prohibits the "*exploitative abuse by an undertaking or a group of undertakings of a state of economic dependence in which it holds a client or a supplier*" where it may have an effect on the functioning or on the structure of the free play of competition regardless of the existence of a dominant position. Such abuses could notably consist in refusal to sell, tied sales, discriminatory practices or agreements on scope. To establish a state of economic dependence of a distributor *vis-à-vis* its supplier, the Authority relies on four cumulative criteria: (i) the brand awareness of the supplier (the latter must be sufficiently lasting); (ii) the supplier's market share (this market share must be sufficiently important to indicate the subordination of the distributor); (iii) the share of the supplier's products in the distributor's turnover (which must not be the result of a deliberate commercial choice of the distributor); and (iv) the absence for the distributor of any equivalent alternative solution from other suppliers. Quasi-similar criteria are used to establish the state of economic dependence of a supplier *vis-à-vis* its distributor.

Besides, Article L.420-5 FCC prohibits price offers or pricing practices setting excessively low prices in consideration of the costs of production, transformation and marketing where such offers or practices have as their object or may have as their effect to exclude an undertaking from a market or to prevent an undertaking or a product from entering a market.

In addition to these "anticompetitive practices" sanctioned *inter alia* by Articles L.420-2 and 420-5 FCC, the unilateral conduct of a non-dominant firm may qualify as a "restrictive practice of competition" caught *inter alia* by Articles L.442-2, L.442-5 and L.442-6 FCC. While Article L.442-2 FCC sanctions selling at a loss, Article L.442-5 FCC sanctions resale price maintenance, regardless of the supplier's market power. Article L. 442-6 FCC sanctions a list of unilateral conducts of undertakings also regardless of the existence of a dominant position. In particular, Article L.442-6-I, 2) FCC as recently amended by the Law for the Modernisation of the Economy No. 2008-776 of August 4, 2008 ("LME") provides that an undertaking is liable where it subjects or attempts to subject a commercial partner to obligations which create a significant imbalance in the parties' rights and obligations. There is still uncertainty on the method French courts will use to apply this new prohibition due to the absence (at the time of writing) of any case-law in this respect. Still, pursuant to Article L. 442-6-III FCC, such a conduct may be sanctioned by a fine up to EUR 2 million (which can instead be set so as to triple the amount of the undue payments, depending on which amount is the highest) upon request of the Minister of Economy or of the public prosecutor, and/or by damages. Please note that only the courts have jurisdiction with respect to restrictive practices.

Please also note that the LME put an end to the prohibition of price discrimination between distributors belonging to the same category. However, discriminatory prices may still fall within the scope of Article L.420-2 if they amount to an abuse of dominant position.

4 Types of Abuse

4.1 Does the definition of abuse include both exclusionary and exploitative conduct?

Yes. Under French law, the term 'abuse' covers both types of abuse.

4.2 To what extent is excessive pricing considered to be abusive?

Excessive pricing is deemed to occur where the price of the products or services at stake is manifestly disproportionate with regard to their economic value. The Authority applies the European case-law (*General Motors*, 1975 and *British Leyland*, 1986). The manifestly excessive discrepancy between the price of a product (or service) and its economic value may be determined on the basis of the cost of the product (or service), or on the basis of prices proposed for similar products (or services) unless such discrepancy can be objectively justified. For instance, the Authority applied

both methods in its *Enrobés bitumeux* decision (2006) without finding any abuse.

Predatory Pricing

4.3 Is there a price/cost test for evaluating predatory pricing? If so, what is the relevant measure of cost?

Yes. The Authority compares the prices implemented during the alleged predation period to the costs incurred by the undertaking concerned over the same period.

- Where prices are below the average variable costs, there is a presumption that the dominant undertaking aims at eliminating competitors unless the said undertaking provides an alternative explanation to its behaviour supported by verifiable data (e.g. launching a new product).
- Where prices are above the variable costs but below the average total costs, the Authority must provide evidence that such pricing policy is part of an eviction strategy.
- For specific sectors, in particular for undertakings for which they are strong risks of cross subsidies (monopoly and former monopoly) with subsidiaries active in a competitive market, or for undertakings having considerable fixed costs and almost no variable costs, predatory prices result from a comparison between prices and long term incremental costs instead of variable costs.

4.4 To what extent is recoupment relevant to the evaluation of predatory pricing?

In cases where prices are above the variable costs but below the average total costs, the Authority must demonstrate the possibility of recoupment in order to establish the existence of an eviction strategy.

4.5 Is there a specific abuse of margin squeezing?

Yes. In its 2008 Annual Report, the Authority stressed the fact that although margin squeezing bears similar characteristics to other abuses, such as refusal to deal or predatory pricing, it is nevertheless a specific type of abuse in itself. Such abuse consists, for an integrated firm in a dominant position on an upstream market, in setting its prices on that market in a way that prevents other undertakings from competing with it on the competitive downstream market. In order to establish an abuse of dominance by way of margin squeezing, the Authority stated in its Report that four cumulative conditions must be fulfilled:

- the firm must be dominant or monopolistic on the upstream market;
- the intermediate good/service must objectively be necessary to allow other undertakings to compete with the abovementioned firm on the downstream market. Such good/service may - but does not necessarily have to - amount to an essential facility;
- the dominant firm must be vertically integrated, i.e. the firm must have a global pricing strategy and its decisions in this respect must be sufficiently coordinated upstream and downstream; and
- if the relevant markets are regulated markets, the dominant firm must have sufficient autonomy with respect to its pricing strategy for competition rules to be considered applicable.

If the four conditions are fulfilled, the corresponding abuse is presumed and the Authority is not required to examine the actual effects of the margin squeeze, although in practice it is not uncommon for the Authority to proceed in assessing such effects. The dominant firm may however rebut this presumption by objectively justifying its behaviour or by proving that efficiency gains have been passed on to customers.

Rebates

4.6 Does the law distinguish between different categories of rebates? Are there certain legal presumptions that apply to particular types of rebates?

Various types of rebates/discounts have been distinguished by the Authority.

- Quantitative rebates insofar as they are solely based on the quantities of products purchased, are presumed not to have adverse effects on competition. This will not be the case if such rebates are individualised target rebates which in practice produce the same effects as loyalty rebates.
- Loyalty rebates designed to ensure that the buyers purchase all or most of their supplies from the dominant firm.
- Bundled or tied rebates whereby a dominant firm uses its dominant position on a market to link the sale of its products on that market to the sale of its products on other markets, whether by bundling or tying. If such rebates tie a wide range of products, they are referred to as 'across-the-board' rebates.

Aside from the abovementioned presumption regarding purely quantitative rebates/discounts, rebates are assessed according to an effects-based approach. The Authority examines whether the rebates are objectively justified by the passing on of efficiency gains to customers and then, whether such rebates have actual or potential exclusionary effects.

4.7 Does the law recognise a "meeting competition" defence?

In its *GlaxoSmithKline* decision (2007), the Authority indicated that "meeting competition" should be proportionate to the objective pursued and was not an admissible defence for a dominant firm, save in exceptional circumstances. Undertakings are thus entitled to lower their prices to meet competition, as was held in a case regarding a tied rebates scheme set up by France Télécom, provided that such practices do not entail exclusionary effects on competition (2004) or result from collusion between several undertakings guilty of collectively abusing their dominant position on the market, as in the *Ciment corse* case (2007).

Refusal to Deal

4.8 In what circumstances is a refusal to deal considered abusive and is there a concept of an "essential facility" under your national law?

Under French law, any undertaking has the right to choose its contractual partners. A refusal to provide products or services may however qualify as an abuse where such refusal aims at eliminating competitors from the market and cannot be objectively justified, on grounds of security, improved quality of after-sales services, or insufficient output.

Refusal to deal may also lead to the application of the essential facility theory. The concept of 'essential facility' was expressly referred to for the first time by the Authority in its *Heli-Inter Assistance* decision (1996). The essential facility theory has since been applied by the Authority in a number of cases, e.g. with respect

to the local loop (*France Télécom*, 2005), a press software (*NMPP*, 2008), or the computerised reservation system of the French railway incumbent (*SNCF and Expedia Inc*., 2009).

As set out in its case-law, in particular in Authority's *Press Distribution* opinion (2002), the following conditions must be fulfilled for a facility to be considered as essential:

- the facility must be owned by an undertaking holding a dominant position;
- access to the infrastructure is strictly necessary or indispensable to carry out a competing activity on a market upstream/downstream from or related to the dominated market;
- the facility cannot reasonably be duplicated by competitors (from an economic point of view);
- access to the facility is refused or granted on the basis of unjustified restrictive conditions; and
- access to the facility is possible (technically, etc.).

4.9 Is a distinction drawn between termination of supply and *de novo* refusal of supply?

Article L.420-2 FCC expressly lists refusal to deal and abrupt termination of a contractual relationship as examples of abuses. The latter can also qualify as a restrictive practice under Article L.442-6 FCC.

The mere fact a firm is dominant on a market does not deprive it from freely choosing its co-contractors and refusing to supply those it does not wish to deal with. The Authority has also consistently reasserted the dominant firm's right to freely organise its distribution network and determine its commercial terms which implies that co-contractors do not have a vested right of renewal of their contract. Such refusal to deal or termination of supply of goods or services will only be considered abusive if their object or effect is to impair competition on the market without any objective justification to support it.

4.10 Is a distinction drawn between a refusal to supply involving intellectual property rights and other refusal to deal cases?

Yes. Where a refusal to supply involves intellectual property rights, the Authority applies the same analysis as the one developed by the European Court of Justice in its *Magill* (1995) and *IMS Health* (2004) cases. Refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business is considered as abusive where three cumulative conditions are met, i.e. (i) the refusal prevents the emergence of a new product for which there is a potential consumer demand, (ii) the refusal is unjustified, and (iii) the refusal is such as to exclude any competition on a secondary market.

Tying and Bundling

4.11 Does the law distinguish between different forms of tying and bundling?

Tied sales are expressly referred to in Article L.420-2 FCC. Tying and similar practices such as bundling can take different forms:

- tying where the sale of one product is subject to the purchase of a second product; and
- bundling where two products are sold together with a discount. In cases of mixed bundling, at least one of the products is available separately without any rebate, as opposed to pure bundling where the products in the bundle are not sold separately which is considered more restrictive of competition as illustrated in a decision concerning a newspaper which had implemented both types of bundling (*La Provence*, 2005).

4.12 Does the law adopt a form or effects-based approach? Are there any tests which are used to determine legality?

Although tying and similar practices have been subject to a strict assessment by the Authority and the courts, in its *Canal Plus* case (2005) the Authority indicated that tying by a dominant firm is not prohibited *per se*, but rather subject to an effects-based approach. Four cumulative conditions have to be satisfied to characterise an abusive tying:

- the seller must be in a dominant position on the market for the tying product;
- the tied product must have a separate use from that of the tying product, i.e. there must be a demand for such product;
- both products must be tied together, through rebates for instance; and
- competition must be impaired either on the market for the tying product or the tied product; the Authority will examine whether there are objective justifications for such practice and whether its object or effects are anticompetitive.

In the *Canal Plus* case, the three following situations were identified as entailing a high probability of exclusionary effects:

- the dominant firm has a monopoly on the market for the tying product, whereas the tied product is sold on a competitive market (as in the 2007 *Port autonome du Havre* case);
- the tying product is essential (e.g. the tying products are essential for treating organ or bone marrow transplants: *Novartis*, 2003); and
- pure bundling (as in *La Dépêche du midi*, 2004 where auctioneers wishing to purchase advertising space in a newspaper had to also purchase advertising space in other newspapers belonging to the same group).

4.13 In what circumstances would bundling and tying be objectively justified?

Bundling and tying may be objectively justified when leading to efficiencies.

Efficiencies will for instance consist in lower prices for consumers, better quality of the products, a wider choice of products, time saved, easier access to the products or improved means of payment due to the tying. In 2005 in the *Canal Plus* case, thanks to the tying of Canal+ and CanalSatellite services, customers received one invoice instead of two and were able to use the same TV decoder for both services.

Discrimination

4.14 Does the mere fact that parties are being treated differently render such conduct abusive or otherwise unlawful in France or does the law require demonstration of actual or likely anti-competitive effects?

Discrimination is no longer prohibited under Article L.442-6 of the FCC, but may still amount to an abuse of dominance under Article L. 420-2 of the FCC.

The Authority does not prohibit the fact for a dominant firm to apply different terms and conditions or different prices to its clients

per se, but determines whether such practices have an exclusionary object or effect, whether actual or potential. In this respect, rebates granted to certain clients without any form of benefit in return are an indication that the firm granting them may be implementing an exclusionary strategy. A dominant firm is nevertheless entitled to objectively justify its discriminatory behaviour by proving that efficiencies have been passed on to consumers or that there are objective reasons for treating two customers differently, that is to say reasons indicating that such customers are not in comparable situations.

Other Abuses

4.15 Are there examples where systemic abuses of administrative or regulatory processes and/or aggressive litigation strategies have been characterised as abusive?

Only in exceptional circumstances is the fact of initiating legal proceedings considered as an abuse of a dominant position. The Authority applies the two cumulative criteria set out by the European Commission in its *ITT Promedia* decision (1996): (i) the action cannot reasonably be interpreted as an attempt by the undertaking concerned to assert its rights and is therefore solely designed to harass the opposite party; and (ii) the proceedings are part of a plan aimed at hindering competition on the market. The Authority also refers to a 2001 ruling of the *Cour de cassation* stating that the abuse of right requires proof of malice. The Authority has never acknowledged the existence of an abuse of litigation.

4.16 Are there any examples where a misuse of the standard setting process has been characterised as abusive?

To our best knowledge, there are no such examples.

4.17 Please provide brief details of other noteworthy abuses not covered above.

Exclusivity provisions may also lead to abuse of dominance. In its *KalibraXE* decision (2007), the Authority however stated that exclusivity provisions in favour of a dominant undertaking do not constitute an abuse *per se* and set out a list of considerations that ought to be taken into account when reviewing such exclusivity provisions i.e. (i) the scope of the exclusivity, (ii) its duration, (iii) the existence of technical justifications, and (iv) the existence of economic consideration for the co-contractor (e.g. *Photomaton*, 2008).

5 Public Enforcement

5.1 Which authorities enforce the legislation against abuse of dominance? What is the role of sector- specific regulators?

Following the entry into force of the LME together with the Ordinance of November 13, 2008, the Authority has become entrusted, not only with the enforcement of antitrust law as in the past, but also with merger control which was previously dealt with by the Ministry of Economy. The Paris Court of Appeal has jurisdiction to review appeal against decisions taken by the Authority.

The Ministry of Economy remains competent to enforce Article L.420-2 FCC with respect to practices implemented at a local level. The Ordinance entrusts the Ministry of Economy with the power to investigate so-called "anticompetitive micro-practices", i.e. practices which affect a local geographic market, concern undertakings with an individual turnover not exceeding EUR 50 million and with an aggregated turnover not exceeding EUR 100 million, and do not require the application of Article 82 of the EC Treaty.

The administrative courts may also apply competition law (CE, *Société Million et Marais*, 1997). In certain circumstances, criminal courts (*Tribunal correctionnel*) may impose criminal sanctions in case of abuse of dominance (see question 5.5). Regarding the role of sectorial regulators, please see question 1.5.

5.2 What investigatory powers do the enforcement authorities have?

The new Authority has at its disposal reinforced dedicated investigation services, which are under the supervision of the *Rapporteur général*. The Authority's investigative powers are very similar to those of the European Commission. During its investigation, the Authority may send requests for information or organise oral hearings; it may also carry out inspections: the agents of the Authority may access any premises of an undertaking(s); make copies, by all means, of relevant documents (privileged documents excepted); and ask questions relating to the said documents. In the situation where an undertaking opposes the inspection, the agents can access the premises (including private premises and cars), seize original documents by all means (privileged documents excepted) or affix seals on the basis of a judicial authorisation of the freedom and custody judge (*ordonnance du juge des libertés et de la détention*). The Authority may request the assistance of agents from the Ministry of Economy for inspections on the basis of a judicial authorisation.

5.3 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions? What are the timescales?

The Authority may be seized by the Ministry of Economy, by a third party complaint (most of the cases) or assume jurisdiction of its own motion. Where the Authority decides to examine the case, the procedure is divided between the investigation phase and the judgment phase.

The investigation phase aims at collecting evidence through requests for information, inspections, etc. If, following such phase, there are sufficient elements indicating that there may be a breach of French or EU law, the *Rapporteur général* sends a statement of objections to the defendant and the Government Representative (*Commissaire du Gouvernement*) who have two months to submit their written comments in response. The Rapporteur général then issues a report summarising the case which is notified to the parties, the Commissaire du Gouvernement and the ministries concerned by the case. The parties have two months (three months in exceptional circumstances) to respond to the report in writing.

During the investigation phase, the Authority may impose interim measures.

At the end of these proceedings, the Authority issues a decision. According to the Authority, the average duration between the time a complaint is filed and the final decision is 18 to 20 months (in some cases this period may last longer).

French law also provides for a simplified procedure and a non-contest procedure. In the simplified procedure, the *Rapporteur général* may, while notifying the statement of objections to the

parties, decide that the case will be examined by the Authority without a prior report. As for the non-contest procedure (*procédure de non-contestation des griefs*), where an undertaking does not contest the accuracy of the allegations made against it in the statement of objections and offers credible, significant and verifiable commitments, the *Rapporteur général* may propose to the Authority to impose a reduced fine without any report being drafted (see also question 5.4).

Finally, an undertaking may also propose commitments before the statement of objections is issued. Where they are accepted by the Authority, the Authority issues a commitment decision which closes the case before any formal investigation and/or qualification of the practices at stake.

5.4 What are the sanctions and remedies that may be imposed in an abuse of dominance case? Do these include structural remedies?

The Authority can impose administrative fines and issue injunctions.

The Authority may impose fines up to 10% 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. Where the offender is not an undertaking, the maximum amount of the penalty is EUR 3 million. In case of a simplified procedure, the fine may not exceed EUR 750,000 for each undertaking. In case of a non-contest procedure, the maximum amount of the fine incurred is 5% of the highest worldwide turnover and, within that framework, the undertaking may benefit from a reduction rate based on the commitments proposed by the undertaking. The Authority may also order the publication of the decision (or an abstract thereof).

There are no similar guidelines to those of the European Commission on the method of setting fines. To determine the appropriate fine, the Authority takes into consideration factors such as the gravity of the practice (for example predatory practices are considered as serious), their duration, the damage caused to the economy, the situation of the undertaking concerned, the characteristics of the relevant market, and the repetition of such practices. The highest fine ever imposed in a case of dominance amounts to EUR 80 million and sanctioned the telecom incumbent France Télécom for having abused its dominant position on the broadband Internet market (*France Télécom*, 2005).

The Authority may issue injunctions. In particular, in case of abuse of dominance, the Authority may enjoin an undertaking to modify, supplement, or terminate all the agreements having contributed to increasing its market power, even if such agreements have been approved in a merger control procedure by the Authority (Article L.430-9 FCC). In addition, in case of abuse of dominance in the retail sector which has not been brought to an end despite previous injunctions and penalties, the Authority may impose structural remedies if it is the only way of guaranteeing effective competition within a given trade sector (Article L.752-26 FCC).

In order to ensure compliance with its fines and injunctions, the Authority may impose periodic daily penalties up to 5% of the average daily turnover.

With respect to "anticompetitive micro-practices" (see question 5.1), the Ministry of Economy may issue injunctions and propose settlements, the amount of which cannot exceed EUR 75,000 or 5% of the latest turnover achieved in France, whichever is the lowest. The Ministry of Economy cannot impose fines as such. Where the undertaking does not comply with the injunctions or the terms of the settlement, the Ministry refers the case to the Authority.

5.5 Can abusive conduct amount to a criminal offence?

Yes. Pursuant to Article L.420-6 FCC, if a natural person fraudulently intervenes in a personal and decisive manner in the conception, organisation or implementation of the practices referred to in Article L.420-2 FCC, that person risks a four-year prison sentence and a EUR 75,000 fine. Article L.420-6 FCC also applies to legal entities. However this Article is rarely implemented.

5.6 How often is the legislation enforced in practice?

The Authority has adopted 4 decisions (at the time of writing) imposing fines in 2009, 1 decision in 2008, 5 decisions in 2007 and 2 decisions in 2006.

6 Private Enforcement

6.1 Can the legislation be enforced in private actions before your national courts?

Yes. Pursuant to Article L.420-7 FCC and the Decree of December 30, 2005, eight civil courts (*Tribunaux de grande instance*) and eight commercial courts (*Tribunaux de commerce*) have jurisdiction to apply the legislation relating to "anticompetitive practices", and thus to examine cases of abuse of dominance. The Paris Court of Appeal has jurisdiction to review appeals against rulings of these courts.

In addition, only judges have jurisdiction to review alleged "restrictive practices", and thus only courts can impose the civil fines provided for in Article L.442-6, III FCC (see question 3.5). Besides, only courts can rule on the validity of a contract or grant damages.

6.2 To what extent is interim relief available?

Interim measures can be granted by the president of the civil court (*Président du Tribunal de Grande instance*) before any judgment on the merits of the case in order to prevent imminent damage or to bring a manifestly illicit disorder to an end. Similarly, the president of the commercial court (*Président du Tribunal de commerce*) may take interim measures in order to prevent imminent damage or disorder.

6.3 To what extent are private damages available and can punitive damages be awarded?

Pursuant to the principle of strict compensation of damages under French law, judges must determine the exact value of the damage actually suffered by the plaintiffs and compensate them only to such extent. To be awarded compensation, a plaintiff must establish the fault committed by the dominant firm, the damage actually suffered and causation between the fault and the damage.

6.4 How frequent are private enforcement actions before your national courts?

There have been few private actions in France to date, mainly because of the strict compensation principle which discourages victims of abuse of a dominant position (and more specifically consumers) from suing the dominant firm and also on account of the difficulty for claimants to demonstrate the causal link between the practice and the damage suffered. In addition, there is no plaintiff bar in France and the rules on legal ethics prohibit lawyers from canvassing victims.

7 Defences

7.1 What defences are available to a firm accused of abusing its dominant position and to what extent are efficiencies taken into account?

Objective justifications may explain behaviours such as excessive pricing, prices below the average variable costs (launching of a new product for instance), refusal to deal (insufficient output capacity for instance, or public service obligations: *Météorologie*, 1992), etc. In particular, rebates/discounts may be objectively justified by the passing on of efficiency gains to customers. The anticompetitive nature of practices such as bundling or tying has become increasingly controversial on account of the efficiencies brought about by such practices and the Authority therefore tends to rely on an effects-based analysis. Besides, practices which result from the implementing a governmental act or regulation are deemed not to be subject to Article L.420-2 (Article L. 420-4 FCC).

8 Recent Developments

8.1 Please provide brief details of significant recent or imminent developments not covered by the above in relation to France.

See question 5.1.

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