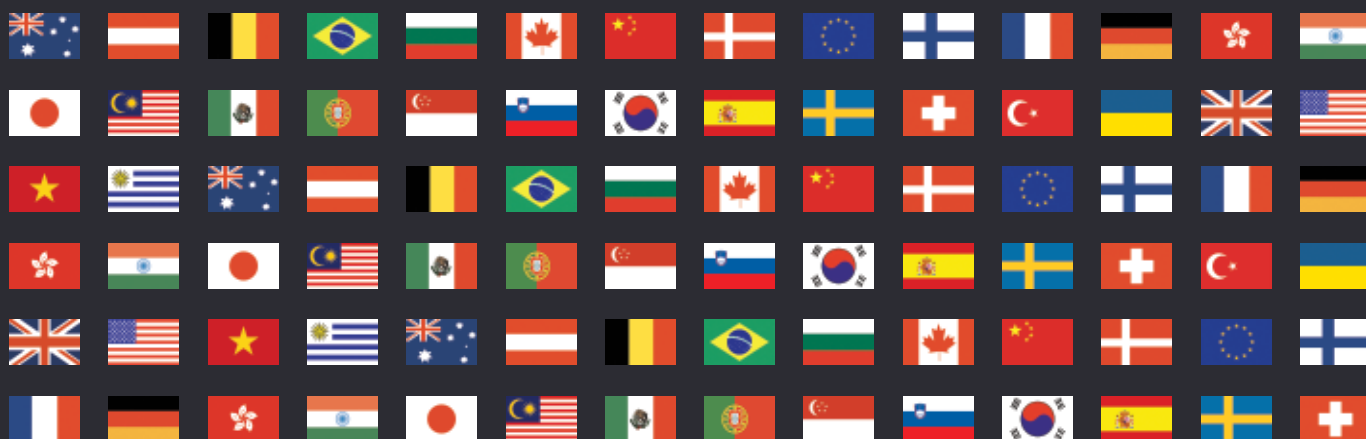


Cartel Regulation 2021

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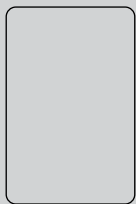
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Cartel Regulation 2021

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Lexology Getting The Deal Through is delighted to publish the twenty-first edition of *Cartel Regulation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Argentina, Bulgaria, France and Spain.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Neil Campbell of McMillan LLP, for his continued assistance with this volume.



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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

In France, cartels are prohibited by article L 420-1 of the French Commercial Code (FCC).

If a prohibited practice is capable of affecting trade between EU member states, both article 101 Treaty on the Functioning of the European Union (TFEU) and article L 420-1 of the FCC may apply cumulatively.

Procedural rules are provided for in articles L 450-1 to L 450-8 of the FCC, and the principles relating to their implementation are described in articles R 450-1 to R 450-8 of the FCC.

Relevant institutions

2 | Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The French Competition Authority (FCA), an independent administrative authority created in 2008 to replace the former Competition Council, investigates cartel matters.

Within the FCA, a functional separation between its investigating and decision-making services has been established.

The investigating services of the FCA carries out the entire investigation phase. This service is composed of case handlers allocated among different services under the direction of a general case handler.

The FCA's decision-making body, the board, comprises of 17 members who do not participate in the investigations. The president of the FCA is member of the board. Isabelle de Silva was appointed in 2016. The board meets in plenary sessions, divisions or as a standing committee.

The FCA may initiate a cartel investigation ex officio, following a leniency application, a prior investigation led by the French General Directorate for Competition Policy, Consumer Affairs and Fraud Control, or a third-party complaint.

Changes

3 | Have there been any recent changes, or proposals for change, to the regime?

On procedural aspects, France is transposing the Empowering National Competition Authorities Directive (EU) No. 2019/1 (ECN+ Directive) which will bring minor changes to French competition law and will confer new powers on the FCA. It will introduce a principle of discretionary prosecution and the FCA will have the power to choose the cases to be addressed in priority and to act on its own initiative to impose interim measures. Finally, the maximum fine will be raised and the €3 million maximum fine currently applicable to associations will be removed.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

Article L 420-1 of the FCC prohibits concerted actions, agreements or alliances, whether express or tacit implemented by undertakings or associations of undertakings, that have, or may have, as their objective the effect of preventing, restricting or distorting the free play of competition in a market.

Article L 420-1 of the FCC does not provide for an exhaustive list of prohibited practices. There are no specific provisions dealing with group boycotts or bid rigging but they fall under the scope of this article.

Cartels are 'by object' restrictions which are per se illegal and their anticompetitive effect does not need to be proven.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Joint ventures and strategic alliances are subject to cartel regulation.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

The law applies both to corporations and individuals, as long as they are engaged in a production, distribution or service activity.

Individuals may also subject to criminal responsibility if they are involved in anticompetitive behaviours, such as cartels.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

French competition law applies to concerted actions, agreements, or alliances that have the objective of affecting the French market or have an effect on the French market regardless of the place where the companies involved have their headquarters and the conduct took place.

Export cartels

8 | Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

French law does not provide for any exemption or defence for conduct that only affects customers or other parties outside the jurisdiction.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

Article L 420-4 of the French Commercial Code (FCC) sets a specific provision which applies to the agricultural sector.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

Two exemptions are set out by the French Commercial Code (FCC) at article L 420-4.

The first exemption covers practices which result from the application of law or subsequent regulations.

For instance, in 2010, the French Court of Cassation held that the tariffs for the consultation and for the surgical acts of certain doctors were subject to price regulation in France, which excluded the application of article L 420-1 of the FCC. The second exemption concerns practices, the actors of which can justify they ensure economic progress, including by creating or maintaining jobs, and that they reserve a fair share in the resulting profit for users, without giving the undertakings involved the opportunity to eliminate a substantial part of the competition for the products in question. Practices consisting of organising agricultural products or products of agricultural origin under the same brand or trade name, production volumes and quality or the commercial policy (including agreeing a common transfer price), may only impose restrictions on competition that are essential to achieve the aim of economic progress.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

The French Competition Authority (FCA) can start an investigation at its own initiative, following a leniency application, a third-party complaint, or a prior investigation led by the French General Directorate for Competition Policy, Consumer Affairs and Fraud Control.

Once a case has come to the FCA's attention, the FCA will try to collect further information to determine whether there are relevant and reasonable evidence to establish an infringement to competition law.

For that purpose, the general case handler usually appoints one or more agents of the investigating services as case handlers to examine each case.

The FCA may organise unannounced inspections, send requests for information, and set up interviews with any relevant director or employee.

The investigation phase is not subject to any specific timeframe.

Investigative powers of the authorities

12 | What investigative powers do the authorities have? Is court approval required to invoke these powers?

Under French law, agents of the FCA may conduct two types of investigations.

Ordinary investigations (article L 450-3 of the FCC)

Under article L 450-3 of the FCC, agents have the power to:

- access all business premises, land or means of transport for professional use;
- request copies of books, invoices and all other professional documents, and obtain or take copies of these by any means and on any medium;

- have access to software and data stored, and to the unencrypted reproduction of information;
- access to the data stored and processed by telecommunications operators, under the conditions and within the limits provided for in article L 34-1 of the French Post and Electronic Communications Code.

FCA officials inform an investigated undertaking prior to a visit. The officials schedule a meeting with the investigated undertaking and will, generally, request for a list of documents to be prepared and provided for the scheduled visit.

The FCA may also impose fines of up to 1 per cent of an undertaking's total annual worldwide turnover to undertakings that obstruct an investigation, in particular by supplying incomplete or inaccurate information, or by submitting incomplete or misleading information or documents (article L 464-2-V of the FCC).

Investigations under judicial control (article L 450-4 of the FCC)

Under this article, investigations are subject to a judicial order from the liberty and custody judge, upon the request of the French Minister of the Economy, the general case handler or the European Commission.

If the authorisation is granted, investigations will be carried out under the supervision of the judge and in the presence of the company's representative (or two independent witnesses) and two police officers.

Officials may:

- conduct unannounced visits to any place;
- seize documents and any information medium;
- affix seals to all business premises, documents and electronic storage media within the limit of the duration of the visit to these premises;
- access the data stored and processed by telecommunications operators; and
- ask any representative for explanations of facts or documents relating to the subject matter of the investigation.

The order issued by the judge of freedoms and detention must be notified verbally.

The company under investigation has the right to be assisted by external legal counsel, but the inspectors do not have to wait for the arrival of the external legal counsel to start an investigation.

The judicial order authorising the dawn raid and the conduct of the dawn raid may each be appealed before the first president of the Court of Appeal, within 10 calendar days following the notification of the judicial order or the receipt of the minutes of the investigation established by the FCA's inspectors.

Any obstruction of an investigation can be punished by a fine of up to €300,000 and a two-year prison sentence (article L 450-8 of the FCC).

The FCA may also impose fines of up to 1 per cent of an undertaking's total annual worldwide turnover to undertakings that obstruct investigations, in particular by supplying or submitting incomplete, inaccurate or misleading information or documents (article L 464-2-V of the FCC).

INTERNATIONAL COOPERATION

Inter-agency cooperation

13 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

The French Competition Authority (FCA) cooperates with competition authorities of other jurisdictions, in particular the European Commission. It may share among the authorities information and documents it already has in its possession.

Cooperation between European national competent authorities (NCAs) is increasing. For instance, in 2019, the FCA and Germany's Federal Cartel Office launched a joined project on algorithms and their implications on competition. The final report was presented in November 2019.

The FCA is also a member of the OECD Competition Committee, the United Nations' Intergovernmental Group of Experts, and the International Competition Network (ICN).

As an example, through the ICN's Cartel Working Group, the FCA participated in the study of the implications of Big Data and algorithms in the fight against cartels. The scoping paper was issued in June 2020 and presented two perspectives: Big Data and algorithms as a new 'threat' and as a new 'tool' for cartel enforcement.

Interplay between jurisdictions

14 | Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Regulation 1/2003 organises the cooperation between the European NCAs.

According to article 22(1) of the Regulation 1/2003, the FCA may, in its own territory, carry out inspections or other fact-finding measures under its national law on behalf of the NCA of another EU member state in order to establish whether there has been an infringement of article 101 or 102 of the Treaty on the Functioning of the European Union (TFEU).

The FCA may also request the communication of information or documents.

Since NCAs may also apply European competition law, the FCA shall inform the European Commission when it applies article 101 TFEU, before starting investigation measures, and will stop its investigation if the Commission initiates its own proceedings.

The FCA actively cooperates with the European Commission by performing investigations and supplying any relevant information or documents.

A recent example of cooperation is the *Booking* case. The FCA, in collaboration with nine NCAs and the Commission, launched a survey among hoteliers to assess remedies implemented in the hotel booking sector.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

Adjudication powers lie with the French Competition Authority (FCA) and national courts.

During the investigation and the prosecution phase, the FCA's agents gather all the relevant information to determine the existence of anticompetitive practices.

At the end of the investigation, the FCA dismisses the case or provides the concerned parties with a statement of objections and the parties can answer within two months. The investigation services will then issue a report detailing the objections upheld by the rapporteur at the end of the investigation, the seriousness of the anticompetitive behaviour and the damage it caused to the economy. The parties can answer within two months.

The case is then discussed before the FCA's board. The board hears the investigation services, the parties and a representative of the government.

After a hearing with the parties, the board will issue a decision and may impose sanctions or dismiss the case.

Burden of proof

16 | Which party has the burden of proof? What is the level of proof required?

The burden of proof rests on the party alleging a fact. It can fall on the FCA if its stance is that the anticompetitive behaviour is a cartel or on the party alleging a breach of competition rules.

For commercial matters, in France, evidence is freely submitted by the parties (ie, evidence may be provided by any means (eg, documents or witness testimony)).

Circumstantial evidence

17 | Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

The FCA can prove an infringement via circumstantial evidence – precise, serious and consistent indicia that are circumstantial and do not have a direct link to the actual infringement can constitute sufficient proof of the infringement when taken together.

Appeal process

18 | What is the appeal process?

The FCA's decisions can be appealed by the parties or the French Minister of the Economy before the Paris Court of Appeal within a month of the decision being issued (article L 464–8 of the French Commercial Code (FCC)). Appeals before the Paris Court of Appeal are full appeals and may challenge facts and points of law. Thus, the court can annul FCA decisions either partially or totally.

Appeals are not suspensive. However, the First President of the Paris Court of Appeal may order the execution of the decision to be suspended if it may lead to manifestly excessive consequences or if new facts of exceptional gravity have come to light since notification of the decision was issued.

Appeals can be further referred to France's highest civil court, the Court of Cassation, within two months of the Paris Court of Appeal issuing its appellant ruling. This further appeal is limited to points of law and does not have a suspensive effect.

An appeal against an FCA interim measure may be lodged before the Paris Court of Appeal within 10 days after receiving notification of the FCA's decision. The FCA shall render its decision within one month.

SANCTIONS

Criminal sanctions

19 | What, if any, criminal sanctions are there for cartel activity?

Article L 420–6 of the French Commercial Code (FCC) provides that taking a personal and decisive part in the conception, organisation or implementation of an anticompetitive practice is a criminal offence, and individuals can be punished by a prison sentence of four years and a fine up to €75,000.

Criminal sanctions cannot be imposed by the French Competition Authority (FCA), which has to refer the criminal part of the case to the public prosecutor.

In practice, criminal sanctions are very rare and cases are limited to bid rigging in which the French state was the victim. So far, no prison sentences have been issued.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

The FCA has the power to impose injunctions, publicise its findings, and issue fines.

Injunctions and interim measures

The FCA may issue injunctions requesting the termination of the anti-competitive practice within a determined period. If this order is not followed, a financial penalty may be imposed.

The FCA may also grant interim measures (L 464-1 of the FCC) if there is a strong presumption that the alleged practice will seriously and immediately affect the general economy, the economy of the concerned sector, or the interests of consumers or the plaintiff.

If the FCA is not already involved, the French Minister of the Economy may also impose orders obliging parties to terminate anticompetitive practices (article L 464-9 of the FCC) if the affected market is local, the practice does not fall within articles 101 or 102 of the Treaty on the Functioning of the European Union, the national turnover of either company does not exceed €59 million, and its aggregated turnover does not exceed €200 million.

Publication

The FCA has the power to order the publication in the press of a summary of its decision. The purpose of this is to alert companies in the sector and the public of the harmful nature of the unlawful behaviour (article L 464-2 of the FCC).

Fines and sanctions

The FCA may impose fines of up to 10 per cent of an undertaking's total annual worldwide turnover. Fines imposed on individuals are limited to €3 million.

Periodic penalty payments of up to 5 per cent of the average daily turnover of a company can also be ordered by the FCA to force a company to comply with its decision or a binding commitment undertaken by the company.

The FCA is bound by its 2011 fining guidelines for the setting of sanctions.

The FCA may also impose fines of up to 1 per cent of an undertaking's total annual worldwide turnover to undertakings that obstruct an investigation, in particular by supplying incomplete or inaccurate information, or by submitting incomplete or misleading information or documents.

Civil sanctions

French law does not provide for any specific civil sanctions. Civil actions before national courts are opened to companies or individuals that have suffered damages from anticompetitive practices.

Guidelines for sanction levels

21 | Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

On 16 May 2011, the FCA issued a procedural notice on the method for setting antitrust fines.

First, the FCA sets a 'basic amount' for each company on the basis of the proportion of the value of the sales or products or services to which the infringement relates.

Second, the FCA adjusts the basic amount on the basis of the company's individual situation. It may take into account aggravating

circumstances (eg, a leadership role) or mitigating circumstances (eg, the company was compelled to participate in the cartel).

Then it compares the adjusted base amount with the legal maximum and then adjusts it to take into account leniency proceedings or settlements.

Finally, the FCA may adjust the amount if the company is currently facing financial difficulties.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

Since October 2017, the existence of a competition law compliance programme does not affect the fine the FCA may impose. Therefore, no mitigating factor can be expected from a compliance programme. Similarly, the FCA will not treat the existence of a compliance programme as an aggravating factor.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

Disqualification is not a sanction under French competition law.

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Under article L 2141-9 of the French Public Procurement Code, a public purchaser may exclude individuals and companies from public procurement procedures if the purchaser has sufficient evidence that an individual has implemented coordination practices with a view to distorting competition.

Parallel proceedings

25 | Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

The same conduct can lead to criminal and administrative sanctions, but they cannot be imposed by the same court. Criminal penalties can only be imposed by the national criminal courts, while administrative sanctions are imposed by the FCA.

Individuals or companies that suffer a loss from an anticompetitive practice can bring a private damage claim in front of the civil courts.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 | Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Any individual or company that suffers a personal harm from an anticompetitive practice can bring a private claim before national courts.

Pursuant to article L 481-3 of the FCC, the harm suffered may include loss, lost profit, loss of opportunity or non-material damage.

In accordance to the French rules of civil liability, the plaintiff has to prove:

- an infringement of competition rules;
- the damage suffered; and
- a causal link between the infringement and the damage.

There are no specific rules governing the level of damage. French law guarantees the principle of full reparation of the damage but prohibits punitive damages.

Plaintiffs may face numerous difficulties in proving the fault, the damage and the causal link between them.

Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the EU member states and of the European Union was transposed into French law by Order No. 2017-303 and Decree No. 2017-305 of 9 March 2017.

The new provisions introduce an irrebuttable presumption of fault when the existence and imputation of the anticompetitive practice have been established by an FCA decision which cannot be the subject of an appeal before the Paris Court Appeal (article L 481-2 of the FCC).

Thus, the victim does not have to prove an infringement if the private action is brought after the FCA's decision. Victims of competition law infringements may also bring stand-alone actions (ie, actions that are not based on a previous finding of infringement by a competition authority). In these cases, the victim must prove the alleged infringement of competition law, the harm suffered and the causal link between the two.

The Directive 2015/104/EU created a rebuttable presumption of a damage to the victim of a cartel.

If the claimant faces difficulties quantifying the harm, national courts can be empowered to make an estimation.

Following the directive and the ordinance, additional guidance was provided by the Commission at the European level, which issued a guide in 2019 on the assessment of the passing on of overcharges, as well as by the French Ministry of Justice, which adopted a soft law instrument to assist victims and the courts in interpreting the provisions of the Ordinance (the Circular of 23 March 2017). The Paris Court of Appeal also issued a set of guidelines focusing on the assessment of economic damages (*Fiches méthodologiques*, 19 October 2017).

Class actions

27 Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Since the *Hamon* Law of 17 March 2014, consumers may bring class actions before competent civil courts.

The class must be represented by an authorised consumer association and members of the class must be selected through an opt-in system (article L 623-1 (2) of the FCC). Neither consumers acting alone nor professionals (ie, workers who are required to be a member of regulatory bodies) may engage in a class action.

Class actions may only be brought within five years from the date of the decision establishing an infringement of competition rules was made.

The procedure is conducted in two phases.

In the first phase, a judge rules on the principle of the defendant's and defines the categories of victims. The judge also determines what damage could be repaired, as well as the period of time during which consumers may join the group.

During the second phase, once a declaratory ruling on liability has been issued, any consumer in an identical or similar situation may join the group to obtain compensation, on an opt-in basis, within a two- to six-month period. This time period, which is fixed by the judge, can be no

less than two months and no more than six months after the completion of the publicity measures ordered by the judge (article L 423-5 of the Consumer Code).

The class members will be compensated under the terms of the judge's ruling made during the first stage of the process.

A simplified procedure has also been established when the identity and the number of consumers are accurately known, and when victims have each suffered equivalent damages.

Class actions remain limited in number, which recently led to the issuance of a report addressing the difficulties encountered in executing them and making certain recommendations to encourage the development of collective redress (French National Assembly, information report of 11 June 2020).

COOPERATING PARTIES

Immunity

28 Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Article L 464-2 of the French Commercial Code (FCC) provides for the possibility of leniency for companies that have contributed proving the existence of a prohibited practice and whom its authors were providing evidence which the FCC or any public official were previously unaware of.

The regime of leniency programme has been detailed in *Procedural Notice on French Leniency Proceedings*, which was first published in 2004.

Cases in which a leniency applicant can benefit from full immunity are known as 'Type 1 cases'. The Notice provides for two types of Type 1 case: Type 1A and Type 1B cases.

Type 1A cases are those where the French Competition Authority (FCA) has no information or evidence that is sufficient for investigative measures to be initiated and a leniency application enables the FCA to carry out a targeted on-site inspection.

Type 1B cases are those where the FCA is already aware of the cartel but may not have enough evidence to substantiate an objection. The undertaking which receives Type 1B leniency is the first to submit information that allows the FCA to demonstrate the existence of the cartel.

Any leniency applicant has to meet the following obligations: it must immediately end its involvement in the cartel (however, the FCA can authorise the undertaking to continue its participation in the cartel in order to preserve the confidentiality of the leniency application and the efficiency of the investigation), and it must cooperate effectively, fully, totally, on a continuous basis and swiftly with the FCA, which implies:

- providing all information and evidence;
- refraining from destroying, falsifying or dissimulating information or pieces of evidence; and
- maintaining strict confidentiality over its leniency application.

Subsequent cooperating parties

29 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Undertakings which do not meet the conditions for a total immunity may benefit from a partial reduction of fine. In any case, they must provide the FCA with evidence of the alleged cartel's existence that has 'significant added value' over the evidence already in the FCA's possession.

To determine the level of the reduction, the FCA will take into consideration the timing of the application and the 'added value' of the information that is provided.

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

The FCA will take into account the timing of the application and the degree to which the information provided by the applicant is of 'significant added value'.

In principle, the fine for the first undertaking that provides information of 'significant added value' may be reduced by 25 to 50 per cent; the fine for the second undertaking that submits such information may be reduced by 15 to 40 per cent; and the fine for any other undertaking providing such information may be reduced by no more than 25 per cent.

Under French law, there is no 'immunity plus' or 'amnesty plus'.

Approaching the authorities

31 Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

There is no deadline for initiating or completing an immunity application. However, the FCA takes each applicants' place in the leniency queue into account when granting markers.

In order to obtain a marker, the applicant need only provide limited information. They then receive a deadline – generally one month – to finalise its application and to provide supporting evidence.

Cooperation

32 What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

A leniency applicant must cooperate with the FCA in a true, complete, swift and lasting manner from the application date until the end of the investigation. It must submit all relevant information that comes into its possession during the investigation and remain available to answer any questions the FCA may have.

To apply for leniency, the undertaking only needs to provide the following basic information:

- its name and address;
- information on the circumstances which led to its leniency application;
- the names and addresses of the other cartel participants;
- a detailed description of the alleged cartel (eg, information on the products and territories on which the alleged cartel is likely to have an impact, the nature and estimated duration of the alleged cartel); and
- information on any leniency application relating to the alleged cartel.

The applicant will then be granted a certain period of time to provide all the supporting documentation that it may have and a corporate statement describing the alleged infringement in detail.

Confidentiality

33 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The existence of a leniency application and the identity of the applicant are kept confidential from the other parties, until the statement of objections is issued.

Information provided by the leniency applicant is disclosed to the parties involved when the statement of objections is issued. The parties to the procedure have access to the electronic recordings of the oral statements. Other documentary evidence provided by the leniency applicant is made accessible, subject to confidentiality rules.

The FCA may accept the redaction of confidential information that constitutes business secrets, provided this information is not essential for the exercising the rights of defence by the other parties or the establishment of the infringement.

In court proceedings, under article L 483-5 of the FCC, the judge cannot order the FCA to disclose corporate statements made in support of a leniency application.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Undertakings may benefit from fine reductions if they do not challenge the existence of the alleged practices (article L 464-2 of the FCC).

The general case handler submits a proposed settlement 'setting out the minimum and maximum amount of penalty' to the company. If the proposal is accepted, the case handler refers it to the FCA's board which will impose a fine within the range stated in the settlement.

Any company can request a settlement before or following the issuance of a statement of objections. In order to apply, the undertaking must agree to waive its right to challenge the existence of the practices (ie, their materiality, duration, scope and the undertaking's participation in the practices). Once the statement of objections is sent, the undertaking must contact the case handler without delay as a settlement report must be finalised and signed within two months of the statement of objections being issued.

The settlement procedure may be implemented in conjunction with the leniency procedure.

There is another alternative dispute resolution process: the commitment procedure. However, this procedure is mainly used in abuse of dominance cases or vertical practices and is not really appropriate for cartels.

Corporate defendant and employees

35 When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

French competition law does not provide for immunity or leniency from criminal prosecution. The FCA does not have the jurisdiction to prosecute individuals, as this falls within the scope of criminal law and under the scope of the public prosecutor.

However, the FCA's Procedural Notice of 3 April 2015 on leniency programmes indicates that leniency constitutes a legitimate reason for not referring a case to the public prosecutor. Thus employees are protected from criminal sanctions.

If an individual refuses to cooperate with a leniency application's requirements, the undertaking may take disciplinary action in accordance with applicable employment law and contractual rules. In principle, employees are contractually obliged to cooperate to the extent that the requested cooperation does not result in a breach of their fundamental rights.

Dealing with the enforcement agency

36 | What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

An application for leniency must be addressed to the FCA's general case handler or leniency officer. They will fix a deadline by which the applicant must provide all the elements of evidence in its possession and on the basis of which, the case handler will prepare a report.

The applicant must file its application with the general case handler in writing or orally.

Receipt of the application by the general case handler allows the applicant to apply for a marker. Markers protect the applicant's place in the leniency queue for a period of time specified by the general case handler.

Finally, the case is examined by the board of the FCA, which formally grants leniency if it considers that the conditions have been fulfilled.

Potential applicants can freely and anonymously contact the FCA's Leniency Officer to obtain information about the leniency programme before formally applying for leniency.

DEFENDING A CASE

Disclosure

37 | What information or evidence is disclosed to a defendant by the enforcement authorities?

The procedure before the French Competition Authority (FCA) and national courts is contradictory. Thus, in order to have their rights of defence guaranteed, defendants should have access to the documents on which the FCA or the courts intend to base their claim of a cartel's existence.

Article L 463-4 of the FCC provides that the French Commercial Code (FCC) may refuse to grant parties access to documents containing business secrets. If access to such documents is necessary to protect the rights of defence, the defendant shall have access to a non-confidential version.

Representing employees

38 | May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

Counsel may represent employees under investigation in addition to the corporation that employs them, except in situations where this would lead to a conflict of interest.

A present or past employee should obtain independent legal advice or representation when he or she becomes the individual object of a criminal prosecution or, more generally, when his or her interests differ from that of the corporation employing them.

Multiple corporate defendants

39 | May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Counsel may represent multiple corporate defendants in the same proceedings, unless this would raise to a conflict of interest.

Payment of penalties and legal costs

40 | May a corporation pay the legal penalties imposed on its employees and their legal costs?

Article L 470-1(2) of the FCC provides that a court may sentence the corporation to pay the fines ordered against one of its employee, the amount of which may not exceed €3,000 for a natural person and €15,000 for a legal person.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Article 39, section 2 of the French General Tax Code provides that financial sanctions are not tax-deductible. This also applies to fines for breaches of competition rules.

Private damages imposed by national courts are tax-deductible.

International double jeopardy

42 | Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

In accordance with the principle of double jeopardy, the FCA may not bring proceedings against or impose a fine on corporations or individuals that have already been prosecuted or fined if the facts, the party concerned and the legal interest protected at stake are the same.

This principle also applies to overlapping damage claims.

Getting the fine down

43 | What is the optimal way in which to get the fine down?

The most efficient way to reduce a fine is to apply for leniency or to cooperate with the FCA in the context of settlement procedures.

The existence of a pre-existing compliance programme or compliance initiatives undertaken after the investigation has commenced do not affect the level of the fine.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

On 9 January 2020, the French Competition Authority (FCA) announced its main priorities for 2020. It stressed that the digital and retail sectors would remain at the top of its agenda, given the recent developments in these fields and the challenging competition issues they raise.

The FCA recalled that trade unions and associations have been sanctioned several times in recent years for infringements of competition law. The FCA sanctioned a wide variety of professional bodies such as notaries, architects, and courier services for cartel practices. The FCA warned that heftier fines were to be expected since the implementation of the Empowering National Competition Authorities Directive (EU) No. 2019/1 (ECN+ Directive), which allows for the imposition of fines of up to 10 per cent of the global turnover of each company that belongs to the union or association.

On the legislative front, the FCA will follow the implementation of the ECN+ Directive in France.

On 19 February 2020, the FCA expressed its views on the possible lines of approach to enhance antitrust enforcement in the digital sector, both at the EU and national levels. This publication covers questions

relating to anticompetitive practices and shows the FCA's willingness to be part of the process launched by the European Commission and many competition authorities and regulators in order to deal with questions raised by the growth of digital platforms.

Key cases

On 29 January 2020, the Court of Cassation annulled the judgment of the Paris Court of Appeal in the interbank fees case (Cass. com., 29 January 2020, No. 18-10.967) for interpreting the concept of 'restriction by object' too broadly. The Court of Cassation noted that only coordination practices that harm competition to a sufficient degree may be qualified as restrictions by object. Absent a clearly established anticompetitive object, likely anticompetitive effects must be proven to establish an infringement of articles 101(1) TFEU and L 420-1 of the French Commercial Code (FCC).

On 20 February 2020, the Paris Commercial Court dismissed the damages claim brought by various entities of Belgian retail group Louis Delhaize following the FCA's 2015 sanction decision in the *Dairy Products* case. The Court considered that the claimants' economic assessment of their harm was insufficiently substantiated, whereas the defendants were able to successfully raise the passing-on defence.

On 16 March 2020, the FCA imposed a €1.1 billion fine on Apple for entering in anticompetitive agreements with its distributors and abusing the situation of economic dependency of its network of Apple Premium Resellers. The decision follows an investigation initiated in 2012, when eBizcuss, which was at the time the largest French Apple Premium Reseller, accused Apple of abusing its dominant position. In its decision, the FCA found that Apple had engaged in two vertical infringements, one with its wholesalers and the other with its network of Apple Premium Resellers, and in an abuse of economic dependence under L 420-2 of the FCC.

On 18 May 2020, the Court of Cassation upheld the Paris Court of Appeals' judgment which had confirmed the FCA's fining decision against Groupement des Installateurs Français (Groupe GIF). The Court of Cassation held that the FCA's board could re-open the investigation to allow the FCA's investigation services to add evidence which they relied upon for establishing the statement of objections but that they 'inadvertently omitted' to include in the case file. The defendant's response to the statement of objections can remain in the case file, despite the fact that the defendant did not have access to that evidence when preparing its response, as long as the defendant is given the chance to reply to a supplementary statement of objections after the investigation is re-opened.

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

There are no ongoing or anticipated reviews of or proposed changes to the current legal framework.

Coronavirus

46 | What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

The FCA's premises closed on 17 March 2020 due to the containment order from the French government, but its services, especially its investigation services, continued to work remotely.

The FCA did suspend 'the two-month period available to companies to submit, in applying article L 463-2 of the FCC, their comments



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in response to a statement of objections or a report'. The suspension has now been lifted. As a result, the legal and regulatory time limits which were suspended on 12 March 2020, started to run again as of 24 June 2020.

Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the chapter.

France	
Is the regime criminal, civil or administrative?	The regime is administrative and criminal.
What is the maximum sanction?	The FCA may impose fines of up to 10 per cent of an undertaking's total annual worldwide turnover.
Are there immunity or leniency programmes?	French law offers leniency programmes before the FCA. Total or partial immunity can be granted, but this does not prevent the applicant for leniency from facing payment of damages to the victims of the competition law breach.
Does the regime extend to conduct outside the jurisdiction?	French competition law applies to concerted actions, agreements, or alliances that have the objective to affect the French market or have an effect on the French market, regardless of the place where the companies involved have their headquarters and the conduct took place.

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