



## AGENCY INSIGHT

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# 10 years of the French *Autorité de la concurrence*: looking back and looking ahead

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### I. THE ROLE OF COMPETITION LAW AND POLICY

The competition community comprises of a diverse assembly of experts—passionate about their job. Among them, consumer organizations, in-house counsels, attorneys, academics, judges, competition agencies, sector regulators, government departments, and international organizations.

The debate they engage in, directly influences competition policy, and enables the adjustment of existing enforcement tools to address ever more varied issues, such as the digital economy and platforms. Indeed, competition law—nowadays—has become a central policy tool affecting consumer welfare. Similarly, it affects compliance and a key element of a firm's strategy.

At times, however, the goals of this policy instrument—the goals of competition law—are inaccurately characterized as mechanical and dogmatic. Statements such as 'you only look at price effects for consumers', 'competition is about the survival of the fittest', 'because of competition policy there can be no European champions and Europe is at a disadvantage compared to other regions of the world' can be heard quite often. These statements reflect some misconceptions as to the role of competition agencies and competition law enforcement in an ever-changing economic landscape. Furthermore, at times, they challenge the legitimacy and accountability of competition agencies.

It is therefore important to address these misconceptions and clarify the role and goals of competition law in Europe.

First, we must see competition as a crucial part of the 'European project'. Competition policy finds its roots in an ambitious political project with the goal to

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establish a common market in Europe. By setting up rules, the signatories of the Treaty of Rome not only wished to foster peace between nations, but also prosperity. This political European project remains, more than ever, relevant at a time when the international political and economic landscape is fraught with tensions and instability.

The fundamental competition law principles have been shaped at that time. Article 85 of the Treaty of Rome (now Article 101 of the Treaty on the Functioning of the European Union; TFEU) prohibits agreements between firms or concerted practices that are likely to affect competition between Member States, and which have as their object or effect the restriction or the distortion of competition within the internal market. Article 86 (now Article 102 of TFEU) prohibits abusive practices, such as exploiting a dominant position in the common market.

More than 60 years later, the very same principles still apply. They are the legal basis for a number of cartel decisions that have been sanctioned by the *Autorité* (to mention a few: cartels in yogurts, washing powder, flour, household electrical devices), and also abuses in sectors that were hardly conceivable at the time when the Internet did not exist (abuse by a web search engine able to answer to any demand regardless of the consumer's location, abuse concerning a smartphone's operating system, to mention two decisions by the European Commission).

The consistent enforcement of these rules helped achieve the single market, which brought steady economic growth and social stability in Europe. These benefits are important and often noted, whenever we debate competition policy.

A second important goal of competition policy is to foster economic efficiency and innovation. A situation where incumbents are in a position to block new entrants and impose their prices will result in products and services of a lesser quality and variety. Conversely, when competition is stimulated, one can witness a race for innovation, with a much more diverse range of products at reasonable prices. Competition has an effect similar to that of regular exercise of a sport activity: it maintains players in a good physical shape and makes them sharper, because they are faced with tough competitors.

Yet, the benefits of competition are not only economic, but also societal. In a competitive economy, everyone has its chances. The more concentrated the economy is, the higher the inequalities are. To give one illustrative example, let us consider the reforms of the regulated professions, as approved by the Macron law of 2015. The law enabled a whole generation of young graduates to access jobs that would have been out of reach because of sociological or financial barriers. It also permitted a better gender balance, as shown by the higher proportion of women among notaries for example.

Consumers and firms derive profits from an effective competition. Many decisions by the *Autorité* have resulted in lower prices and better services, for example in banking services (2010 decision in a cartel in the banking sector on interbank fees). Another example concerns the improvement of services in the telecom industry, with affordable prices for the benefit of consumers and firms as well (2005 decision in a mobile phone cartel, and 2015 decision in an abuse case against the dominant player Orange in the market for business telecommunication).

It is also important to stress that competition policy is not incompatible with the creation of big European or international groups. Since 1990, out of 7000 notified merger transactions, only 30 have been blocked by the European Commission. None in France. European groups have been able to develop, such as PSA/Opel and Essilor/Luxottica to name a few recent mergers. Merger control rarely blocks groups seeking to merge, and, most of the time, tries to identify targeted remedies to avoid a deterioration of competition on certain markets.

## II. THE EMERGENCE OF A STRONG AUTHORITY: A LONG AND CONTINUOUS EVOLUTION

The *Autorité de la concurrence* was created in 2009, almost 60 years after the establishment of a commission in charge of cartels, back in 1953. This commission gained the status of an independent administrative authority in 1986, when it became the *Conseil de la concurrence*. It had the capacity to impose administrative sanctions and issue opinions on the most sensitive merger transactions, but the prerogative to authorize them remained, at that time, in the hands of the Minister of Economy. By entrusting the power to impose sanctions to this independent authority under judicial control, the legislator made an important choice. It started the major trend that changed the dynamics of regulation in France, and saw greater powers being given to independent administrative authorities. Those authorities, including sector regulators, played a crucial role in opening up the French economy to competition; to name just two, the Telecom Regulator that opened this sector towards strong and customer-driven competition, and the Energy Sector Regulator that accompanied a similar evolution for gas and electricity.

In a discreet but steady way, the *Conseil de la concurrence* took an increasingly meaningful position on the national scene, by issuing detailed decisions and opinions that impacted the public debate, and by granting special attention to economic analysis.

Still the evolution was incomplete until 2008, because the French competition agency lacked certain crucial powers. This is why the legislator intervened in 2008. The most significant aspect of the reform was the transfer of the power to authorize mergers from the Ministry of Economy to the new authority. It created much debate at that time because it implied the Minister of Economy's loss of a very crucial and politically important prerogative. By transferring this power to an administrative authority already in charge of sanctioning antitrust violations, the legislator achieved a very positive result—the set-up of a global, coherent and comprehensible enforcement system. Synergies were created between the different missions and the merger control reform led to more predictable and faster procedures for companies. At the same time, the legislator decided, to grant the Minister of Economy with the power to take or 'evoke' the case—once it is decided by the *Autorité*—and to make its own decision, provided that it is based on public interest's grounds, other than competition law. Moreover, the fact that industrial policy and state participations in public firms were not under the jurisdiction of the *Autorité de la concurrence* removed any concern of impartiality. The independence of the *Autorité* was therefore a promise of credibility for foreign firms.

The reform also vested the *Autorité* with the power to conduct antitrust investigations, which used to be under the responsibility of a dedicated directorate within the Ministry of Economy (so-called Direction générale de la concurrence, de la consommation et de la répression des fraudes; DGCCRF). The legislator however maintained a close cooperation with the DGCCRF, as any evidence of antitrust violation must first be shared with the *Autorité*. The *Autorité* could then decide to either take the case or leave it to the DGCCRF, should action at the local level be preferred. This system has proved effective, as it allows an optimal level of detection throughout the French territory, thanks to the role played, at local level, by the network of regional offices of the DGCCRF.

Last but not least, the *Autorité* was given the power to issue opinions at its own initiative, on any topic related to competition. By doing so, the law fully emancipated the *Autorité*, which can decide to take a closer look at any sector of the economy and assess any situation, without depending on formal requests by the government (which are still being referred to the *Autorité*). In this role, the *Autorité* is able to assess competition dynamics, legislation, and to conduct sector inquiries. The *Autorité* is known for its rigorous methodology and consults all stakeholders so to ensure the widest audience possible and to engage in a public debate.

### III. LOOKING BACK: 10 YEARS OF SUCCESS?

Based on international standards, France is often quoted as a successful model. For the seventh year in a row, the *Autorité de la concurrence* has been ranked in the elite category for best competition authorities in the world by the Global Competition Review. In addition, within the European Competition Network, the *Autorité* is the agency that issues the highest number of decisions applying European Union law. Among its European counterparts, the *Autorité* also enjoys a significant experience in the use of interim measures, which are particularly necessary to address cases where the conduct at stake generates an ‘emergency’ situation, for a firm or a sector. Finally, the scope of the antitrust enforcement by the *Autorité* can be measured by the value of fines issued after its investigations: in each of the last 10 years, the *Autorité* imposed fines totalling between 200 million and 1 billion Euros per year.

For the first time this year, the *Autorité* assessed, based on Organisation for Economic Co-operation and Development (OECD) guidelines, the macroeconomic impact of its action. This exercise revealed that, since 2011, the positive impact for the economy has reached 14 billion Euros, of which 10 billion account for the removal of excessive prices imposed by cartels.

Besides this major impact, competition culture and awareness considerably improved in France. Firms are more and more reluctant to engage in secret cartels, most of them systematically implement compliance programmes, and dominant firms are mindful not to be labelled as abusers.

The *Autorité*'s decisions follow robust legal and procedural requirements. The *Autorité* is highly esteemed for its proactive role in delivering diagnostics and proposing structural reforms. As trusted expert, the *Autorité* is also regularly asked for its recommendations on a wide range of topics. Recent examples include competition and agriculture, competition issues in overseas territories, and the audiovisual sector.

#### IV. HOW TO EXPLAIN THIS SUCCESS?

The *Autorité* is composed of dedicated and talented professionals like Bruno Lasserre, its first president, who contributed to the modelling of the new authority, the development of its skills and influence.

Thanks to its strong independence and an effective combination of powers, the *Autorité* is in a position to deliver tangible results, in its enforcement capacity as well as in its advocacy role.

Merger control is an area where the *Autorité* has proved its ability to engage in a dialogue with the business community and to adapt to market evolutions, via a pragmatic and innovative approach in its decisions and choice of remedies.

In the area of advocacy, the *Autorité* can engage and point out potentially anti-competitive public measures (for instance in its negative opinion on the restrictive regulations proposed by the government meant to ‘protect’ taxi drivers, and its opinion on highways that had not been entirely followed, but has partially inspired a reform of the sector regulator Arafér). It can also signal controversial practices by firms likely to distort competition (such as the opinions on group purchasing organizations, and online advertising).

Calling for some structural reforms, the *Autorité* was heard in its recommendation on coach transportation and on regulated professions. The Macron law endorsed the *Autorité’s* conclusions in both areas. The recent opinion on the audiovisual sector released by the *Autorité* likewise called for a thorough and urgent reform of the applicable regime, in order to restore a level-playing field between traditional and over the top (OTT) services, which are not subject to the same rules.

Yet, there is still room for improvement regarding the *Autorité’s* performance, for example to reach shorter delays in the decision-making process for antitrust enforcement.

This should encourage the *Autorité* to push for new and bold paths and identify new ideas of reforms. A ‘strategist State’ needs a watchdog that can take credible and courageous positions, free from political influence or ‘capture’ by private interests.

#### V. LOOKING AHEAD: WHAT IS THE ROAD MAP?

##### *The task ahead of us is ambitious*

An effective enforcement—The *Autorité’s* first priority is to maintain an effective enforcement, in a context where detection gets trickier. Despite undisputed progress in competition awareness, serious breaches of competition law are still carried out, and these need to be tracked down relentlessly. The *Autorité* recently sanctioned two far reaching cartels, one in the sector of polyvinyl chloride (PVC) floor coverings and the other in the sector of household electrical devices. Our ambition is to tackle these cases swiftly and effectively so as to ensure a high level of deterrence.

The digital economy—Being a sharp and wise advocate and enforcer when it comes to digital issues also lies at the heart of our priorities. Agencies are faced with dissimulation techniques based on new technologies. Screening methods must adapt to tackle vast amounts of data. The rise of platforms and big data has become a key element in the competition landscape.

Google, Apple, Facebook, and Amazon, yesterday cherished, are today the subject of demonization. But one has to consider them objectively. They are innovative firms that have brought revolutionary services and technologies. Yet, they sometimes do not abide by the rules or may abuse their position. Action needs to be taken when this occurs. While we move into the right direction on tax fairness, there are still obstacles ahead. Regarding consumer protection and data protection, lots of progress has been made and starts to materialize. Regulation can play a role to deal with specific, systemic issues, and the adoption of the platform-to-business Regulation is an interesting tool which aims at reinforcing transparency obligations in business relations. Among these avenues, competition remains a key factor in ensuring a level-playing field among actors as they might otherwise want to escape their responsibility on grounds that they operate on a global scale or benefit from regulatory gaps.

Competition law offers the necessary tools and has to be enforced with full determination. The analytical framework in place can and will be used. It was applied in a major phase II merger of two platforms in the sector of real estate listings, in which we considered, as key elements of our analysis, network effects, two-sided markets, multi homing by users and conditions to access data. It is important, however, to pursue the updating of our merger control regime, in a context where strategies connect markets without any obvious relation. An offer of video content can for example be offered to Internet users, free of charge, to incentivize them to buy sneakers.

We have also observed business models which sometimes ignore profitability in the short-run, but which ultimate goal is to retain a large number of subscribers worldwide, through very attractive prices or by offering free services, like delivery. We therefore have to assess whether this type of corporate strategy could constitute a new type of anticompetitive practices with the aim to form monopolies, to foreclose rivals or to predate.

The issue of the value chain also needs to be more often apprehended by competition law. The *Autorité* recently used excessive pricing as the legal basis for a decision in the waste processing sector. Interestingly enough, this legal standard could well apply tomorrow in the digital world, should the relevant conditions be met.

Another topic of interest is killer acquisitions, which might have the purpose of eliminating future rivals rather than creating synergies. One possible way to approach this issue could be to introduce certain aspects of ex-post-merger control. Another idea to consider would be to apply a specific test to companies that are already widely dominant, or play a role of gate keeper, but still want to purchase startups.

Cartel detection—Cartel detection remains a priority as well. Cartels are as old as the market economy, but continuously evolve, taking new shapes. In our 2018 PVC cartel decision, for example, we considered that a non-competing agreement concluded among manufacturers forbidding them to communicate on the individual environmental performances of their products, infringed competition law because it deprived the customer of a selection parameter, and reduce the incentives to compete on environmental quality.

While classic cartels used to involve secret meetings, during which business people agreed on prices, we nowadays see pricing algorithms alter prices on market places at a very fast pace. These technological advances pose the question of possible algorithmic collusion. The study that we are currently carrying with the German

competition authority (BKA) consists in understanding the use of algorithms in different economic scenarios, identifying competition issues related to certain types of algorithms and considering practical challenges when investigating algorithms.

Market knowledge and dialogue with stakeholders—Deepening our understanding of markets is a demanding but critical work. In our opinion on online advertising, the *Autorité* provided a detailed mapping of the modes of operation, market players and issues of the sector, which led to the opening of preliminary investigations to address concerns expressed by stakeholders.

This work will be completed by the launch of a new conference series hosted by the *Autorité*. The first one will be dedicated to blockchains, with speakers from the French parliament, civil society and academia. The following ones will cover the fintech sector and the transformation of retail business models.

The *Autorité* also seeks to develop a close dialogue with the business community on its decision-making practice. This was the case following our gun jumping case in 2016 (fining Altice, a telecom operator, 80 million Euros), which was perceived by some stakeholders as creating a doubt on the legality of certain common practices. We met with associations of lawyers and were able to answer their questions in a detailed manner via the publication of an article.

A fruitful concertation also took place on the drafting of the notice relating to the settlement procedure and on proposals made to reform our merger control. In the merger area, the *Autorité* announced the reduction of the volume of information requested during the notification stage, the expansion of the use of the simplified (fast-track) procedure and the creation of a new completely online declaration system. We indeed take seriously the need to alleviate as much as possible procedural constraints in order to allocate resources to more complex transactions.

The retail sector—Retail is also a priority sector for the *Autorité*. Now that the law provides for a mechanism of notification of joint purchases agreements to the *Autorité*, we are in a better position to assess their effect. The *Autorité* launched a formal investigation to analyse their impact vis-à-vis suppliers and vis-à-vis consumers regarding products diversity. A possible outcome of our investigation could be to require a modification of the agreements.

We are also attentive to developments of distribution models that combine brick-and-mortar shops and online sales, so-called ‘phygital’ retail distribution, and started a study on the subject to better understand its implications. The *Autorité* already analysed this issue through its merger practice when it had to carefully assess the weight of online sales to apprehend competitive local pressure in the sector of ‘brown’ and ‘grey’ products retail. We might soon have the opportunity to extend this jurisprudence to the sector of toys.

The labour market—The *Autorité* will also explore new territories, in relation with employment issues. We will, at the request of the government, issue an opinion in 2019 on the competitive impact of collective agreements and their potential extension. Such extension might circumvent rules of labour law and have undesirable anticompetitive effects, by constituting a barrier to entry for new actors.

On the enforcement side, we also want to look into collusive practices such as the use of no-poaching agreements for the work force. Another area of interest concerns negative effects that some mergers could have on the labour market by reducing bargaining power of workers, salaries and working conditions.

## VI. A VAST HORIZON

The horizon of the future is vast. Our goal is to continue to move forward at a steady pace and with confidence.

The adoption this year of the European Competition Network+ Directive is a significant leap forward. With this text, member states expressed their trust and ambition for more homogenous and powerful European competition rules. Effective tools will be deployed throughout Europe: truly persuasive sanctions, interim measures, ex-officio power, and the capacity to choose cases depending on priority. Like the *Autorité* 10 years ago, the European competition system now reaches full maturity.

The transposition of the Directive into French Law will contribute to further improve our procedures and to adapt them to the need of quick action while maintaining procedural fairness.

Same as the economy is global, competition operates globally thanks to regular and rich discussions within the OECD and the International Competition Network. We will continue to have an active part in these fora and take our share in the development of harmonized principles and procedures.

There is undeniably plentiful of work ahead, and the future looks bright for competition!