After a very active 2020, the Autorité de la concurrence announces its priorities for 2021, which will focus on the digital economy

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With the end of the year just a few days away, the *Autorité* assesses its activity and outlines its work for 2021.

According to Isabelle de Silva, President of the *Autorité: "Despite the context we are all familiar with, in 2020 the Autorité fully mobilised to meet its objectives and best fulfill its mission of defending competition. Thanks to the strong mobilisation of our teams, we have ensured that the review of business mergers continues in short deadlines, notwithstanding the constraints related to the state of health emergency. In 2021, our action will remain resolutely focused on the digital economy, with our study on the financial sector, fintechs and the development of platforms to payment services. In addition, our action will be marked by the entry into force of reinforced intervention tools, with the transposition of the ECN+ directive and the possibility to refer acquisitions made "below the mandatory notification thresholds" to the Commission for examination, in the case of, for example, predatory or consolidating acquisitions".*

2020, a year marked by significant activity despite the difficult health context

2020 has been to a great extent marked by the serious health crisis that has hit our country. Despite these difficulties, the Autorité de la concurrence has been committed to maintain a high level of activity and to implement its priorities.

In order not to penalise the activity of companies in a context of economic crisis, the Autorité has made a point, despite the constraints related to confinements and restrictions, to maintain the very short deadlines that it usually practices for reviewing mergers, without making use of the additional time limits provided for by the ordinances issued in the context of the health emergency state.

For example, it has issued:

- Some **200 merger control decisions**
- **23 anticompetitive practice decisions**
- **12 opinions**

It handed out fines worth **1.8 billion euros**

(Figures dated 12/22/2020)

Key decisions and opinions

Several important decisions have been issued by the *Autorité* in the digital sector, including the decision ordering Google, as part of urgent interim measures, to negotiate with publishers and press agencies the remuneration due to them regarding related rights. In the sector of the distribution of Apple electronic products, the decision sanctioning Apple and its two wholesalers 1.2 billion euros, has brought to light practices restricting competition and the distributors' freedom to set rates, and abusing their economic dependence.

For the first time, the Autorité implemented the powers conferred to it by the EGALIM law, which resulted in commitments to address the risks to competition caused by two major joint purchasing agreements in the area of retailers' own-brand labels products (Auchan / Casino / Metro / Schiever and Carrefour / Tesco).

The Autorité also sanctioned a large-scale cartel in the ham sector.

Very active in the healthcare sector, it sanctioned abusive practices committed by 3 pharmaceutical companies in the treatment for AMD and also strongly condemned boycott practices against the Santéclair healthcare network, implemented by the council of dental surgeons and two trade union federations.

The Autorité continued to vigilantly monitor competition in the overseas territories, particularly in the context of the healthcare crisis.

Finally, at the request of the Minister of the Economy, it issued a major opinion analysing the competitive situation in Corsica island and making recommendations to remedy the identified shortcomings.

The continuation of the Autorité's modernisation work

Continuing the work started to better take into account the objectives of sustainable development, the Autorité de la concurrence has created a dedicated thematic team within its investigation services and actively participates in the work carried out within the framework of the European

competition network.

In 2020, the Autorité also launched its new unit dedicated to the digital economy, now fully operational, and which will strengthen its expertise in platforms, algorithms and data sciences.

During the Covid-19 crisis, the Autorité finally set up a dedicated team to guide companies through this delicate period and ensure the absence of anticompetitive practices that could have harmed the economy and consumers. It was thus able to intervene, in this context, to enlighten a professional association which wondered about the possibilities of discussing the terms of commercial rents payment during the Covid crisis, or to remedy exclusivity practices that risked slowing down the access of overseas hospitals to respirators.

In 2021, the Autorité de la concurrence intends to continue its action of implementing competition law at a high level.

Priorities for 2021

The digital sector

Once again this year, the Autorité de la concurrence will devote its full attention to the digital sector. The Autorité will first deliver its opinion on the competitive transformation of the financial sector. This opinion, which follows a self-referral, will allow it to review the evolution of the competitive dynamic in the financial sector, with the emergence of Fintechs, but also on the consequences linked to the massive arrival of GAFA in the payment services sphere.

The Autorité will continue to actively participate in discussions led at European level on digital regulation, in particular the ones regarding the Digital Market Act and Digital Services Act, which will define a new regulatory framework applicable to digital platforms. The Autorité will also participate, within the framework of the European competition network, in the revision of the European Commission's communication on the relevant markets.

Several litigation investigations, initiated in particular following the 2018 opinion on online advertising, should be concluded in 2021. This applies to two cases, one concerning intermediation services in the online advertising sector and the

other, regarding massive data collection practices. The Autorité will also rule on Google's compliance with the interim measures issued against it regarding related rights as well as on the merits of the case. The Autorité will also hold a hearing at the beginning of the year on the request for interim measures presented by IAB France, MMA France, UDECAM and SRI[1] and relating to the changes announced by Apple concerning its next operating system for iPhone IoS14.

The digital economy unit will continue to grow, with the implementation of tools to monitor in real time the evolution of the general conditions of use of digital platforms and to deepen the monitoring of public markets by the algorithm bias. It will also lead the work of the investigation services' transversal group on the digital.

Transposition of the ECN+ Directive and continued modernisation of the tools used by the Autorite de la concurrence

From an institutional point of view, the Autorité had its powers reinforced in 2020 with the adoption, in December, of a new law (the so-called « DDADUE law »). Among major improvements, it is worth noting in particular the broadening of the scope of simplified procedure, which will now be applicable to a greater number of companies, within the general framework for financial penalties, and the end of the leniency procedural notice, which will enable to process faster leniency applications, an essential tool in the detection of covert cartels.

The passing of the DDADUE law also allows for the transposition through a Government ordinance of the ECN + directive that enhances the powers of national competition authorities. 2021 will be marked by the adoption of this legislation, the last necessary step for the Autorité to benefit from this renovated legal framework.

Among the advances that will become reality, we will note:

- the introduction of the principle of prosecution mechanism, which will allow the Autorité to better adapt its resources to the most significant issues for competition

- the possibility for the Autorité to start interim measure proceedings *ex officio*
- the ability to issue structural injunctions within the framework of anticompetitive practices;
- or, the revision of the ceiling applicable to associations of undertakings, which has been set at 10% of turnover.

In this context, the *Autorité* will revise its fines calculation guidelines accordingly.

The power that the Autorité de la concurrence will have to start proceedings *ex officio* will be particularly important in order to enable it to intervene even more quickly on the practices that are most damaging to the economy. The Autorité has already been able to test the effectiveness of this new referral method in the large-scale distribution sector, with its intervention in terms of bringing together large purchasing offices. This new option could prove to be particularly valuable in the digital sector, given the difficult reversible effects of certain practices on highly evolving markets.

The Autorité is committed to supporting companies in their compliance efforts

The Autorité wishes to resolutely promote companies' compliance initiatives. At the start of 2021, it will present the conclusions of a working group that it led in 2020. This group brought together heads of companies, professional bodies and experts and should make recommendations on the principles to be followed by companies and desired actions / tools from the Autorité.

In order to help companies better prepare for their mergers, in 2020 the Autorité completed a major overhaul of its Guidelines, after consultation with professionals. The new framework document will allow companies to understand, in an up-to-date and educational way, the analytical framework, the examination methods, the possible options, in order to enlighten them on the way in which the Autorité is likely to decide on mergers and acquisitions. The adoption of these Guidelines will be accompanied by changes implemented at the request of companies in order to facilitate merger procedures (designation of the team in charge of the case, pre-notification, etc.).

Finally, at the very beginning of 2021, the Autorité will publish a study dedicated to professional organisations. It will examine how they can promote better application of competition law among their members, but will also illustrate the competitive risks associated with the functioning of these bodies, by giving them keys to prevent them. The Autorité chose to carry out this study in a context where the transposition of the ECN + directive exposes these bodies, and their member companies or professionals, to potentially much higher financial penalties than in the past.

Sustainable development

In 2021, concerns relating to sustainable development will continue to be integrated in the decision-making practice of the Autorité, which will focus on targeting the most harmful anticompetitive practices in this area. Several cases that may fall into this category should be concluded in 2021. The Autorité will also continue to support companies wishing to benefit from guidance on this subject, for example when they plan to carry out concerted actions with an environmental objective. The Autorité will also participate in the work carried out at European level on this subject within the framework of the *Green Deal* launched by the European Commission.

Contemporary music sector

In the first months of the year, the Autorité will issue the opinion requested by the National Assembly's Commission for Cultural Affairs on the subject of concentration in the contemporary music sector. It conducted a vast consultation in 2020 and will hear several stakeholders in the sector in January, before issuing its conclusions. This will be the first time that the Autorité will look, in an overall opinion, on the current music sector to examine the competitive developments that are going through it, notably under the effect of the development of digital media and consumption patterns.

Public Procurement

As in the past, the Autorité will continue to pay particular attention to cartels that distort public procurement processes. In 2021, the Autorité will implement new

control mechanisms, including preventively, and taking advantage of digital tools based on OSINT (open source intelligence).

Mergers during COVID-19

In 2021, when examining mergers, the Autorité will pay attention to the context of the economic crisis, related to the health crisis. The year 2020 led the Autorité to examine a large number of transactions involving retail brands in economic difficulty. The year 2021 should see this trend continue. The Autorité will make sure that certain transactions do not artificially escape its control due to the low turnover achieved in 2020 by the companies in question. It will also endeavor to take into account the context in which these transactions will take place, while maintaining vigilant control over the impact of these transactions on competition.

An important novation for companies: The possibility of seeing acquisition transactions not subjected to compulsory notification referred for examination to the european commission under article 22 of the european regulation of 2004.

The Autorité has been campaigning for more than two years to have what it considered a loophole in national and European merger control to be remedied. It was indeed possible for acquisitions potentially having a strong impact on competitive dynamics to escape all control, when the target's turnover did not reach the mandatory notification thresholds, and this including when the target was redeemed for a considerable amount, as in the Facebook-WhatsApp transaction. The European Commission responded favourably to this call, announcing in 2020 that it would henceforth accept, going back to its past doctrine, referrals by national competition authorities of mergers “below the thresholds”, within the framework set by Article 22 of the 2004 European regulation.

Year 2021 will be the first year of implementation of this new approach. The Autorité intends to actively participate in defining guidelines in this area, an approach announced by the European Commission. It will therefore make proposals on the procedural framework that could be applied and on the

categories of transactions that could be concerned. It will also set up, with immediate effect, a market watch in order to detect transactions that could be subject to referral to the European Commission.

[1] IAB France represents players in the online advertising ecosystem, and is a member of the international IAB network; MMA brings together the main players in the mobile media (mobile marketing agencies, media agencies, mobile operators, etc.); UDECAM is an association that brings together different media and communication players; and the SRI is the *Syndicat des Régies Internet*, which brings together members, internet agencies, and partners, carrying out a complementary and / or technological activity of advertising monetisation.

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