

Report LIDC – Question A – English version

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This document was written by a working group composed of Thierry Boillot, Mathilde Boudou, Nizar Lajnef, Thibaut Marcerou, Lauren Mechri and Charles Sauvage, coordinated by Jean-Julien Lemonnier. The views expressed are those of this working group as a whole. They do not necessarily reflect the personal opinion of the contributors who participated in the preparatory meetings, and are therefore not bound by it.

I. The notion of discrimination in national / regional substantive legal framework

French law on anti-competitive practices deals with discriminatory conducts as cartels and as abuses of dominant position. Since 1986 and the adoption of the founding text of modern competition law in France, the Order of 1 December 1986,¹ the text prohibiting the abuse of dominant position targets discriminatory conducts.

The prohibition of abuse of dominant position and economic dependence is now provided for in Article L420-2 of the Commercial Code and expressly refers to "discriminatory conducts":

"Is prohibited [...] the abusive exploitation by an undertaking or group of undertakings holding a dominant position in the internal market or in a substantial part of it. Such abuses may include, in particular, refusal to deal, tying or discriminatory conditions of sale and the termination of established business relationships, solely on the ground that the partner refuses to submit to unjustified commercial conditions.

In addition, the abusive exploitation by an undertaking or group of undertakings of the customer or supplier's state of economic dependence is prohibited if it is likely to affect the competition functioning or structure. Such abuse may consist in particular of refusal to deal, tying, discriminatory conducts referred to in Articles L.442-1 to L. 442-3 or range agreements".

Article L.420-1 of the Commercial Code deals with the prohibition of anti-competitive agreements. Similarly to Article 101 TFEU, this provision does not expressly cover discriminatory conducts. However, decision-making practice has already sanctioned cases of discrimination on the basis of the prohibition of anti-competitive agreements.

¹ Order No. 86-1243 of 1 December 1986 related to freedom of prices and of competition, Article 8, codified by Order No. 2000-912 of 18 September 2000 related to the legislative part of the Commercial Code, and Law of ratification No 2003-7 of 3 January 2003 modifying Book VIII of the Commercial Code.

Discriminatory conducts may also be assessed under the French law on restrictive practices of competition. This topical subject has been modified many times, including by the Law on the Modernisation of the Economy (known as the "LME") of 4 August 2008² and, finally, the "EGAlim" Law of 30 October 2018,³ which empowered the Government to reform by way of orders⁴ the provisions of the law on restrictive practices.

Since 26 April 2019, the new article L.442-1 of the Commercial Code provides for the main provisions of the law on restrictive practices of competition.

The reform that had the greatest impact on the discrimination regime was undoubtedly the 2008 reform brought about by the Law on the Modernisation of the Economy, in that it removed the prohibition of *per se* discrimination.

The reasons for this modification lies in the fact that, originally designed to correct abuses of buyer power, this prohibition ultimately gave rise to perverse effects, as emphasized in the Hagelsteen Report of 12 February 2008.⁵ In particular, the provision caused a rise in the price level to the detriment of consumers.⁶

Provisions other than those governing anti-competitive conducts or restrictive practices mention discriminatory conducts, such as article L.410-3 of the Commercial Code: "*In [some] overseas [...] departments, and in sectors where supply conditions or market structures limit free competition, the Government may adopt, after public notice of the Competition Authority and by decree of the Conseil d'Etat, the measures necessary to remedy the malfunctioning of the wholesale markets for the goods and services concerned, in particular the markets for export sales to departments of transit, storage and distribution. The measures taken concern access to these markets, the absence of price discrimination, the fairness of transactions, the margin of the operators and the management of essential facilities, taking into account the protection of the interests of consumers*".

II. The notion of discrimination in practice by competition authorities / courts

Discriminatory conducts can be found in cartel, abuse of dominant position and merger control. The analysis of every conduct starts with an inventory of the decision-making practice of the competition authorities and the supervisory jurisdictions.

Regarding the period of review, we considered that twenty years would be sufficiently representative for our study and we have analysed all the decisions since 2000. However, as regards merger control, we have started to review decisions since 2009, when merger control was transferred from the Minister of Economy to the Competition Authority.

² Law No. 2008-938 of 4 August 2008 on modernisation of Economy.

³ Law No. 2018-938 of 30 October 2018 for the equilibrium of commercial relations in the agriculture sector and food and healthy and sustainable food accessible to all, Article 17.

⁴ Order No. 2019-359 of 24 April 2019 revising title IV of the book IV of the Commercial Code related to transparency, to restrictive practices of competition and other prohibited conducts.

⁵ "*The negotiability of tariffs and general terms and conditions of sale*", Report of Mrs. Marie-Dominique. Hagelsteen of 12 February 2008 released to Mrs. Christine Lagarde, Minister of Economy, Finances and Employment and Mr. Luc Chatel, Secretary of State in charge of Consumption and Tourism (<https://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/084000079.pdf>):

"The prohibition of abusive discrimination, as defined in Title IV of Book IV of the French Commercial Code, referred to as "non-negotiability of tariffs and general terms and conditions of sale", is intended to prevent the development of abusive discriminatory conducts, i.e. practices that are not justified by real counterparts and to punish providers and distributors who abuse their economic buyer power or power to sell in order to obtain unjustified conditions.

This protection mechanism and the associated risks of penalties gave also rise to the perverse effect of dissuading manufacturers from engaging in a wide differentiation of their tariffs or conditions of sale and, therefore, limiting commercial negotiations and price discussions to negotiations on the services provided by distributors for the promotion of products ("back margins"). This phenomenon has resulted in sustained price increases and inflation in resale prices to consumers."

⁶ I. LUC, "*Price discrimination: a legal approach*", AJCA 2015, p. 299, aforementioned.

A. Discriminatory conducts sanctioned as abuses of dominance

1. Examples of discriminatory conducts

The Competition Authority's decision-making practice on discriminatory conducts analysed as abuse of dominance combines both exclusionary abuses ("*primary line abuse*") and exploitative abuses ("*secondary line abuse*"). Among the 32 decisions we found, the majority concerns exclusionary abuse (28) and only a few decisions relate to exploitative abuse (4). However, the distinction is not straightforward as it is only explicitly mentioned in a limited number of decisions.⁷

Among these decisions, 6 decisions follow a self-referral from the Competition Authority, 4 decisions derive from complaints of the Minister of Economy and 22 decisions derive from complaints of undertakings that have suffered harm from the practices.

Between 2002 and 2017,⁸ the Competition Council and then, from 2009, the Competition Authority issued 238 sanction decisions. Among them, 55 decisions were issued on abuse of dominance provisions, 12 of which specifically sanctioned discriminatory conducts. Therefore, decisions on discriminatory conducts represent 5% of sanction decisions and just under a quarter of all sanction decisions on abuse of a dominant position (24% precisely).

In 2011 there was no decision prohibiting discriminatory conducts on the basis of abuse of dominance whereas in 2017, 44% of sanction decisions were issued as abuse of dominant position and a quarter of them punished discriminatory conducts. The decision-making of the Competition Authority on discriminatory conducts is well established.

Between 2000 and 2019, 14 decisions⁹ out of 25 decisions related to alleged discriminatory conducts, resulted in fines. All of them concerned exclusionary abuses ("*first-line discrimination*") and none of them dealt with exploitative abuses ("*secondary-line discrimination*"). Indeed, the only decision on the merits dealing with an exploitative abuse is Decision No. 10-D-30, is a decision with commitments but no fine.

Apart from the decisions on the merits, there are also decisions on interim measures. There are 9 proceedings with a request of interim measures; only 2 of them have resulted in injunctions, both in the digital field and concerning Google.¹⁰

Between 2000 and 2019, the total amount of fines imposed by the Competition Authority for discriminatory conducts amounted to EUR 270.306.848 with an average amount of EUR 19.307.631,79 per decision (EUR 18.020.456,53 per undertaking).

With regard to the five local anti-competitive practices identified (practices of a limited scope affecting local markets that are dealt with by the DGCCRF), only three resulted in a financial settlement for a total amount of EUR 108.000 or EUR 36.000 on average. The other two cases did not result in a fine.

No fine has been imposed on an exploitative abuse¹¹.

⁷ Competition Authority, Decision No. 09-D-04 of 27 January 2009 related to the referral of Les Messageries Lyonnaises de Presse against conducts of the group Nouvelles Messageries de la Presse Parisienne in the sector of press distribution ; Decision No. 10-MC-01 of 30 June 2010 related to the request for interim measures presented by Navx.

⁸ Although our period of review of decisions covers the periods 2000-2002 and 2018-2019, the annual reports of the Competition Authority containing statistical data were not available for these years.

⁹ This gap with the number of 12 decisions sanctioning discriminatory conducts can be explained by the two prohibition decisions of 2000 (Competition Council, Decisions No. 00-D-14 of 3 May 2000 related to conducts in the terracotta bricks sector in the West of France and Decision No. 00-D-85 of 20 March 2001 related to conducts in the sector of sodium chlorate distribution).

¹⁰ Competition Authority, Decision No. 10-MC-01 of 30 June 2010 related to the request of interim measures presented by Navx; Decision No. 19-MC-01 of 31 January 2019 related to the request for interim measures by Amadeus; Mostly confirmed by Paris Court of Appeal, 4 April 2019, RG No. 19/03274.

¹¹ As an example, See Competition Authority, Decision No. 18-D-13 of 20 July 2018 related to conducts operated by Google on the online advertising sector and dealing with the intermediation in the field of websites creation, which is a decision

Among the 26 decisions on the merits rendered by the Competition Authority that we have identified,

- 24 decisions concern exclusionary abuses. Among them,
 - o 14 decisions resulted in fines, the amounts of which were mentioned above. Most of these 14 decisions imply injunctions (9 decisions) or order the publication of a text contained in the decision itself (7 decisions), so that only one out of 5 cases solely impose a fine (3 decisions)¹².

Details of the injunctions imposed by the Competition Authority:

- Establish, within three months, non-discriminatory criteria for granting scanner and MRI shifts to doctors non-members of the SCM;¹³
- Do not discriminate customers in the future on the basis of the choice of software that can be qualified as essential facility;¹⁴
- Remove discriminatory elements from its general remuneration scale for dealers broadcasters;¹⁵
- Take all necessary measures to terminate infringements, with follow-up, and inform customers of their right to freely terminate their subscription at any time;¹⁶
- Modify its public pricing policy distributed to funeral companies and its form designed for families;¹⁷
- Comply with the commitments;¹⁸
- Implement a competition compliance program;¹⁹
- Establish a consumer complaints management system and a tool for identifying complaints specifically related to the disputed acts or practices under competition law;²⁰
- Provide for non-discriminatory remuneration arrangements between the SNCF booking website and travel agencies.²¹

rejecting the referral because of the lack of proof which enable to demonstrate the alleged discriminatory conducts of “detracting” constitutive of abuse of dominant position.

¹² Competition Authority, Decision No. 10-D-39 of 22 December 2010 related to conducts in the sector of vertical road signaling; Decision No. 00-D-14 of 3 May 2000 related to conducts in the sector of plaster bricks in the West of France; Decision No. 05-D-58 of 3 November 2005 related to conducts in the sector of drinking water in Ile-de-France.

¹³ Competition Authority, Decision No. 06-D-36 of 6 December 2006 related to conducts of civil undertaking Imagerie Médicale du Nivolet.

¹⁴ Competition Authority, Decision No. 14-D-06 of 8 July 2014 related to conducts of Cegedim in the sector of medical information data.

¹⁵ Competition Authority, Decision No. 03-D-09 of 14 February 2003 related to the referral of Tuxedo related to conducts in the market for distribution of the press to the public airport domain.

¹⁶ Competition Authority, Decision No. 12-D-24 of 13 December 2012 related to conducts in the sector of mobile telephony sector for residential customers in metropolitan France.

¹⁷ Competition Authority, Decision No. 17-D-13 of 27 July 2017 related to conducts in the funeral sector in the Ain department.

¹⁸ Competition Authority, Decision No. 13-D-21 of 18 December 2013 related to conducts in the French market for high-dose duprenorphine marketed in the city.

¹⁹ Competition Authority, Decision No. 14-D-05 of 13 June 2014 related to conducts in the telephony sector for residential customers in La Réunion and Mayotte.

²⁰ Competition Authority, Decision No. 07-D-33 of 15 October 2007 related to conducts of France Telecom in the sector of access to high-speed Internet.

All these orders have the common objective to terminate the discrimination.

- 2 are decisions with commitments without a fine:
 - Apply discounts on public fares per category of turnover to transport tickets reserved to be sold “dry”;²²
 - Establish communication and compliance programs and maintain and expand an ad control program.²³
- 8 decisions have dismissed the case.
- As for the 2 decisions on the merits dealing with discrimination based on exploitative abuse, neither of them impose any fine;
 - One is a decision with commitments;²⁴
 - And the other is a rejection decision.²⁵

With regard to interim measures, 9 decisions have been issued:

- 6 decisions are decisions refusing to grant interim measures²⁶ two of which refuse to continue the proceedings;
- One decision deals with a commitment to suspend the signing of a contract until the decision on the merits;²⁷
- And finally, 2 decisions impose interim measures:
 - Define the scope of Ad Words rules, clarify such rules, clarify proceedings in case of suspended accounts, and restore Navx's Ad Words account, all with a follow-up;²⁸
 - Clarify Google Ads rules and make them available to advertisers, provide a warning in case of account suspension, organize training with attendance, and undertake a personal review of campaign compliance, all with a follow-up.²⁹

²¹ Competition Authority, Decision No. 09-D-06 of 5 February 2009 related to conducts of SNCF and Expedia Inc. in the sector of online travel sales.

²² Competition Authority, Decision No. 10-D-06 of 26 February 2010 related to conducts of Société des Téléphériques de la Grande Motte (STGIM).

²³ Competition Authority, Decision No. 12-D-22 of 22 November 2012 related to a referral by NHK Conseil, Agence I&MA conseils, Sudmédia conseil, OSCP, Audit Conseil Publicité Annuaires, Charcot.net, Agence Heuveline, Avycom publicité annuelle, Toocom, Ecoannuaires, Netcreative-Pages annuaires against conducts of PagesJaunes SA

²⁴ Competition Authority, Decision No. 10-D-30 of 28 October 2010 related to conducts in the online advertising sector.

²⁵ Competition Authority, Decision No. 13-D-07 of 28 February 2013 related to a referral of E-kanopi.

²⁶ Competition Authority, Decision No. 02-D-69 of 26 November 2002 related to referrals and request for interim measures by Union fédérale des consommateurs Que Choisir and Confédération de la consommation, du logement et du cadre de vie; Decision No. 09-D-02 of 20 January 2009 related to request for interim measures by Syndicat National des Dépositaires de Presse; Decision No. 09-D-15 of 2 April 2009 related to the request for interim measures by SFR concerning various conducts of France Télécom Group in the markets for mobile telephony and high-speed Internet (offer ‘Unik’); Decision No. 09-D-29 of 31 July 2009 related to request for interim measures by Euris; Decision No. 12-D-01 of 10 January 2012 related to the request for interim measures concerning conducts of Oracle Corporation and Oracle France; Decision No. 13-D-04 of 14 February 2013 related to the request for interim measures concerning conducts of EDG Group in the photovoltaic electronic sector.

²⁷ Competition Authority, Decision No. 11-MC-01 of 12 May 2011 related to the request for interim measures by Kiala France and Kiala SA in the parcel delivery sector.

²⁸ Competition Authority, Decision No. 10-MC-01 of 30 June 2010 related to the request for interim measures by Navx.

Of the 5 DGCCRF decisions, 3 decisions lead to settlements, and the two oldest decisions terminated the dispute without imposing any fine.

2. Conditions for discrimination abuse

Considering that the decisions identified were not very explicit, our study focused on the most detailed decisions which emphasize the criteria and tests for discriminatory conducts.

a. The criteria for the equivalence of situation.

i. Equivalence of situations

The Competition Authority's decision-making practice shows that a similar volume of orders can be used to establish the equivalence of situations:

"The application[of the system] of discounts has led 3M France, an undertaking with dominant position on the market for retro-reflective films used for vertical road signs, to apply unequal purchasing conditions to commercial operators which have ordered similar volumes and purchasing ranges, thereby placing some of them at a competitive disadvantage".³⁰

ii. Lack of equivalence of situations

The Competition Authority's decision-making practice provides several examples of elements used to establish differences in situations.

The rental of locomotives is not comparable to a purchase contract on global services: *"Locomotives [...] cannot be considered as equivalent". "The simple rental of locomotives by Akiem for its customers is therefore not comparable to the purchase contract on global services concluded between Naviland Cargo and Fret SNCF". "The conditions for the [supply of] locomotives must be assessed as a whole in light of this contract".³¹*

Similarly, the presence of "social costs" in one situation but not in another may justify the distinction between the two situations: *"The NMPPs confirm the existence of a gap between the compensation they pay to SAD agencies and the one paid to independent warehouses. [...] This gap is justified by the NMPPs by "social costs" and, inter alia, by eight employee representative committee and one central committee. In addition, SAD has agencies in large cities, whereas independent and managed warehouses are located in medium-sized or small cities: the situations are therefore not directly comparable".³²*

Finally, the situations are not equivalent when they are legally different: *"As long as these publishers with respect to Groupe Canal Plus, were in a different legal situation compared to Groupe AB, no discriminatory treatment can be found"³³. This decision is interesting as it indicates that the equivalence of situations must be assessed in fact and in law.*

²⁹ Competition Authority, Decision No. 19-MC-01 of 31 January 2019 related to the request for interim measures by Amadeus; Mostly confirmed by Paris Court of Appeal, 4 April 2019, RG No. 19/03274.

³⁰ Competition Authority, Decision No. 10-D-39 of 22 December 2010 related to conducts in the sector of vertical road signaling.

³¹ Competition Authority, Decision No. 12-D-25 of 18 December 2012 related to conducts in the rail freight transport sector, para 638 et seq.

³² Competition Authority, Decision No. 09-D-02 of 20 January 2009 related to the request for interim measures by the Syndicat National des Dépositaires de Presse, para 84.

³³ Competition Authority, Decision No. 10-D-32 of 16 November 2010 related to conducts in the pay-TV sector, para 325.

b. Illustrations of the tests applied to establish the difference of treatment.

i. Difference of treatment.

In Decision No. 10-D-39, vertical road signs, the Competition Authority emphasized indicators of the discriminatory nature of a discount scale initially laid down by the Court of Justice of the European Union in its judgment of 29 March 2001, *Portuguese Republic v Commission*³⁴:

1. The threshold triggering the highest discounts is very high as compared to the average purchases made by 3M customers, so that only a few companies were able to benefit from this amount of discounts.
2. A non-linear increase in discount rates with quantities. An examination of 3M's invoice discount rates shows that over the period, the increase in the discount rate when the highest turnover levels are exceeded is frequently higher than the increase in the discount rates when the intermediate turnover levels are exceeded.

In Decision No. 05-D-58, drinking water in the Ile-de-France region, "*in the absence of efficiency gains, when the bundled rebate operates between an upstream product on which the bundling undertaking is in a monopoly and a downstream product, the upstream product of which is a mandatory input, on which this undertaking is in competition, then the discount has the effect of creating price discrimination on the upstream product, which raises competitors' costs solely for the benefit of the bundling undertaking and does not show the lack of competitive advantages of the competitors. Evidence of anti-competitive discrimination shall be constituted if it is established that the bundling undertaking applies to itself a lower acquisition price for the upstream product than the price charged to competitors*".

ii. No difference of treatment.

In Decision No. 12-D-25, rail freight transport, "*the conditions applied to VFLI and ECR were equivalent in this case*". "*SNCF effectively invoiced both VFLI and ECR on the basis of this allocation criteria, which is proportional to the equipment utilization rate*".

In Decision No. 17-D-11, the Competition Authority considered that there was no need to continue the proceedings concerning cross-promotion practices alleged to be discriminatory by the claimant because this conduct, which "*consists in announcing the forthcoming broadcast of a television programme and must therefore be of a purely informative nature, unlike advertising messages*" (para 118) "*is only possible between channels controlled by the same audiovisual group, which excludes channels of other groups from such a transaction [and] therefore creates a difference between channels according to whether or not they belong to the same audiovisual group, so that TF1 Publicité cannot be accused of having operated a difference of treatment of channels placed in different situations*" (para 119).

c. Taking into account the effects.

The Competition Authority's decision-making practice is committed to show the actual or potential effects of the alleged anti-competitive practices of discrimination under investigation.

i. Consideration of potential as well as current effects

There are some examples of decisions of the Competition Authority that take into account the potential effects.

In its Decision No. 05-D-58, the Competition Council considered that "*Lyonnaise des Eaux's practice of discriminating to its advantage on the price of water supply as part of its overall offer compared to that of its separate wholesale offer [bundled rebates] had an object and could have an anti-competitive effect because it aimed to discriminate the competing offer on the distribution part, a practice prohibited by Article L. 420-2 of the Commercial Code*" (para 112).

³⁴ Case C-163/99, *Portuguese Republic vs Commission* [2001] ECR I-02613.

Similarly, in its Decision No. 14-D-06, the Competition Authority states that "*in order to establish the abusive nature of an exclusionary practice, the anti-competitive effect of the practice on the market must be potential, but it does not have to be concrete. It is sufficient to demonstrate the existence of a potential anti-competitive effect capable of foreclosing competitors as efficient as the dominant undertaking*" (para 152).

The Competition Authority considered *a contrario* in its Decision No. 13-D-05 that "*the facts complained of [...], namely the implementation of a discriminatory supplier referencing process, cannot be considered as an abuse under Articles L. 420-2 of the Commercial Code or 102 TFEU insofar as no restrictive effect or probable effects can be established*" (para 222).

In this respect, we do not believe that the Competition Authority's assessment has evolved over time.

ii. Useful indicators in demonstrating effects.

The Competition Authority verifies whether the practices are likely to lead to the foreclosure of the competitors of the dominant undertaking. However, we did not find typical indicators used by the Competition Authority.

3. Forms of "primary-line" discrimination prohibited as foreclosure abuse

The Competition Authority's decision-making practice provides various examples of exclusionary practices analysed from the perspective of the prohibition of discrimination:

- When a vertically integrated undertaking is granted privileged access to goods or services that it controls at the upstream level and which are useful or even indispensable to operate on the downstream market in which it is also active. This is typically the case of an undertaking having a dominant position for the provision of an essential facility, which itself uses that facility and grants access to those facilities to other undertakings only on less favourable terms than the terms for its own services.³⁵
- Discriminatory fidelity rebates when two buyers purchasing the same quantity of the same product pay a different price depending on whether they obtain exclusive supply from the dominant undertaking or diversify their sources of supply.³⁶
- Quantitative scales (i.e. the granting by a dominant undertaking of quantity rebates based exclusively on the volume of purchases made by its customers) resulting in the application to trading partners of different conditions to equivalent services.³⁷
- Territorial selectivity through prices. In practice, for example, an alignment of its prices to respond to offers made by a competitor in a precisely defined area where it is present.³⁸
- Systematic or targeted price adjustment.³⁹

³⁵ Competition Authority, Decision No. 06-D-36 of 6 December 2006 related to conducts by civil undertaking Imagerie Médicale du Nivoret; Decision No. 11-MC-01 of 12 May 2011 related to the request for interim measures by Kiala France and Kiala SA in the parcel delivery sector; Decision No. 14-D-06 of 8 July 2014 related to conducts of Cegedim in the medical information database sector; The latter being mentioned in Opinion No 18-A-03 of 6 March 2018 on the exploitation of data in the Internet advertising sector, para 254.

³⁶ Competition Authority, Decision No. 07-D-08 of 12 March 2007 related to conducts in the sector of cement supply and distribution in Corsica.

³⁷ Competition Authority, Decision No. 03-D-09 of 14 February 2003 related to referral by Tuxedo related to conducts in the market for the press distribution on the public airport domain; Decision No. 09-D-04 of 27 January 2009 related to referrals by Messageries Lyonnaises de Presse against conducts of Nouvelles Messageries de la Presse Parisienne Group in the press distribution sector; Decision No. 10-D-39 of 22 December 2010 related to conducts in the vertical road signaling sector; Decision No. 13-D-21 of 18 December 2013 related to conducts in the French market for high-dose buprenorphine marketed in the city.

³⁸ Competition Authority, Decision No. 00-D-14 of 3 May 2000 related to conducts in the plaster brick sector in West France.

- Discriminatory treatment, in particular in favour of its subsidiaries, to give them an advantage as compared to competitors.⁴⁰

The Competition Authority sometimes applies specific tests applicable to specific practices. Three examples:

Fidelity rebates.

In Decision No. 10-D-39, vertical road signs, the Competition Authority selected two criteria showing the discriminatory nature of a rebate scale initially laid down by the Court of Justice of the European Union in its judgment of 29 March 2001, Portuguese Republic v Commission.⁴¹

Bundled rebates.

In Decision No. 05-D-58, drinking water in Ile-de-France, the Competition Authority assessed elements constitutive of a bundling practice to establish anti-competitive discrimination (para 103 of the Decision).

Predatory prices.

In its Decision No. 07-D-09, GlaxoSmithKline, the Competition Council recalls that the applicable test is the "cost test", which it therefore applied in this case. The Paris Court of Appeal finally amended the decision of the Competition Council.⁴²

In some cases, the Competition Authority admits that a discriminatory conduct can be qualified as an abuse of dominant position as well as an agreement or an abuse of economic dependence.

4. Forms of "secondary-line" discrimination prohibited as exploitative abuses

Article L 420-2 specifies that an exploitative abuse can typically consist of "discriminatory conditions of sale".

Such a practice cannot really be qualified as "the most analysed/sanctioned". Only a few decisions deal with exploitative abuses and not exclusionary abuses; they analyse and in some cases sanction various discriminatory conducts without imposing any fine.

In Navx vs Google,⁴³ there is an exploitative abuse as a discrimination:

- In the promotion between GPS manufacturers who can provide radar databases on their website without being excluded from the AdWords service, and manufacturers of warning devices and radar databases who cannot;
- And with regard to the information available to advertisers: some are informed, in writing and in time not to be suspended, of the exact scope of the rule or Google's interpretation of it (this is the case with

³⁹ Competition Council, Decision No. 00-D-85 of 20 March 2001 related to conducts in the sector of sodium chlorate distribution; Decision No. 05-D-58 of 3 November 2005 related to conducts in the drinking water sector in Ile-de-France.

⁴⁰ Competition Authority, Decisions No. 02-D-69, No. 07-D-28, No. 07-D-33, No. 09-D-02, No. 09-D-06, No. 09-D-15, No. 10-D-06, No. 10-D-32, No. 12-D-01, No. 12-D-22, No. 12-D-24, No. 12-D-25, No. 13-D-04, No. 13-D-05, No. 14-D-05 and No. 17-D-13.

⁴¹ Case C-163/99, *Portuguese Republic vs Commission* [2001] ECR I-02613.

⁴² Paris Court of Appeal, 1st Chamber, section H, RG No. 2007/07008, 8 April 2008 : *"there is no evidence to link the lack of entry of other generic manufacturers to GLAXO's pricing practices in the cefuroxime sodium market; There is no element in the file which enables to exclude the applicant's assumptions on this point regarding the deterrent effect of the prior entry of these generic manufacturers that would not capture sufficient residual market share or on the significant and consistent decline in market value [...]; Based on the foregoing, the claims of abuse of dominant position by predatory pricing attributed to GLAXO cannot be confirmed and this company must therefore be exonerated [...] it is not established that the company[GLAXO has] infringed the provisions of Article L 420-2 of the Commercial Code"*. Confirmed by Cour de Cassation, Commercial Chamber, 17 March 2009, No. 08-14.503.

⁴³ Competition Authority, Decision No. 10-D-30 of 28 October 2010 related to conducts in the online advertising sector; Especially Decision No. 10-MC-01 of 30 June 2010 related to the request for interim measures by Navx.

Affili-action) and others are informed in writing only after the account suspension (this is the case with Navx).

Google's freedom to define its AdWords content policy does not exempt Google from the obligation to implement this policy under objective, transparent and non-discriminatory conditions. In particular, it must (i) define general and unambiguous rules, (ii) clearly inform advertisers of their existence and, where appropriate, change these rules by providing advertisers with equally clear information and sufficient notice before they enter into force, (iii) define an equally objective and transparent procedure for the control and suspension of accounts and (iv) ensure non-discriminatory application of the rules and well-defined procedures.

In the E-Kanopi vs Google case,⁴⁴ E-Kanopi argues that there was a discrimination in the application of Google's rules aimed at weakening E-Kanopi vis-à-vis its competitors, which would be characterized in two different ways:

- Google would have allowed competitors of E-Kanopi to continue to use the AdWords service whereas in similar cases, the complainant's accounts were suspended;
- And more ingeniously Google would have minimized in practice the display of E-Kanopi's ads based on the quality rating of the complainant's advertising campaigns.

But on the second point, E-Kanopi does not provide any evidence to suggest that Google is alleging a quality criterion with an anti-competitive effect. Indeed, the fact that some of E-Kanopi's advertising campaigns may have had particularly low scores due to a low ranking does not in itself justify the low-quality scores by Google's discriminatory choices.

Finally, in the recent case of Amadeus vs Google,⁴⁵ the Competition Authority "*noted that, given the evidence given, the practices alleged by Amadeus are likely to be discriminatory. This is based in particular on the fact that providers of electronic intelligence services have been able to broadcast ads via Google Ads whereas Amadeus ads with identical terms were refused.*"

The Competition Authority's decision-making practice already has several decisions dealing with discriminatory conducts in the digital sector: they concern exploitative abuses.⁴⁶

This sector is one of the main concerns of the Competition Authority, which advocates, for instance, the creation of a digital "*task force*" with its own budget and perhaps whose priority will focus on the digital giants.

We can also refer to Opinion No. 18-A-03 of 6 March 2018 on data processing in the online advertising sector ("Opinion on online advertising"). Following this Opinion on online advertising, the General Rapporteur of the Competition Authority announced on 8 November 2018 the opening of investigations into the collection, exploitation of data and abusive access restrictions. Discrimination cases may be identified among these conducts.

Algorithms are also a real issue with regard to the joint study on algorithmic collusion of the French Competition Authority and the German Competition Authority, launched in 2018.

⁴⁴ Competition Authority, Decision No. 13-D-07 of 28 February 2013 related to referrals by E-kanopi.

⁴⁵ Decision No. 19-MC-01 of 31 January 2019 related to the request for interim measures by Amadeus; Mostly confirmed by Paris Court of Appeal, 4 April 2019, RG No. 19/03274.

⁴⁶ Decision No. 10-MC-01 of 30 June 2010 related to the request for interim measures by Navx; Decision No. 10-D-30 of 28 October 2010 related to conducts in the online advertising sector; Decision No. 13-D-07 of 28 February 2013 related to a referral of E-kanopi; Decision No. 18-D-13 of 20 July 2018 related to conducts operated by Google on the online advertising sector; Decision No. 19-MC-01 of 31 January 2019 related to the request for interim measures by Amadeus.

B. Identification and description of discriminatory conducts pertaining to an anticompetitive agreement (Article 101 TFEU and its equivalent under your national law)

The Competition Authority and the DGCCRF have issued several decisions dealing directly with the notion of discrimination, explicitly devoting paragraphs on the qualification of this type of behaviour in anticompetitive agreements.

From 2000 to May 2019, 13 decisions of the Competition Authority and 9 decisions of the DGCCRF sanctioning discriminatory conducts were identified. As the published DGCCRF decisions are not sufficiently described, they are not included below.

The typical cases of discriminatory conducts sanctioned under Article L. 420-1 of the Commercial Code are as follows:

- Discrimination relating to the conditions of membership

Many decisions concern the conditions for an operator's membership of an association, organisation or economic grouping. In particular, a series of decisions were related to the taxi transport sector.

It results from settled case law, reiterated in a judgment of the Paris Court of Appeal of 27 May 2003, confirming on this specific point a decision of the Competition Council, that *"the conditions for membership of a professional association may affect free competition if, on the one hand, such membership is a condition for access to the market or if it constitutes a competitive advantage and if, on the other hand, these conditions for membership are defined or applied in a non-objective, non-transparent or discriminatory manner"*.⁴⁷

These principles are based on two decisions of 2001 concerning the refusal of a candidate to join an Economic Interest Grouping ("EIG") of taxi drivers. In the first case, the Competition Council sanctioned the conducts of the grouping aimed at imposing non-objective and discriminatory criteria on new members by applying a high entry fee to candidates who do not succeed a member of the grouping⁴⁸. In the second case, the Competition Council imposed a fine on a group of taxi drivers after having found that, in addition to the need to be sponsored by two members, *"membership is not based on any objective criteria making it possible to assess the potentially discriminatory nature of the decision taken by the grouping"*. For the Council, *"the sponsorship requirement, the absence of objective selection criteria and the discretionary nature of the EIG's decision, reflected in the absence of reasons for decisions to refuse admission, could have hindered a new entrant's access to the market concerned or, at least, limited the access of craftsmen excluded from the grouping to customers"*. In addition, noting that the articles of association provided that any operator who buys a taxi driver's licence from a member of the group automatically joins the group without any sponsorship constraints, risk of refusal or membership fees, the Council considered that *"the difference of treatment provided for in the GTL's articles of association artificially discriminates between craftsmen according to whether or not they have bought back a licence held by one of the GTL members"*, which constitutes a violation of Article L. 420-1 of the Commercial Code.⁴⁹

Similarly, in a decision of 2010, the Competition Authority sanctioned a taxi driver EIG on the grounds that, similarly to the decision of 2001 cited above, *"The distinction made on this ground between a new member and a successor therefore appears [...] to be also devoid of any objective basis and artificially discriminates on the sole basis of the licence buyback to a member of the EIG criterion."* and that *"Since it is not questionable that membership of an EIG is likely to constitute [...] an essential condition for market access, the lack of objectivity*

⁴⁷ Paris Court of Appeal, 27 May 2003, RG No. 2002/1860, reforming the Competition Council Decision No. 02-D-60 related to conducts by Chambre syndicale des entreprises de déménagement and Association française de déménageurs internationaux; See also Competition Authority, Decision No. 10-D-15 of 11 May 2010 related to conducts by EIG "grouping of Amiens and metropole Taxis".

⁴⁸ Competition Council, Decision No. 00-D-78 of 21 March 2001 related to the competition situation in the Besançon taxis sector; Decision No. 00-D-79 of 21 March 2001 related to the competition situation in the Belfort taxis sector.

⁴⁹ Competition Council, Decision No. 01-D-32 of 27 June 2001 related to referral of M. Henri Faraud concerning conducts in the Saint-Laurent-du-Var taxis sector.

and justification of the grounds for refusing access to the EIG could have prevented a new entrant from entering the market concerned and limited access to the customers of craftsmen excluded from the EIG".⁵⁰

More recently, in a decision of 28 March 2019, the Competition Authority considered that "The condition of sponsorship by at least two members of the EIG [...] and the need to obtain unanimous agreement from all members of the EIG entail a risk of arbitrary discrimination between candidates. In addition, the possibility to apply an entry fee to the association, the method of calculation of which is not provided for in the articles of the association in objective conditions and left to the discretion of the general assembly, may be used arbitrarily to prevent a new entrant's access to the taxi market in the municipality of Antibes Juan-les-Pins. It follows from the above that the conditions for access to the EIG are non-objective, non-transparent and discriminatory [...]"⁵¹

Finally, in a decision rendered on 24 June 2019, the Authority considered that, since the entry into force of the law of 6 August 2015 promoting the creation of new bailiffs' offices only, the fact for a group of bailiffs to condition the membership of new members of the group (i) on the holding of a bailiff's office, (ii) on the payment of a financial contribution, the amount of which is determined at the discretion of the general assembly, and (iii) the amount of which may not be less than 300,000 euros for the offices created since the entry into force of the aforementioned law, (iv) the acceptance of membership being decided unanimously by the members of the group, whereas all the existing members of the group were, in fact, already holders of an office, and had never in the past been subject to the condition of payment of a financial contribution, amounted to "preventing the accession of all the new offices created pursuant to the law of 6 August 2015". The Authority concluded that the Grouping's articles of association provided for non-objective, non-transparent and discriminatory conditions for membership. The conditions and procedures for withdrawal and exclusion were also considered as such.⁵²

In the field of the collective quality approach, the behaviour considered discriminatory consisted in the implementation of a certification system which, given the almost indispensable nature of service certification in France, had the object and effect of excluding from the French market for the installation and maintenance of portable fire extinguishers, undertakings that did not have NF-marked fire extinguishers but had fire extinguishers holding a certificate of conformity with European standards.⁵³

- Tariff discrimination

The Competition Council sanctioned conducts consisting in granting more advantageous pricing conditions to a certain category of distributors who did not provide any of the services of the distributors in that category: *"the concrete analysis of tariff differentiations by category of resellers reveals, behind the objective of remuneration for services provided displayed by Texas Instruments France, discrimination against distributors in category I [...]. Thus, mail-order distributors benefit from the most advantageous pricing conditions (tariffs 26.4 to 36.5% lower than in category I), while they do not provide any of the services required of distributors in categories II and III to benefit from these tariffs and should have been treated as distributors in category I."*⁵⁴

- Contractual terms creating discrimination

More specifically, the Competition Council imposed sanctions on an undertaking in the slaughter and commercialisation of animals for slaughter on the grounds that activity quotas imposed in agreements were discriminatory in nature. In this case, the undertaking managing a public slaughterhouse had worked out with other users different activity quotas according to the users and had thus submitted certain users who had made

⁵⁰ Competition Authority, Decision No. 10-D-15 of 11 May 2010 related to conducts of EIG GIE « grouping of Amiens and metropole Taxis ».

⁵¹ Competition Authority, Decision No. 19-D-05 of 28 March 2019 related to conducts in the Antibes Juan-les-Pins taxis sector; this decision is under appeal.

⁵² Competition Authority, Decision No. 19-D-13 of 24 June 2019 related to conducts in the bailiffs sector; This decision can be appealed.

⁵³ Competition Authority, Decision No. 12-D-26 of 20 December 2012 related to conducts in the sector of production, marketing, installation and maintenance of extinguisher.

⁵⁴ Competition Council, Decision No. 03-D-45 of 25 September 2003 related to conducts implemented in the school calculator sector ; Confirmed by Paris Court of Appeal 21 September 2004, RG No. 2003/18636 ; Contested on another issue by Court of Cassation, Commercial Chamber 22 November 2005, No. 04-19108 (this issue gave rise to two decisions: Paris Court of Appeal 20 November 2007, RG No. 20006/21159 then Court of Cassation, Commercial Chamber, 18 November 2008, No. 07-21743).

slaughter requests to *"particular or repeated requirements for reasons that were not opposed to the other users."*⁵⁵

This case also included a "refusal to access a service" section, which led to a judgment of the Commercial Chamber of the Court of Cassation, confirming the views of the Competition Council and the Paris Court of Appeal. According to the Commercial Chamber, *"after noting that Ernée had requested access to the services of the Laval slaughterhouse on nine occasions, [...] the judgment retains, on its own and adopted grounds, that STAL justified its successive refusals on dilatory, discriminatory or false grounds ; that, in particular, on the one hand, Ernée was required to provide a bank guarantee immediately [...] while the associated users of the STAL had [...] distributed certain available tonnages without the legally due guarantee being obtained [...], on the other hand, the saturation of the slaughterhouse's capacity was cited, while [...] the STAL Board of Directors stressed the significant drop in tonnages and planned to increase resources by finding additional volumes of pigs in particular; that the Court of Appeal was able to conclude that STAL, Privileg, Mayenne Viandes and Fermiers de l'Erve had agreed to deny Ernée access to the services of the Laval slaughterhouse and legally justified its decision."*⁵⁶

Finally, in another case, the Competition Authority considered that the price distortion introduced by future contract (a process whereby some customers benefit from a preferential price) implied, in order for it to operate on a permanent basis, that it is extended by discriminatory conducts. The Competition Council, as a matter of fact, considered that *"As the volume of the subsidy was limited, the shortage had to be managed by limiting the number of beneficiary customers. These were chosen from among the major buyers, in particular large export customers who were tempted to compete by sourcing from other European countries. [...] In total, under the appearance of futures contracts, CERAFEL has instituted an anti-competitive agreement aimed at favouring exports of Breton cauliflowers to certain predetermined traders, mainly operating outside France, a practice contrary to the provisions of Article 81 § 1 of the EC Treaty and L. 420-1 of the Commercial Code"*.⁵⁷

As regards contractual restrictions on EIG membership, the case law is well established. The test applied is as follows: the conditions for membership of a professional association may affect free competition if, on the one hand, such membership is a condition to access the market or if it constitutes a competitive advantage and, on the other hand, these conditions for membership are defined or applied in a non-objective, non-transparent or discriminatory manner.⁵⁸

In terms of a collective quality approach (approval necessary to access a market, quality label, professional identification system leading to the selection of companies according to their aptitude or quality criteria), it follows from the decision-making practice of the Competition Council that *"On the other hand, such an agreement would be anti-competitive if the criteria for awarding a label, the holding of which is essential to carry on an activity, were not sufficiently objective and clear and lent themselves to discriminatory application, thus making it possible to foreclose competitors from the market concerned by the label, by means other than those based on the merits of the undertakings"*.⁵⁹ In a 2001 decision, the Competition Council specified that for a system of *"professional identification to be acceptable under the competition rules, the criteria set must be clear and objective and must be such as to guarantee the competence of professionals without going beyond what is strictly necessary for this guarantee"*.⁶⁰

⁵⁵ Competition Council, Decision No. 04-D-39 of 3 August 2004 related to conducts implemented in the slaughter and marketing of animals for slaughter.

⁵⁶ Court of Cassation, Commercial Chamber 14 March 2006, No. 05-13048, confirming Paris Court of Appeal 22 February 2005, RG No. 2004/14592, given on the appeal of Competition Council, Decision No. 04-D-39 of 3 August 2004 related to conducts implemented in the slaughter and marketing of animals for slaughter.

⁵⁷ Competition Council, Decision No. 05-D-10 of 15 March 2005 related to conducts in the sector of cauliflower in Brittany.

⁵⁸ Paris Court of Appeal 27 May 2003, RG No. 2002/1860, reforming Competition Council, Decision of 27 septembre 2002 related to conducts of Chambre syndicale des entreprises de déménagement and Association française de déménageurs internationaux.

⁵⁹ Competition Council, Decision No. 05-D-22 of 18 May 2005 related to conducts by association «Agriculture et Tourisme en Dordogne-Périgord » in the sector of touristic welcome of farmers in their farms. See also: Competition Council, Decision No. 5-D-41 of 18 July 2005 related to conducts by the commission paritaire nationale de l'emploi et de la formation professionnelle des jardineries et graineteries.

⁶⁰ Competition Council, Decision No. 00-D-84 of 8 February 2001 related to professional identification given by the Fédération nationale des travaux publics (FNTP).

In other cases, to our knowledge, there is no test specifically developed by the competition authorities. However, discrimination constitutes an anti-competitive conduct when it has the effect of foreclosing competitors from a market or limiting or blocking access to a market, thereby distorting free competition.

The competition authorities thus seek to determine whether economic operators have agreed to foreclose competitors from the relevant market. For example, in the context of a vertical agreement between Cinemat and some of its customers, the Competition Council dismissed the proceedings on the grounds, inter alia, that "*the conditions of sale do not contain any restrictions likely to limit the access of competing suppliers to the vending machine market or to a related market*".⁶¹

C. Discrimination in mergers analysis

The Authority takes into account the discriminatory effects of a merger, in particular where the merger results in a difference of treatment between the players on the relevant market, such as denying access to an essential facility, or where the merger leads to *de facto* or *de jure* exclusivity, or where the merger results in a leverage effect that closes off market access. While the applied remedies are frequently structural measures, they are sometimes supplemented by behavioural measures, such as the obligation to grant access to infrastructure to competitors in a transparent and non-discriminatory manner, or the obligation to terminate an exclusivity contract.

We can consider that the principle of non-discrimination is taken into account whenever the Competition Authority imposes measures to preserve or promote market access for current or potential competitors, i.e. whenever there is a risk of foreclosure to the upstream or downstream markets. In rare cases, the Competition Authority has examined the potential discriminatory effect of a merger without retaining it. The circumstances in which the discrimination issue played a role in the analysis of the concentration are mainly as follows:

1. The granting of access to networks or infrastructure, in a non-discriminatory and transparent manner⁶² like the access to the rail network to promote intermodality. We can also mention Decision No. 14-DCC-15 of 10 February 2014 on the acquisition of sole control of Mediaserv, Martinique Numérique, Guyane Numérique and La Réunion Numérique by Canal Plus Overseas, in which the Authority identified several risks of competitive harm linked to the horizontal effects of the operation on the intermediate markets for the publishing and marketing of pay-TV channels and on the downstream markets for the distribution of pay-TV services.
2. The termination or modification of exclusivity contracts. The orders issued against Canal Plus Group were intended to guarantee competing distributors access to the inputs of pay-TV channels.⁶³
3. The supervision of commercial behaviour. We can consider that all behavioural measures aiming at preventing the exercise of a leverage effect fall into this category, they often consist in a control of the commercial practices of the different players. For example: Electricité de Strasbourg has undertaken not to market coupled offers based on its ability to offer regulated gas or electricity tariffs.⁶⁴ In the pay and free television markets, the corrective measures balanced Canal Plus Group's leverage effect between its buying power in the pay television markets and its acquisitions of broadcasting rights for free television.⁶⁵

We can also put in this category Decision No. 09-DCC-54 Novatrans SA in which the acquisition of exclusive control of Novatrans, a combined road-rail transport operator, by SNCF, a rail transport operator, resulted in the new entity being able to discriminate against its competitors by, for example, reserving for itself the best prices or time schedule, or by delaying the arrival or departure of a train. The Competition Authority considered that

⁶¹ Competition Council, Decision No. 05-D-18 of 29 April 2005 related to conducts by Cinemat.

⁶² Competition Authority, Decision No. 12-DCC-129 of 5 September 2012 related to acquisition of sole control of Group Keolis by SNCF-Participations.

⁶³ Competition Authority, Decision No. 12-DCC-100 of 23 July 2012 related to the fusion Canalsatellite/TPS.

⁶⁴ Competition Authority, Decision No. 12-DCC-20 of 7 February 2012 of 7 February 2012 related to the acquisition of sole control of Enerest by Electricité de Strasbourg.

⁶⁵ Competition Authority, Decision No. 12-DCC-101 of 23 July 2012 related to the acquisition by GCP of Direct 8 and Direct Star.

this discriminatory behaviour would enhance the attractiveness of the group in downstream markets, by promoting the use by combined transport operators of the new entity's rail services and the use by road hauliers of combined transport operators using the services of the new entity. While the Competition Authority considered that SNCF's incentive to stop offering these services on the market and to reserve them for Novatrans was too low, it stressed the risk of discriminatory conduct, in particular in terms of the pricing of traction services, between its subsidiary and Novatrans' competitors. The Competition Authority has ruled that, at the end of the operation, Novatrans will be encouraged to favour SNCF group road hauliers to the detriment of its third party customers in the event of congestion of the railways traffic, through price discrimination but also through the way orders are processed. The risk is more than obvious as the Competition Authority considered that, due to the high barriers to entry into the combined transport market, the emergence of new operators in the short term was unlikely.

There are also cases in the Competition Authority decision-making practice where the risks of discriminatory effects have been taken into account and examined without being ultimately retained. This is the case in Decision No. 18- DCC-235 Aéroport de Paris (ADP) on the creation of a vertical merger that may restrict competition by making it more difficult to access the markets in which the new entity will operate, or even by potentially foreclosing competitors or penalising them by increasing their costs. Nevertheless, the evidence gathered during the investigation shows, as was pointed out by the European Commission in Decision COMP/M.3762, that the risks of foreclosure of the downstream market or discriminatory pricing practices can, in principle, be ruled out as a result of ADP's control over the way in which the joint venture carries on its business.

In the present case, the joint undertaking was contractually obliged to accept and process all tax-free slips, irrespective of the tax exemption operator who issued them, in accordance with the principles of fair treatment and non-discrimination. This obligation resulted from the terms of the lease between ADP and the joint venture. Secondly, ADP had the means to monitor the joint venture's compliance with its commitments regarding the absence of discriminatory conducts against competitors of its parent companies. In particular, ADP had extensive audit powers (communication of documents, in-depth audits) to ensure that the Joint Undertaking effectively complied with the non-discrimination commitments made in response to tenders. In the event of non-compliance by the joint venture with the principles of fair and non-discriminatory treatment of the various tax-exempt operators, ADP could initiate a termination procedure of the lease concluded with the joint venture.

III. Objective justifications to discriminatory conducts

Under French law, restrictions of competition may be exempted on the basis of Article L. 420-4 of the Commercial Code, in particular when:

- The conducts result from a legislative or regulatory provision and are the direct and necessary consequence of these provisions.
- Where the conducts contribute to economic progress, which must meet the following conditions: (i) demonstration of economic progress, both in its nature and in its quantum, by the undertaking invoking it, (ii) demonstration of objective progress for the community as a whole and not simply a cyclical or more broadly individual improvement in the situation of the undertakings concerned, (iii) demonstration that economic progress is the direct consequence of the practices in question and that it could not have been achieved by other means, less restrictive of competition, (iv) demonstration that this progress is sufficiently important to compensate, from a qualitative and quantitative point of view, for the infringements of competition identified.⁶⁶

We are not aware of any decisions rendered by the Competition Authorities that have not sanctioned discriminatory conducts on the basis of Article L. 420-4 of the Commercial Code and more specifically on economic progress.

⁶⁶ Competition Authority, Annual Report 2012, p. 201.

However, it appears from the decision-making practice that an undertaking in a dominant position has the possibility to prove that the discrimination is objectively justified.⁶⁷

IV. Objectives justifying the prohibition of discriminatory conducts

Rather than by sanction, we found that the restoration of effective competition on a given market could occur with the injunction, as an interim measure. In two interim measure decisions concerning Google⁶⁸, the injunctions to clarify account suspension procedures or the scope of the rules were aimed precisely at restoring effective competition.

In decisions rendered in the field of access to a grouping, the Competition Authority has, in some cases, imposed orders. For example, in 2001, the Competition Council instructed a grouping not to rely on an agreement with another grouping to refuse taxi drivers to advertise.⁶⁹ In 2005, the Council instructed cauliflower producer groupings to remove clauses from their general terms and conditions of sale deemed anti-competitive.⁷⁰ Finally, in 2019, the Competition Authority instructed an EIG of taxi drivers to "remove from the current constitutive contract the non-objective, non-transparent and discriminatory conditions for access to the EIG as well as the provisions limiting the exercise of a competitive activity by its members".⁷¹ As an alternative to injunctions, one case resulted in the implementation of commitments by the grouping.⁷²

Thus, in some cases, the Competition Authority logically draws the consequences of its findings by requiring the removal of terms deemed anti-competitive, the objective being, of course, to restore competition by removing the restriction to market access.

However, the injunction is not systematic.

One can also wonder whether equity comes into play. In competition law, the concept of equity is not used by the competent authorities.

However, it appears that the notion of competitive equity has been raised with regard to the opening up to competition of different sectors, in particular the rail sector. In this respect, the Authority considered that the key factors to ensure the emergence of effective competition are based above all on the identification of the competitive risks that need to be prevented in order to create conditions of competitive equity between the different operators for those parts of these sectors that are open to competition.

For example, in the rail sector, the Authority has highlighted discriminatory access to rail infrastructure essential for the activity of railway undertakings⁷³.

In addition, the term equity may be used in certain situations to refer to equality, which is more commonly used by the Authority, in particular in the context of discriminatory behaviour or participation in public contracts.

⁶⁷ Competition Council, Decision No. 09-D-36 of 9 December 2009 related to conducts by Orange Caraïbe and France Télécom in different markets for electronic telecommunications services in the Martinique, Guadeloupe and Guyane; Paris Court of Appeal, 23 September 2010, RG No. 2010/00163.

⁶⁸ Competition Authority, Decision No. 10-MC-01 of 30 June 2010 related to the request for interim measures by Navx ; Decision No. 19-MC-01 of 31 January 2019 related to the request for interim mesures by Amadeus.

⁶⁹ Competition Council, Decision No. 01-D-32 of 27 June 2001 related to the referral by M. Henri Faraud concerning conducts in Saint-Laurent-du-Var taxis sector.

⁷⁰ Competition Council, Decision No. 05-D-10 of 15 March 2005 related to conducts in the sector for cauliflower in Brittany.

⁷¹ Competition Authority, Decision No. 19-D-05 of 28 March 2019 related to conducts in Antibes Juan-les-Pins taxis sector; This decision is under appeal.

⁷² Competition Council, Decision No. 06-D-29 of 6 October 2006 related to conducts by EIG Les Indépendants in the radio sector; Confirmed by Paris Court of Appeal, 6 November 2007, RG No. 2006/18379 (decision censored on another issue by Court of Cassation, 4 November 2008, No. 07-21275, followed by Paris Court of Appeal, 6 October 2009, No. 2008/21057 and finally Paris Court of Appeal, 1st June 2010, RG No. 2008/21057 confirming permanently the Competition Council's decision).

⁷³ Competition Authority, Opinion 13-A-14 of 4 October 2014 on the draft law on rail reform.

V. Relevance of other legal "areas" to apprehend discriminatory conducts?

Some of the economic operators' behaviour denounced by their competitors are condemned in the context of unfair competition because it wrongfully creates a breach of equality between operators.

This may involve operators failing to comply with the rules that define the conditions of their activity or that govern certain commercial practices. Case law considers that failure to comply with these rules constitutes a misconduct towards those who comply with them. These rules create organisational and operational constraints that have an impact on the costs incurred by undertakings and their ability to attract customers. By failing to comply with these regulations, and by freeing themselves from the resulting costs, undertakings create a competitive advantage that is not based on their own merit, greater efficiency, or greater capacity for innovation. Since this advantage and the resulting displacement of customers is not obtained fairly, they cannot benefit operators at the expense of their competitors.

The question can also be raised in regulatory sectors. Sector regulators operate in France in markets that are opening up to competition (Telecom, Energy, Railways). They use *ex ante* or *ex post* controls depending on the circumstances and characteristics of the market segments.

The telecommunications sector is a good example of this interactive use of controls.

The French telecommunication regulator, "ARCEP", defines, on the one hand, a monopoly zone where Orange is the only operator offering bitstream and, on the other hand, a zone of permanent competition where at least one third of operators offer a bitstream offer. In this context, in areas where competition is effective, cost accounting and accounting separation obligations intended to facilitate the *ex post* control by the Competition Authority of possible margin squeeze practices may in particular be maintained. However, the maintenance in these areas of *ex ante* tariff obligations, in particular the obligation to charge fees reflecting costs, does not seem to be justifiable.⁷⁴

In an Opinion, the Competition Authority recalled that the possibility of using the input equivalence to ensure compliance with the principle of non-discrimination must be put into perspective with Opinion No. 11-A-05. The Authority recalled that, among the regulated network industries, the electronic communications sector is the one for which the current separation measures are the weakest and that this situation could, in the long term, hinder the transition process which should ultimately lead to the repeal of *ex ante* regulation in favour of the sole *ex post* application of competition law.

The Authority indicated at the time of the establishment of this framework that the choice between symmetric or asymmetric regulation, while justifiable for reasons of balance and investment incentives, should not ultimately lead to an incomplete or less pro-competitive regulatory framework⁷⁵. This concern applies not only to the type of network access obligations that may be imposed (presence or not of a fibre unbundling offer and a very high-speed bitstream offer) but also to the tools available to the sectoral regulator to ensure compliance (accounting separation, reference offers, cost information, etc.) and which may justify its *ex ante* intervention. The Competition Authority reiterates this point in the context of the emergence of the very high-speed market: if the symmetric regulatory framework proves insufficient in the future, the question of the consequences of a vacancy in asymmetric regulation will arise. Indeed, it must be ensured that any imbalance occurring during the development of a new market does not have structuring consequences in the long term. The Competition Council had already had the opportunity to emphasize in its Opinion No. 08-A-06 para 21 the structuring effects of distortions of competition affecting new markets by stressing, on the one hand, the importance of volume and learning effects on these emerging markets and, on the other hand, the permanence of these effects.

The field of energy shows a similar logic. Article L 322-8 of the Energy Code requires the electricity distribution system operator, in particular, to "*ensure, under objective, transparent and non-discriminatory conditions, access to these networks*". The Commission de Régulation de l'Énergie, "CRE", uses *ex ante* control

⁷⁴ Competition Authority, Opinion No. 14-A-06 of 15 April 2014 related to the request for opinion of the Autorité de régulation des communications électroniques et des postes (ARCEP) related to the fourth cycle of analysis of markets of wholesale broadband, very high speed and capacity services.

⁷⁵ Competition Authority, Opinion No. 10-A-18 of 27 septembre 2010 related to a project of decision of the Authority the Regulatory Authority for Electronic Communications and Posts for the deployment of optical fibre outside very dense areas, §20-23.

in non-interconnected sectors (ZNI) in which it implements a dynamic regulation mode based on a prior assessment of the contracts concluded between the incumbent operators and the undertakings in the sector. But it also applies sanctions, as part of an *ex post* control, via the Dispute Settlement and Sanctions Committee, the “CoRDiS”.

The contracts provide for a system designed to overcome the "competitive disadvantage" of new entrants suppliers who, because of the lack of scale effects enjoyed by the incumbents, faced higher customer management costs. Thus, the draft contract provides that the supplier's remuneration should be limited in time and, in any event, could only be paid to a new entrant operator that did not reach the threshold of 1 750 000 customers under a single electricity contract. After having referred this last point to the President of the Competition Authority, the CRE considered, by a decision on a communication dated 26 July 2012, that this "asymmetrical" mechanism could contribute to the opening up of the electricity supply to competition on the retail market, without ignoring the principle of non-discrimination between suppliers.⁷⁶

In addition, as part of the *ex post* control, a sanction procedure may be initiated by the CoRDiS, in particular for breaches of the rules defined by the REMIT Regulation or any other breach likely to seriously affect the functioning of the energy market, including the capacity obligation mechanism.⁷⁷

Several CoRDiS decisions aim to punish incumbents.

For example, in Decision No. 08-38-17 on the dispute between Joul and Enedis, the CoRDiS considers that, by refusing to grant Joul's request for payment of remuneration for the costs financed by it on behalf of the grid operator, whereas it appeared from the investigation that, on that date, six other suppliers were benefiting from it, Enedis has failed to comply with its obligation to treat them in a non-discriminatory manner within the meaning of Article L. 322-8 of the Energy Code.

VI. Future of the prohibition of discriminatory conducts on a competition law perspective

We have not identified an increase in decisions in France based on abuse of exploitation in the strict sense, as in other European countries, such as the Aspen decisions in Italy⁷⁸ or Pfizer in the United Kingdom on the excessive price of drugs⁷⁹ (but, in France, the delimitation between exploitative and exclusionary abuses remain thin).

Only a few scattered decisions by the Competition Authority may illustrate the sanction of this practice, but they do not reflect a general trend. For example, the Competition Authority has sanctioned pricing practices of a dominant operator in the overseas telecoms sector.⁸⁰ More recently, the Competition Authority sanctioned a monopoly undertaking in the infectious healthcare waste disposal market in Corsica for having brutally, significantly, durably and unjustifiably increased the tariffs applied to Corsican hospitals and clinics for the disposal of this waste. This Sanicorse case is a very special case, close to a refusal to deal.⁸¹

The lack of decision-making practice is explained by the fact that no test can convincingly qualify the excess. Neither the analysis of capital profitability, nor the analysis of margins, nor any historical or geographical reference frame makes it possible to define a fair price beyond which abuse would be characterized. Obviously, the cases identified are still in sectors where supply is inelastic to demand, but it seems that a rapid price increase is more an effect of another breach of competition law than a problem in itself.

⁷⁶ Commission de Régulation de l’Energie, Report on legal activity in 2018, June 2019, p. 23.

⁷⁷ Article L. 134-25, point 3, of Energy Code.

⁷⁸ Italian Competition Authority, Decision A480 of 29 November 2016, Measure No. 26185, Price increase of Aspen’s Drugs, Bollettino 36/2016.

⁷⁹ Competition Appeal Tribunal, Decision No. 1276/1/12/17 of 7 February 2017 Pfizer Inc. and Pfizer Limited v Competition and Markets Authority.

⁸⁰ Competition Authority, Decision No. 09-D-24 of 28 July 2009 relating to practices implemented by France Telecom on various markets for fixed electronic communications services in the French overseas departments.

⁸¹ Competition Authority, Decision No. 18-D-17, of 20 September 2018 relating to practices implemented in the infectious healthcare waste disposal sector in Corsica.

In France, it is also possible to analyse excessive prices, in the absence of a dominant position, under Article L.442-1, I, 2° of the Commercial Code, which prohibits (between professionals) the submission or attempted submission to a significant imbalance in the rights and obligations of the parties.

The e-commerce sector is particularly conducive to the development of discriminatory conducts. Such sector facilitates three practices: (i) many markets have seen the development of selective distribution networks outside traditional sectors such as luxury, (ii) in which pricing is anarchic, and (iii) geo-blocking are frequently identified.

Online sales have been the subject of particular vigilance by competition authorities: as from 2012, the Competition Authority issued a particularly detailed Opinion on the competitive functioning of electronic commerce.⁸²

In principle, any distributor is free to use the Internet to sell its products: "*As a general rule, a distributor's use of a website to sell products is considered a form of passive selling, as it is a reasonable way for consumers to reach the distributor*".⁸³

The Competition Authority established this principle in Decisions n°06-D-28 of 5 October 2006 on practices implemented in the sector of selective distribution of Hi-fi and Home Cinema equipment and n° 07-D-07 of 8 March 2007 on practices implemented in the sector of distribution of cosmetic and body hygiene products. However, none of these cases led to a sanction or prohibition decision, as all the companies amended their distribution contracts to allow online sales by authorised distributors.

On 28 February 2018, the European Union adopted Regulation (EU) 2018/302 to counter unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market. It has been directly applicable in France since 3 December 2018. In accordance with the principle of non-discrimination already established by the "Services" Directive, the Commission wishes to prevent geo-blocking and other forms of discrimination based on nationality or place of residence (e.g. requests for payment with a debit or credit card from a particular country). The Commission proposes legislation to ensure that consumers who wish to purchase goods or services in the European Union are not discriminated against whether the sale is made physically or online.

To highlight discriminatory conducts in the market between traditional and online commerce, it is necessary to consider both areas as a single market. The issue is still being discussed in two merger control decisions. For example, regarding the book market, the Competition Authority examined in particular the impact of the development of digital books and online book sales on the delimitation of the publishing markets, and in particular, the upstream market for the acquisition of rights, the market for the distribution and distribution of books and the book sales markets. However, raising that the competitive analysis remained unchanged under all assumptions, the Competition Authority left open the question of the existence of segmentation specific to e-books and online sales.

The Competition Authority has noted, in line with its Opinion No. 12-A-20 of 18 September 2012 on the competitive functioning of electronic commerce, that although they operate through a separate distribution channel, the players in the second-hand book retail sector exert significant and increasing competitive pressure on traditional distributors. However, a single market for the retail sale of books in physical and online outlets has not been adopted. Therefore, the Competition Authority concluded that the transaction was not likely to affect competition on the market for the retail sale of books to the final consumer.⁸⁴

More recently, the Competition Authority included for the first time online and physical sales of products in the same relevant market, first in the brown goods sector (TVs, cameras and audio products: MP3, DVD and Blu-

⁸² Competition Authority, Opinion No. 12-A-20 of 18 September 2012 relating to the competitive functioning of electronic commerce.

⁸³ EU Guidelines on vertical restraints C 130/1, p.52.

⁸⁴ Competition Authority, Decision No. 17-DCC-186 of 10 November 2017 relating to relating to the acquisition of sole control of Gibert Jeune by Gibert Joseph.

ray players...) and grey (communication and multimedia: tablets, laptops, smartphones, etc.)⁸⁵ and then in the toy sector.⁸⁶

The Competition Authority considered that the competitive pressure of online sales, whether by pure players (such as Amazon or CDiscount) or the websites of traditional retail channel, as well as the proximity between this mode of distribution and that in physical stores, has now become sufficiently significant for the relevant market to integrate these two channels.⁸⁷

Although European Commissioner Mrs Vestager recalled that platforms are stores like any other, with just a few more pronounced characteristics than in hard trading (such as a high degree of price transparency, suppliers competing with their own retailers, increased risks of parasitism, more frequent clauses restricting competition, increased use of selective distribution systems) it is likely that some traditional economic analysis will need to be reviewed.

From both an economic and legal point of view, the distinction between the quality of suppliers and customers is necessary. Traditionally, websites where suppliers are professionals (B2B) have been opposed to those addressed to consumers (B2C or C2C) because the rules of protection are different. However, some platforms blur the distinction, with the offer coming from both professionals and individuals (Ebay, Leboncoin). The Commission's report on digital commerce opts for a different distinction between platforms for the sale of consumer goods and those that provide digital data, the latter raising copyright issues.

In addition, the digital economy has a natural tendency to market concentration, through the combined effects of network savings, high fixed costs and marginal cost close to zero. This can be summed up in the formula: "*the winner takes all*". Many players in this market are therefore largely dominant and may hold essential facilities. If the theory of essential facilities could be applied to them, competition law would have more effective means of control.

However, to date, the Court of Cassation has retained a strict notion of the conditions for applying the theory of essential facilities, and in particular the principle of the non-substitutability of infrastructures, recalling that it is not enough for the creation of an alternative solution to be unfavourable or costly for competitors, but that it cannot be done under reasonable economic conditions.⁸⁸

Case law shows that a database may not constitute an essential facility even when it is not easily replicable in the short term insofar as it does not appear indispensable, as some customers have other types of databases, or if the operator can prove that the data held are not from his former monopoly or that he has invested additional resources (See the case concerning the France Télécom telephone directory).⁸⁹

The concept of essential facility should be developed or new rules on the transferability of data from one operator to another should be created.

⁸⁵ Competition Authority, Decision No. 16-DCC-111 of 27 July 2016 relating to the acquisition of sole control of Fnac by Darty.

⁸⁶ Competition Authority, Decision No. 19-DCC-65 of 17 April 2019 relating to relating to the joint takeover of Luderix International by Jellej Jouets and the joint ownership resulting from the succession of Mr Stéphane Mulliez.

⁸⁷ Competition Authority, Decision No. 19-DCC-65 of 17 April 2019 relating to relating to the joint takeover of Luderix International by Jellej Jouets and the joint ownership resulting from the succession of Mr Stéphane Mulliez.

⁸⁸ Court of Cassation, Commercial Chamber, 12 July 2005, No. 04-12388.

⁸⁹ Court of Cassation, Commercial Chamber, 12 May 2015, No. 14-10.792.