The new French competition law enforcement regime

Bruno Lasserre
President of the Autorité de la concurrence, Paris

Introduction

France is at a turning point in its history of competition law enforcement. Its institutional framework was overhauled a few months ago, after a reform completed in less than a year. The previous system, which divided powers and means between an independent agency, the Conseil de la concurrence (the ‘Competition Council’), and the Ministry of Economy, was swept away. A single independent Autorité de la concurrence (the ‘Authority’) has replaced it, vested with the full spectrum of competition law enforcement powers.

The coming months and years will be key as the new Authority takes shape, frames its objectives and focuses on delivering tangible consumer welfare results, while safeguarding a business-friendly environment that puts competition at the heart of business.

From competition council to competition authority: a single and stronger independent competition enforcer

2 March 2009 marked the advent of the Authority, which was created by way of transformation of the Competition Council.1 The President of the Republic and Parliament were both directly involved in this reform: the President gave the initial impetus, while Parliament later insisted that the strategic aspects of the reform – creating the Authority and making it responsible for merger review – be included in a law, and not in a mere governmental ordinance, as initially envisioned.

An organisation balancing enhanced efficiency and enhanced fairness

Enhanced efficiency

The Authority benefits from an enhanced institutional standing. The Law ensures the Authority’s independence, as well as laying out its mission of enforcing competition at the national level, and contributing to antitrust enforcement on the European and international scene. Its president, appointed by the President of the Republic following Parliamentary hearings, has been empowered to discuss activities, results and perspectives with Parliament. This is an excellent ‘plus’ as compared to the previous system: independence and accountability should go hand in hand.

The Authority takes over the former organisation of the Competition Council, while incorporating the teams hitherto in charge of dawn raids within the Ministry of Economy. France now enjoys a single agency, able to cooperate or exchange information with the European Commission and various national competition authorities of the European Competition Network (‘ECN’), as well as with other foreign competition agencies.

Enhanced fairness

Due process remains guaranteed by a fully fledged system of internal checks and balances. Antitrust cases are launched and prosecuted by the investigation services, acting under the direction of the general rapporteur with no involvement of the college. The college then adjudicates the case, with no involvement of the investigation services in the process. This separation of functions, which is not imposed by the European Convention of Human Rights, is extremely beneficial because it guarantees an intense debate with the parties and within the organisation.

In addition, the college may now benefit, on a number of procedural issues (eg, business secrets) from the additional backup of a hearing officer, who acts as a procedural expert, by helping resolve procedural issues as they arise, before providing feedback to the college, which ultimately decides.

A single enforcer for mergers and antitrust

Reinforcement of existing powers

The Authority is now the sole French Government body responsible for making competition law work on the markets. This full jurisdiction translates into a comprehensive toolkit, including the power to
carry out dawn raids, to grant interim relief, to issue injunctions, to craft behavioral and/or structural remedies, to impose fines, to reach settlements, to accept commitments aimed at voluntarily restoring competition on the marketplace, and to monitor the implementation of its decisions.

**Addition of new powers**

The Authority has gained the power to deliver on its own motion, and not only upon public or private request, opinions on any competition issue, including legislation and draft legislation. It has also become entitled to make recommendations to the government. Finally, it may carry out sector enquiries.

As for mergers, the Authority takes over the power hitherto exercised by the minister of the economy, namely to evaluate all reviewable mergers pursuant to an expedited assessment (‘phase 1’), unless they give rise to competition concerns that have not been remedied during phase 1 or otherwise warrant an in-depth examination (‘phase 2’). This evaluation, which focuses exclusively on competition issues (including possible efficiency gains), remains subject to full judicial review, as under the previous system.

The minister of the economy keeps the right to assert jurisdiction over mergers raising issues of public policy and to rule on these exceptional cases, once the Authority has made a final and public decision, and without being allowed to override the competition analysis featured in this decision.

**Looking ahead at French antitrust policy**

The Authority’s top priorities must remain consumer welfare, consumer welfare, and consumer welfare.

*Vigorous enforcement in all cases that significantly hurt consumers—and only in such cases*

**Continued deterrence**

Ever since 2004, the Competition Council has made it a core priority to step up cartel enforcement. The creation of a corporate leniency programme in 2006 greatly facilitated the detection of cartels. The programme was updated in 2007, after the adoption of a common European leniency programme, mainly to incorporate a summary procedure intended for international cartel applicants. Intense prosecution triggered by booming leniency applications and *proprò moto* investigations led to an unprecedented number of convictions, featuring landmark cases such as the *Mobile Phones* (2005), *Heating Systems* (2006), *Air Fuel* and *Steel Trade* cartels (2008).

The Authority will remain uncompromisingly committed to uncovering cartels and punishing all those who collude artificially to fix prices, share markets or ration demand. Market players must anticipate that trying to make money off the backs of consumers does not yield profits and entails ever-greater risks of detection, prosecution, and fines. Consumers should be aware that the Authority will not let them down. Our determination to make certain that competition works for the benefit of each and every consumer is the backbone of our mission and legitimacy.

But cartels are not the Authority’s only target: the Competition Council had made it clear that whenever robust evidence proves that other types of anti-competitive agreements (as well as unilateral strategies) have significant hurtful effects for consumers, prosecution is warranted. The landmark unilateral conduct decisions in the *France Telecom* and *Corsican Cement cases* (2007), as well as the condemnations of highly damaging RPM agreements in the *Perfumes* (2006) and *Toys* (2007) cases, are reminders that consumers may also be victimised by vertical restraints or unilateral conduct, and that in such a case, fines must be set at a level that guarantees adequate deterrence. The Authority will build on that strong record.

**Greater predictability**

Nevertheless, the Authority will further enhance the openness and transparency of its activities. In the coming months, we will move towards publishing guidance on how we make use of our power to impose fines.

That said, in a system based on the rule of law, competition authorities do not have the last word. Predictability also depends on the way national judges set out to control antitrust policy in view of administrative guidance released by competition enforcers. This works perfectly well at the EU level: the Court of First Instance and Court of Justice are of course not bound by the Commission’s guidelines, but they have decided to apply them when controlling the legality of antitrust fines – and they routinely do so. We could move along that path.

**Robust economics and strict rules**

**Effects-based analyses of competitive pros and cons**

The Authority’s mission is to make certain that competition works in the marketplace. It is not to interfere in the way firms conduct their business, as long as their behaviour is not incompatible with antitrust law.

We will make it a priority to build on the council’s track record of feeding tailor-made, effects-based analyses into our decisions, unless faced with a...
hardcore cartel or a case in which the anti-competitive object of the practice at stake is evident. Our antitrust enforcement must be intelligent and balanced. It must stay clear of prejudice and bias. As has been often stated elsewhere, the way forward involves careful assessment of actual and potential effects on consumer welfare, although some cases are manifestly less complex or more straightforward than others.

GLOBAL GUIDANCE

Although this approach rests on a principled decisional practice, the Authority will need to provide clearer guidance on its methods and priorities. This is obviously not something we can do in isolation. Convergence is needed throughout Europe and beyond. We will pay due regard to the Commission’s guidance on its Article 82 enforcement priorities, although national priorities may of course differ from EU priorities. This should not come as a surprise, given the Authority’s attachment to EU law. The French Competition Council has traditionally been very active in the ECN, be it in terms of national cases applying EU competition law (with 162 cases put on the ECN out of a total of 1,043, and 55 decisions applying EU law out of a total of 338) or in contributions to policy debates, such as the ongoing revision of the texts applying to vertical restraints.

Looking ahead at the French merger review

The transfer of merger control to the independent Authority is the flagship measure of the new regime.

Efficient and predictable processes

Making the most of the two phases of the review process

The French conception of merger review is closely in line with the international consensus. Yet, there is always room for progress. The implementation of the Law should translate into further efficiency gains in terms of procedural efficacy, fairness and timeliness for merging firms as well as for the Authority.

We will take the necessary steps to ensure that the two-stage review process (phase 1/phase 2) provided by the French Code of Commerce better serves this purpose in the coming years. It should be used more clearly as a means of swiftly differentiating between mergers that do not give rise to significant competition concerns and must therefore be cleared without imposing undue delays and red tape, and mergers that are likely to cause significant consumer harm and thus warrant a more intensive assessment. Where it is evident from the start that a deal raises no competition concern whatsoever, there should be room for quick clearance, without delaying the decision until the last working day permitted for a phase 1 assessment. Likewise, where it is clear that an operation raises no novel issue, there should be room for streamlining the decision instead of elaborating on the reasoning behind the decision.

On the other hand, a new, more positive approach to merger review will depend on merging companies as well as on the Authority. In the past, much too often companies have waited until the last days of the procedure to make minimalist offers of remedies. Our experience shows that this is a ‘lose/lose’ game. It would be far more interesting for market players to take a proactive part in the shaping of a suitable solution instead of doing too little, too late, and then being confronted by remedies that have been unilaterally crafted by the agency.

Achieving efficiency gains across the board

Much more needs to be done if we want to fully realise the efficiency gains made possible by the reform. The Law creates a one-stop shop for merging firms, who will now deal with the Authority throughout the process, from pre-merger discussions (which will remain available under the Authority’s open-door policy) all the way to clearance. We have set up a dedicated merger unit, mixing first-class experts with younger talents, who will handle cases from beginning to end. They will, of course, benefit from the skills of the chief economist, who will advise on the merits, particularly in complex cases. Their input should translate into internal dialogue, checks and balances and, ultimately, well-informed and well-reasoned conclusions.

The Law also provides additional flexibility in the adjudicative part of the process. Phase 1 decisions can be made by the president acting alone – a useful tool for speeding up unproblematic cases. By contrast, in phase 2 cases, parties systematically have the benefit of a fully fledged hearing with the college. This means that such cases are not only discussed collegially, but also decided collegially. This is clearly a move in the right direction because having a frank and constructive debate with the parties on the competitive pros and cons of their merger is key to the intellectual legitimacy of the decision taken at the end of the process.

Last, the Authority’s strategic work plan will include a good deal of thinking on predictability. We will publish procedural and substantive merger guidance in July 2009, and wait until the public consultation unfolds before enacting it in autumn 2009.
Continued modernisation of a substantive approach

**Modern tests, rigorous methods of evaluation, and legible decisions**

Our merger review substantive test centres on the substantial lessening of competition, whatever form it may take. Our competition assessments are meant to integrate all market circumstances and economic parameters, including likely foreseeable changes. We never reach conclusions on a theory of competitive harm without having fully evaluated the arguments and evidence brought by the merging parties, as well as any remedies offered to alleviate our concerns. This approach explains why we reach few adverse findings, with 95 per cent of all operations being cleared without conditions and the remainder being allowed to go forward subject to remedies.

However, this does not mean that we should rest on our laurels – quite the contrary. Our chief concern in the coming months will be to make certain that, merger decision after merger decision, we develop a practice that matches the one that has been developed over the years by the Competition Council in the antitrust field.

There is one particular area in which some progress could be made. We have done a great deal of work on the standard of proof issue, which was not an easy task. We must now work on the methods and criteria we use when evaluating factual evidence, specifically economic and econometric evidence, as well as market studies.

Playing our part in the broader merger community

The Authority intends to become an integral component of the European merger dialogue – something it has already achieved in the field of antitrust since the inception of the ECN. It also intends to be at the forefront of the merger dialogue that takes place within the ICN and the OECD, as it has already started doing for antitrust since 2004.

During the last year, the process that led to the Authority’s institutional reform demonstrated once more that the ICN and OECD are unique fora for benchmarking and for amassing understanding of how competition enforcement is organised in other jurisdictions, how it works in practice, and what results it achieves. Their numerous reports and best practices, along with their workshops and roundtables, have given the Authority a fairly good idea of what it does well and what foreign tools or practices it could fruitfully take over to optimise its system (something it actually did with the Law).

Accordingly, it is only fair that we try and give other agencies as much as they have given to us, by reaching out and investing in their merger review projects.

Looking ahead at the other building blocks of French competition enforcement

**Objectives**

Our objectives for the coming five years boil down to two core targets: making certain that firms and consumers understand how much they can benefit from competition and making certain that they effectively reap the benefits of enforcement of the competition rules.

**Advocacy**

Competition has always had its advocates and its detractors. However, in many cases, the debate is biased by the fact that people are not talking about the same thing. So our first task must be to put things back in perspective.

Competition is not and should not become a doctrine. The aim is to have an economy that works and that brings prosperity. Competition means that firms should do their utmost in terms of innovation, investment, quality, etc – in a word, that they should strive to be the best and the brightest in their field. But that’s only half of the story. Competition law states that not only firms, but also consumers, should benefit from free enterprise, and competition policy ensures this is the case. Why? For a very simple reason: why would consumers accept the market economy if they had nothing to gain from it?

Thanks to the great work achieved by the French Government and Parliament with the Law, French businesspeople and citizens have started realising that, in the longer term, competition enforcement contributes to economic efficiency and prosperity. The French President and Prime Minister have entrusted the Authority with the mission of continuing this job by raising awareness. We will roll up our sleeves accordingly. To start with, we are now able to issue reports and opinions on our own motion and we will boost this ex officio policy in the coming months. We have already opened a number of cases, for instance in the railway sector.

But advocacy is not a task for the Authority alone. All of our partners should join hands. If a growing number of firms understand that they have everything to gain – and nothing to lose – by putting competition at the heart of their strategy, then we will have won our greatest prize. This is why compliance was the ‘new frontier’ of the Competition Council during its last year.
infringement cases being closed by way of a settlement very attractive. With approximately one out of four package, which has been around since 2001, it is also certain cases, lengthy) litigation. As for our settlement are increasingly keen to work with us on commitments, guidance. It is a great encouragement to see that firms 25) to the point where it became possible to issue public has experienced this in a number of cases (more than years. We are not happy when we have to impose a high fine but whenever competition infringements damage consumer welfare, they should be sanctioned and alternative procedures that allow us to negotiate we have struck in recent years between deterrence and qualitative and quantitative impact. We must evaluate our priorities upfront, because we have a duty not to waste our limited resources. Prioritisation must inform our policy of opening ex officio infringement and noncompliance cases. We should also not hesitate to dismiss cases that are not supported by satisfactory evidence.

Finally, the Authority will continue to advocate for a finer balance among the different pillars of competition enforcement. Administrative enforcement is now entrusted to a single agency, but greater attention needs to be paid to criminal and civil enforcement.

French criminal antitrust enforcement, which is under the responsibility of criminal judges, is still limited. The Law provides that individuals who personally play a decisive part in the conception or operation of a corporate antitrust breach can be fined or jailed for a maximum of four years. But implementation is scarce. That could soon change. The President of the Republic commissioned a report on the future of criminal business law, issued in January 2008, which contains a number of interesting proposals on the antitrust front. Many of them are consistent with suggestions the Competition Council made when it was heard by the commission members. They suggest a move towards more targeted and efficient criminalisation. Any type of antitrust infringement can currently give rise to criminal proceedings, including vertical restraints or unilateral conduct, despite the complex issues to which they may give rise. Also, there is no leniency programme for individuals. Thought should be given to aligning individual incentives with corporate incentives. But changing the law will not suffice without clear signals as to exactly what public policy the prosecutors are pursuing. We will also need to better cooperate with them.

As for private enforcement, which is being considered at the EU level, everyone understands that it is the second leg of competition law. Human beings must use both their legs, and these two legs must be coordinated, as otherwise walking will be risky. Allowing victims to claim damages when they have suffered from a cartel is
an important element of trust in a legal and economic system based on the rule of liability for injuries caused to others. However, such claims should be well coordinated with public enforcement, so that private interests do not conflict with the public interest.

**Organisation and management**

Transforming the Competition Council into a fully fledged Authority would have been meaningless if the Authority were not provided with the additional means needed to implement its additional powers.

The Authority is now in the process of integrating 60 new people, a move that will bring its total staff to almost 200, as compared to 130 for the Competition Council in past years. The credit that goes with it should be transferred too. In a tight budgetary context, in which almost all administrative budgets and staffs are being frozen (if not cut down), this means the government has really made more efficient competition enforcement a priority.

But in turn, means bring little result if those in charge do not have a clear view as to how to run their organisation. The Competition Council has already done a lot in 2006 by setting up dedicated economic and legal departments. In the Authority, an office has been added to the economic and legal departments to provide me with support on strategy and policy, as well as on institutional, European and international affairs. Integrating these new taskforces has been very successful and has provided obvious added value, exactly as the Authority’s first-class communications service has done since its creation.

The investigation services are the main target now. In addition to the merger service and the dedicated chief economist and legal service, the investigation services host a unit specifically devoted to on-the-ground investigations, which is our expert team for technical dawn raids issues. We also have broken down case handlers in small, governable groups directly accountable to mid-level managers, themselves placed under the direction of the general rapporteur. This should translate into enhanced reactivity and consistency.

Moving beyond structures, the Authority will optimise the way people work, both individually and together. In recent years, our recruitment policy has been aimed at diversifying and balancing profiles, in line with strategic priorities, as well as mixing promising juniors with established talents. We now have a good portfolio of people, composed roughly of 50 per cent civil servants and 50 per cent private practitioners coming from various backgrounds. This policy should be carried on.

Finally, processes should also evolve. Since 2004, the Competition Council’s college and investigation services have done an impressive job in taming the caseload, which has been reduced by 60 per cent between 2000 and 2008. Older cases have been virtually eliminated, apart from a few voluminous cartel and complex abuse cases, in which the agency must take the time necessary to assess evidence that runs into thousands of pages. Finally, the average duration of the procedure has been halved. Without this collective effort, which enabled the agency to do its utmost, nobody would have ever noticed the inefficiencies that stemmed from the duplication and dispersion of powers and means between the Competition Council and the Ministry of Economy. That reform would have been on nobody’s map.

I will now direct the Authority’s teams to think about ways of securing these results on the long run. The caseload must remain firmly under control, and the Authority must continue to act in line with business time. This is a renewed challenge, because antitrust complaints have been on the rise lately (120 in 2008 as opposed to 100 per year between 2000 and 2007). Requests for interim relief have also increased. Given these trends, we must further modernise and secure our processes – a move we initiated by recruiting talented référendaires specifically dedicated to conceiving and drafting our decisions and opinions.

In a nutshell, making sure that accountability, predictability, and quality are built into the very fabric of the Authority and put at the heart of every move it makes will top my agenda.

**Note**