Competition Conference, Vienne, 12 décembre 2014

Panel IV: Investigative and decision making powers vs. due process and defence rights

"A fully-functioning administrative competition authority: the French example"

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Introduction

- Thank you very much for your invitation to take part in this exchange which touches really on the issue of the interplay between two objectives, which are equally legitimate, namely the effectiveness of enforcement on the one hand and the proper regard for due process on the other. Today's panel offers us the opportunity to better understand our respective systems, benchmark our results and draw lessons from our experiences.
- I will take this opportunity to tell you more about the main features of the administrative model of competition regulation as implemented by the Autorité. In France, it was in view of contingent circumstances, namely the poor deterrence brought by a low level of enforcement of competition rules by criminal courts, that the need was felt to resort to specialist administrative enforcement in 1986. Overall, the "unitary" administrative model of enforcement has flourished in Europe, as virtually every Member State has now taken up this system. However, I believe the French model of administrative enforcement provides some specific food for thought by being, to some extent, a middle way between, on the one hand, a judicial model with an organic separation of the prosecutorial and decisional functions and, on the other, a purely unitary structure where there is a single investigative and decision-making body.
- I will first dwell on the defining features of our full functional separation model, borne out of a specific legal and constitutional context (**I**). The guarantees secured in terms of defence rights and due process are prolonged at the judicial review stage as part of a broader enforcement chain (**II**). Having set out the procedural gains to be derived from the French system, I will conclude with the broader positive impact in terms of competition policy of a single integrated authority whose scope and missions cover comprehensively but exclusively the entire spectrum of competition regulation (**III**).

I. Separate investigative and adjudicative functions to guarantee defence rights

- Strict functional separation between investigation functions and decision-making procedures that may result in the imposition of a sanction is an essential feature of the organisation of the Autorité. Such separation provides strong guarantees of impartiality to the parties.

- Historically, the choice of an administrative regulation was made in 1986, officially enshrined in French case law in 1987 by the Constitutional Court - which held that the Competition Council is a "regulatory body" and " of non-judicial nature". In this context, a set of measures was developed to ensure the functional separation between investigative functions and decision-making functions within a single administrative authority.

This administrative model of competition regulation had to meet the criteria of due process as defined in Article 6§1 of the ECHR. Both the civil and administrative Supreme Courts ruled that an administrative authority, although not a court or tribunal, should comply with the due process requirements associated with its judicial function within the meaning of this article.

- The current organisation of the Autorité results from the additional requirements imposed by case law. It is actually worth noting that the French Judicial Supreme Court developed a more extensive interpretation of Article 6§1 ECHR concerning the Autorité than the European Court of Human Rights itself, in considering that the investigative services could not participate in the Board's deliberations, even in the absence of voting rights within the Board. The legislator drew the consequences of the case law on the occasion of the 2001 Law on "new economic regulation". The new legislation went even beyond what the judge had prescribed by importing the full extent of the principles of due process into the administrative stage. In 2008, the law on "modernization of the economy", following an extensive parliamentary debate, further strengthened the functional separation and, at the same time, enshrined for the first time in the relevant statutes the status of the Autorité as an independent administrative authority. If the functional separation between investigative functions and decision-making functions was not required by the judge to ensure impartiality, the legislator decided to put in place this organisation to lift any doubts on the fairness of the procedure.

- The French Constitutional Court also validated the conformity of the Autorité's institutional framework with constitutional rules and principles on the occasion of the judicial review of a merger decision in the CanalSat/TPS case. These companies challenged the impartiality of the decision-making process of the Authority. The Constitutional Court ruled that the Competition Authority's rules on deliberation and *ex officio* opening of cases complied with the principles of independence and impartiality as applicable to the powers to impose fines of an independent administrative authority, since there was no confusion between the investigative and the decision-making functions.

- This functional separation is materialized in the day-to-day running of the activities of the Autorité : the President holds the authorization power for expenditure, and the Autorité has a dedicated budget heading within the budget of the ministry of the economy ; the General Rapporteur is the authorizing officer for expenditure in relation with the investigative services. Moreover, the General Rapporteur has the power to nominate Deputy General rapporteurs, case handlers and investigating officers.

- Regarding the procedure, while the former Conseil de la concurrence could start proceedings on its own motion, it is now up to the General Rapporteur to make a proposal to that effect to the Board. The

General Rapporteur has also responsibility over the conduct of investigations, makes decisions on applications for extension of time, commences simplified procedures, deals with matters of confidentiality, etc.

Indeed, the impartiality deriving from functional separation can be traced throughout the inner workings of the Autorité – this is what the Conseil d'Etat has shed light on in a decision of June 2013 (*Colruyt*) regarding a case where the Autorité had fined an undertaking for failing to notify a merger. It is worth noting that the judge carried out a step by step, *in concreto* examination of whether and how the separation between investigative and decision-making bodies inside the agency actually ensured that there was no prejudgment by the former of the materiality of the facts nor of their legal qualification, especially in a situation where the Autorité had commenced the proceedings *ex officio*.

- More substantially, the principle of functional separation, combined with that of collegiality at board level, greatly enhances the robustness of the decisions of the Autorité. It leads to each case being looked at with fresh eyes at the decision-making stage – the fact that some cases have been either dismissed by the Board or referred back to the investigation services testifies to the reality of this separation. Furthermore, this type of institutional setting is likely to discourage any attempt to exert pressure.

- Therefore I trust that effective functional separation within one single administrative agency, endowed with the full spectrum of powers along the chain of competition enforcement, under judicial review of a court having full jurisdiction upon its decisions, does offer to the parties as much guarantee of impartiality as would an organic type of separation, based on the referral of the case to the judiciary or to a distinct quasi-judicial entity.

II. The judiciary, a strong link in the competition enforcement chain

- However, regulating competition through a dedicated, specialized and solely-focused administrative agency should not be construed as ruling the judge out the game. Quite on the opposite, an effectively designed competition enforcement regime requires that the judiciary be <u>a fully-functioning link in the enforcement chain</u>.

The shape of our system of judicial review is the by-product of:

- our national institutional history,
- the principles of constitutional or European origin that are the backbone of due process
- more recently, the principle of the effectiveness of competition enforcement as stemming from articles 101 and 102 of the European regulation 1/2003.

This triple origin exerts its threefold effect on who has jurisdiction over our decisions, the extent of the judicial review as well as how the proceedings unfold before the review Courts.

Let me delve into this some more and share with you our experience of effective judicial review of competition law cases, with a "French touch".

- Who reviews the Autorité's decisions?

The answer is not as straightforward as you may expect, since the judicial review of our decisions is split between the civil courts (= the Paris court of appeal and the *Cour de cassation*), the administrative court (=the *Conseil d'Etat*), and to some extent the criminal court.

- The institutional reform of 1986, whereby the independence from the government of the then Conseil de la concurrence was enhanced, transferred the review of our decisions on "behavioral matters", that is: pertaining to anti-competitive practices, to the Paris Court of appeal. The underlying assumption was that any behavior of private undertakings should be within the jurisdiction of those judges who are usually in charge of ruling on such matters.

Overall it makes for a hybrid situation, since a judge having jurisdiction on civil and commercial matters it is brought in to control the legality of an administrative decision.

- The *Conseil d'Etat*, the French Supreme administrative Court, retains the power to review our decisions on what I would call the control of "economic structures", that is to say: mergers. It can be explained by historical reasons, since until 2009 this was a prerogative of the Minister of the Economy, and also by the fact that this is typically an administrative decision, issued on the basis of an *ex ante* examination.

- Dawn raids are carried out under control of the criminal judge, who grants authorization to enter and search the designated premises and seize the documents found, and supervises these operations.

- Since a law of 2009 has introduced in France the right for a party to legal proceedings to seek a ruling from the Constitutional Court on whether a statute law complies with constitutional requirements, the entire legal framework of the Autorité has been made potentially subject to review by this court. To date, no provision regarding the institutional setting of the Autorité has been annulled by the Constitutional court.

- This scattered legal review regime can have adverse consequences:

One is that the Paris Court of appeal has to deal with notions of administrative law that it is not too familiar with. One example is the legal standing of our procedural notices, for instance the one whereby we describe how the amount of fines is calculated: they are not binding under French law, except the Autorité publicly stated that it would hold itself bound by them. It is a notion that the administrative case law has long recognized, and there was some degree of uncertainty regarding whether the Civil court would be eager to enforce it – which it did, eventually.

➢ Another consequence is that some stakeholders tend to envisage all acts, such as opinions or even press releases, as well as preparatory acts, as potentially aggrieving them, even as these acts are either not definitive or do not have biding legal effects attached to them. While administrative case-law is clear as to the

scope of judicial review – for instance, the *Conseil d'Etat* duly ruled in October 2012 and in July 2013 that our opinions cannot be legally challenged – it seems that for those seeking review there is a confusion between what belongs to enforcement and what is done by the Autorité in a purely advisory capacity.

➢ In terms of the applicable standard of proof, the Autorité is once again dealing with dual references: its inspections are scrutinized under the stringent requirements of criminal law, whereas the admissibility of proof is appreciated in accordance with civil law, which forbids that evidence obtained in a manner unbeknownst to the defendant be produced in Court – so the Autorité seems to be submitted to the harshest possible demands in both cases.

- Scattered as it may be, the judicial review of the decisions of the Autorité is a thorough one:

The jurisdiction of both the civil and administrative courts extends both to the facts and to their legal qualification, and the substance of our decisions can be amended. Moreover, the Autorité does not benefit from the same margin of discretion as that given by the Court of Justice to the Commission in relation to complex economic assessments.

This ensures that the French administrative type of competition enforcement fully complies with article 6§1 of the ECHR, as interpreted by the European court of justice (*in* Menarini Diagnostics, 27 September 2011): while article 6 of the Convention is indeed applicable to antitrust proceedings before an administrative competition agency, the fact that the case can later be assessed by a judicial court with full jurisdiction to review the administrative decision is enough to offer the necessary guarantees of due process.

- How do the judicial proceedings unfold?

- Now that we have set the stage, so to speak, for the judicial review of the decisions of the Autorité, what part is there for it to play?

➢ The Autorité has a legal standing before the Court in the course of review proceedings, as it is expressly entitled to defend its own decisions in court and, as the case may be, to file suit to have a decision by the Court of appeal reversed.

This is all the more necessary when there is a risk of discrepancy between national and European case-law, as was the case for instance on the notion of whether a conduct "may affect trade between Member States" was at stake (Cour de cassation, 31 January 2012, Orange Caraïbes).

➢ This right to be a party in the review proceedings is a condition of the effective enforcement of EU competition rules (CJUE, VEBIC, 7 December 2010).

This rule stemming from European case law has been duly implemented in France since 2012, both through case law, as the Supreme Court admitted the appeal lodged by the Autorité against the ruling of a review Court that had reversed its decision (Cour de cassation, 17 January 2012), and through new legal provisions, as the Government issued a Decree explicitly allowing that the Autorité be a party to the proceedings before

the review Court (*décret n°2012-840 du 29 juin 2012 relatif aux recours exercés devant la cour d'appel de Paris*)

➢ The fact that the competition agency is afforded rights as a party to review proceedings is certainly not a lessening of the fairness of the trial but, on the contrary, a way to nurture the adversarial debate, so that the judge is not "*wholly 'captive" to the pleas in law and arguments put forward by the undertaking(s) bringing the proceedings*" (VEBIC case, §58).

- The way proceedings develop at every stage of judicial review also affects competition enforcement.

➢ For the most part, the trial unfolds at a reasonably speedy pace, is in tune with the timeframe for business, (most cases brought before the Court of Appeal would be treated within less than 12 months after the challenged decision by the Autorité was issued).

A lawsuit against interim measures adopted by the Autorité will be treated in accordance with the emergency inherent to the case, and the standard of proof adjusted accordingly.

Moreover, having a full judicial review does not mean that the entire debate held before the Autorité will be taking place all over again: only the allegations of the parties will be subject to adversarial debate at the review Court level, which helps keep the proceedings manageable for the Court.

➢ However, one of the least appealing features of French civil procedure lies in the fact that the Supreme Court cannot rule on the facts of the case and may only adjudicate on points of law. When it overturns a Court of Appeal's decision, it cannot replace it with its own decision but must refer the matter back to a Court of Appeal – either a Court in a different region or, as for the Autorité's decisions, to the same Court but before a panel of other judges than those who heard the case before.

As a consequence, the proceedings can become extremely lengthy, especially if the new decision made by the Court of Appeal to which the case was referred is appealed again before the Supreme Court. This is not a minor problem: there have already been 10 cases giving rise to 2 decisions by the Supreme Court, and 3 cases where 3 decisions were made by the Supreme Court

This does not apply before the Administrative Supreme Court, the *Conseil d'Etat*, which has full power to take up the entire case and issue a final decision upon it.

These delays generate legal uncertainty and undermine the efficiency of competition regulation.

- The issue of a shared legal culture between the Autorité and the review judge

At the EU level, all institutions, including the Court of Justice, have under the EU Treaty a duty to "practice mutual sincere cooperation" (article 14 of the Treaty on the European Union).

In France, there is somehow more of a distance between the Autorité and the review courts, and the two institutions work along different lines.

Moreover, one of the features of the Paris Court of appeal, the review court on antitrust decisions, is that it is not specialised. While a designated chamber of that court deals with all cases against decisions by the Autorité

and also those of the energy, telecom and rail sector regulators, that same chamber will also review several other types of litigation (tax, customs) of an equally technical nature, and the magistrates appointed thereto do not receive any particular training.

There is some good in the fact that the decision-maker (the Autorité) and the reviewing entity (the Court of appeal) have distinct approaches, based on different cultures, as it may lead to having an entirely fresh look at the case when a decision is challenged. However it may also lessen the perception by the judges themselves that they are a part of a competition enforcement chain: one concrete example is that the review judge may give precedence to context and policy over the objective assessment of the restriction at hand, as some precedents show in France in the banking or agricultural sectors.

III. A single entity with a single goal: what good there is in being the sole competition regulation authority

- In the European Union alone, while a vast majority of countries operate an administrative type of competition enforcement, a few others choose to rely on the judicial system, be it by referring the adjudication of cases to an administrative, civil or criminal Court.

However, an administrative enforcement model should only be seen through the prism of the absence of judicial intervention in the first stages of the case. It is also and rather about being able to gather all aspects of competition enforcement under the same roof, and I would argue that there is a lot of good in being the sole entity entrusted with all instruments of the competition enforcement toolbox.

France has enjoyed a system of independent competition regulation for now more than a quarter of a century. Two features deserve a few words, as they typify what an administrative system of regulation may achieve: the unification of competition regulation under one banner, and the capacity for the agency to act on its own motion.

- It is now common for competition agencies of the administrative type to work under a "one-tier system", with a single authority being entrusted with the full spectrum of competition enforcement powers: investigations, enforcement of antitrust rules, reviewing mergers, carrying out market studies, issuing opinions to policymakers. Still, it is worth recalling how much good there is in this unification.

- Investigation + decision-making functions: combining them within the same agency prevents duplication and reduces the risk of information getting lost on the way. Being capable of conducting any enquiry to enforce competition rules means that a comprehensive investigation strategy can be developed and that the enforcer is equipped to effectively combat anticompetitive practices.

- Merger control + antitrust enforcement: this combination has gathered now a consensus across all 27 national competition agencies in the EU now. It is good for the visibility of the agency. The "one stop shop" approach allows the agency to get unambiguously identified by all stakeholders as the one competition enforcer, and also to speak with one loud voice in the international arena.

Furthermore, the credibility of the agency can be greatly enhanced when it has competence on which remedies it will endorse as a condition for merger clearance as well as the power to closely monitor their implementation and, if necessary, to issue a fine in case the undertakings concerned does not fulfill the commitments attached to the decision (TPS CanalSat / Vivendi Universal Canal Plus : decision of 20 September 2011 to withdraw the clearance granted in 2006 + financial penalty; authorization renewed on 23 July 2012 subject to compliance with injunctions ordered to restore sufficient competition in the pay TV markets).

- Advocacy + antitrust: the ability to conduct market studies is a decisive tool for an agency; they provide a detailed diagnosis of markets, allow the agency to build up its own body of knowledge on markets, enhancing its expertise and its capacity to make informed prioritization decisions.

More specifically, the power of a competition agency to launch a market enquiry, to issue an opinion and make recommendations to government and businesses upon its own initiative is a remarkably powerful tool. It strengthens the position of the agency as it signals that it may make its own strategic choices, shape competition regulation and, namely, may target any sector where it suspects the state of play to be dysfunctional.

- Highly potent cross fertilization can be expected to arise out of making parallel/simultaneous use of these powers. The skills and knowledge gained while practicing one enriches the use of the other, both at agency and individual levels.

The growing use of settlements is a case in point: the expertise gained when devising them in the framework of merger review is equally beneficial to designing them in a unilateral conduct case, and vice versa.

Once the agency is endowed with the powers to carry out inspections, merger review, antitrust enforcement, market studies and competition impact assessment of legislation, a pattern emerges that competition enforcement works as a continuum. It has been the case for instance for the Autorité that the competition analysis carried out in the course of a sector inquiry in the management of railway stations (2009) has later nurtured the theory of harm and the design of remedies in two merger reviews in the rail sector (2010, 2013 : Veolia / Transdev).

This is even more the case, as I have suggested before, when the agency has the capacity to act on its own motion, and thus devise its own agenda. For instance, the Autorité has made a priority of looking into the healthcare sector; to that effect, it has launched a vast sector enquiry into the distribution of pharmaceuticals, shedding light on ways to improve consumer/patient welfare while reducing costs for the national healthcare system (December 2013). At around the same time, the Autorité fined two laboratories for anticompetitive practices based on disparagement of generics manufacturers (May and December 2013). We also issued an opinion to government on a draft regulation regarding the online sale of medicines (April 2013). Together, all of this has served the same purpose and offered an all-round approach to competition concerns in one sector that can only be the prerogative of an independent, fully-fledged administrative agency.

- Finally I would like to underline how exercising a large spectrum of competences and providing stakeholders with decisions of maximum quality requires to count on a team of competition experts who will be able to ensure the robustness of the agency's decisions and opinions.

The complexity and refinement of the policy issues and of the reasoning of the decisions are bound to increase along the development of the agency, and the parties are likely to adjust by getting better equipped with

proficient competition counsels. So a competition agency eager to remain up to speed with its constituents needs to incorporate the fine experts that this growing sophistication will demand.

This is what being an administrative agency with an autonomous status has allowed us to do.

For instance, we were able, as early as in 2001, to decide that we would have an economists office to carry out an effects-based analysis and cope with the increasing weight of economic reasoning that is a defining feature of today's competition enforcement.

We also enjoy sufficient flexibility as to the recruitment of staff to hire people from the bar, from the judiciary, from several branches of the civil service; having them work on the same teams is bound to boost our creativity and the reliability of the findings made by this diverse crowd.

Conclusion - Further improvements: towards simpler procedures, more effective investigative powers and greater possibilities for settlements

I would like to conclude my intervention by referring to current thoughts on further improving the functioning of the Autorité by striking the right balance between greater efficiency and preservation of defense rights. In this regard, exchange of best practice and cross-fertilisation of our experience amongst fellow members of the ECN, in particular, can be very useful to design those instruments and to make enforcement of antitrust rules more convergent and effective throughout the EU.

Settlements are an interesting example.

I know that you extensively discussed settlements and the interlink with leniency programmes yesterday in the second panel. Our procedural toolbox already includes a leniency procedure and a settlement procedure which are instrumental in maintaining the Autorité's track-record of fighting cartels. In the past years, a few innovations were introduced with, inter alia the publication of a settlement notice whereby we commit ourselves to a fine reduction of 10% when conditions for settlement are met.

What is noteworthy here is that we have a very abundant practice of implementing settlements which predates the introduction by the European Commission of this instrument in its own procedural toolbox in 2008. However, we have come to the conclusion that we could gain from emulating the Commission and several of our ECN colleagues in expanding the scope of settlement negotiations to include an absolute amount of fine agreed on with the parties, rather than leaving this issue still up for debate, including before the judge. Indeed, this would considerably reduce the burden of managing appeals against decisions in cases otherwise settled with the parties. This evolution in now contemplated in a bill which is set to be discussed and adopted by Parliament in the first semester of 2015. This, I believe, is an additional illustration of balancing effectiveness and procedural fairness – within the framework of an administrative model of competition regulation.