Competition Compliance

Contributing editors
Susan Ning and Kate Peng

2018

GETTING THE DEAL THROUGH

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King & Wood Mallesons

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Competition Compliance 2018

Second edition

Getting the Deal Through is delighted to publish the second edition of *Competition Compliance*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

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 **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 Italy, Malaysia and Switzerland.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

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.

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 Susan Ning and Kate Peng of King & Wood Mallesons, the contributing editors, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
May 2018

France

Katrin Schallenberg and Amélie Lavenir
Clifford Chance

General

1 What is the general attitude of business and the authorities to competition compliance?

The French business community is increasingly concerned with compliance. This has recently been amplified by the new anti-corruption rules (Sapin 2). More companies now have dedicated in-house compliance teams, and the needs in this area have dramatically increased over the past few years.

The French Competition Authority (FCA) encouraged competition compliance programmes and for many years awarded fine reductions to companies committing to implement such a programme or upgrade an existing one; in 2012 it had published a framework document on antitrust compliance programmes (2012 Framework Document). However, on 19 October 2017 the FCA issued a statement (October 2017 Statement) indicating that it now considers that compliance programmes should be part of the day-to-day management of companies and that, as a general rule, it shall no longer award a fine reduction for commitments to implement such programmes, especially in the case of serious competition law infringements.

2 Is there a government-approved standard for compliance programmes in your jurisdiction?

As indicated above, the FCA repealed in October 2017 the 2012 Framework Document. There is thus no official guidance other than the FCA's case law. A compliance programme is a proactive strategy of governance that ensures risk avoidance where possible. To be effective, a compliance programme should achieve two objectives. It should prevent the risk of committing infringements (eg, anticompetitive agreement, sensitive information exchange between competitors, retail price management, abuse of a dominant position, etc), and provide the means of detecting and handling misconduct that has not been avoided in the first instance. To achieve these objectives, companies should create and maintain a culture of compliance.

A set of concrete measures combining learning strategies with supervisory, control and punishment systems may increase the effectiveness of a programme. These measures can consist in training, whistle-blowing systems, audits, etc (see section on implementing a competition compliance programme below).

3 Is the compliance guidance generally applicable or do best practice and obligations depend on a company's size and the sector of the economy it operates in?

The FCA always considered, including in the now repealed 2012 Framework Document, that one compliance programme may vary from another. There is no 'one size fits all' programme. To reduce and adapt to risks of antitrust infringement, a company's compliance programme must be tailor-made to its sector, its size, its organisation, its governance and its culture.

In the case of large corporate groups, the FCA will take into account whether the compliance programme offered in the context of commitments (which gives right to a fine reduction) is limited in scope to the activities or subsidiaries that were directly investigated or whether it is broader and applies more generally, in whole or in parts, to the group.

4 If the company has a competition compliance programme in place, does it have any effect on sanctions?

As explained in question 1, there is no general policy for companies to receive a reduction if they have a compliance programme in place. Indeed, where a company already has a competition compliance programme and the FCA discovers an infringement has been committed, this is neither a mitigating nor an aggravating circumstance and thus has no impact on the sanction.

While for many years a commitment to implement a compliance programme or upgrade an existing one could give rise to a fine reduction, the FCA announced in October 2017 that it considers this shall no longer be the case.

Implementing a competition compliance programme

5 How does the company demonstrate its commitment to competition compliance?

Since the repeal of the 2012 Framework Document, all guidance on compliance programmes is enshrined in the case law of the FCA. In order to demonstrate competition compliance, companies should generally:

- take a public and strong position stressing that compliance with antitrust rules is a key feature of the company. A company must also make a general commitment to comply with antitrust rules. This position should be public – for example, available on the institutional website of the company;
- appoint one or more persons empowered within the company to develop and monitor the compliance programme (ie, compliance officer);
- put in place information and training to ensure employees are aware of competition law issues, the compliance programme, etc;
- set up effective control – for example, audit, whistle blowing, etc; and
- set up an effective oversight system – namely, disciplinary sanctions for serious infringement of company policy regarding compliance with antitrust rules.

6 What are the key features of a compliance programme regarding risk identification?

Regular assessments of the internal processes regarding contacts with competitors, pricing mechanism, etc, are an efficient way of monitoring competition compliance. In addition, regular audits of specific functions in the company, which are considered particularly exposed to antitrust risks (eg, marketing, sales, etc) are also recommended. Such audits can be carried out by external counsel, and take the form of mock dawn raids, that is, exercises similar to an investigation by a competition authority (eg, interviews, copy and review of documents and emails, etc).

A whistle-blowing mechanism, whereby employees can report any risk they identify on an anonymous basis, is also a key feature of any compliance programme.

7 What are the key features of a compliance programme regarding risk assessment?

As part of the compliance programme, one or more compliance officers (depending on the size of the company) should be appointed. The

compliance officer should be appointed for his or her unquestionable skills and will, as such, be responsible for assessing the risks that may be identified. As the main contact point on all antitrust-related issues, the compliance officer must have the necessary authority within the company to take measures whenever risks are identified.

8 What are the key features of a compliance programme regarding risk mitigation?

To reduce the risk of infringement the company should ensure that relevant employees are informed, trained and aware of antitrust rules (eg, annual training sessions, e-learning tools, etc). To this educational dimension should be added disciplinary sanctions in case of serious infringement.

To reduce risks to a minimum, all employees should cooperate and refer every potential issue to the compliance officer. For better efficiency, the programme should have support from the board, and the competition officer should have significant power to implement and monitor the programme.

9 What are the key features of a compliance programme regarding review?

Regular evaluation of the programme should be carried out, especially during events that may create new risks for the company (eg, acquisition of a new company or development of a new activity). A competition programme can be adapted, as long as it continues to respect the best practices developed by the FCA. When the compliance programme constitutes a binding commitment made by the company, the FCA may regularly check if the programme is actually being implemented. The company must be prepared to complete a report for the FCA to check compliance.

Dealings with competitors

10 What types of arrangements should the company avoid entering into with its competitors?

Article L.420-1 of the French Commercial Code (FCC) prohibits, like article 101 of the TFEU, all concerted practices, agreements and alliances, express or tacit, between undertakings that have as their object, or may have as their effect, the prevention, restriction or distortion of competition in a market.

The text does not provide an exhaustive list of prohibited practices, but in general, an undertaking should not engage in any form of coordination, collusion or agreement, whether express or implied, with competitors on prices, output, opportunities, investments, technical progress, etc. In addition, exchanges of sensitive information (recent and detailed information on prices, management, profitability, customer sales, etc) is considered to amount to a 'concerted practice'.

11 What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

The following are examples of strategies that may be employed:

- A company should ensure that where meetings take place, agreed formalities are followed, including recording the agendas and minutes, and that follow-up tasks do not impact the external market conduct of the parties.
- In the context of a transaction between competitors, a company should take precautions in approaching data room access. This includes ensuring that the data room is password-protected and covered in a non-disclosure agreement. In addition, the most sensitive information should only be shared with a 'clean team', that is, a limited number of employees not involved in competing day-to-day market activities. A company may consider involving external counsel where substantial risk of infringement exists.

12 What form must behaviour take to constitute a cartel?

A cartel usually refers to the most serious types of anticompetitive agreements or concerted practices between competitors, such as price fixing, agreements to limit outputs, etc. A cartel may be oral or written, tacit or expressed, between competitors where the purpose is to prevent, restrain or distort market competition.

13 Under what circumstances can cartels be exempted from sanctions?

There are two exemptions from cartel prohibition, set out in article L.420-4 FCC. The first exemption is for practices implemented in application of a statute or regulation. For example, the French Court of Cassation held in 2010 that tariffs for the consultation and surgical acts of some doctors are subject to French price regulation, thereby excluding the application of L.420-1 FCC.

The second exemption applies where the practices at stake ensure economic progress through the creation or maintenance of jobs and reserve a fair share of the resulting profits to end consumers, without giving the undertakings the opportunity to eliminate competition for a substantial part of the products in question.

14 Can the company exchange information with its competitors?

The legality of information exchanges between competitors is assessed on a case-by-case basis by the FCA, in line with the guidance issued by the European Commission. For example, the FCA may take into account the structure of the market, the nature of the data (whether recent, strategic, future, etc) and whether the disclosure occurs only between the competitors, excluding customers. Taking into consideration the characteristics of an exchange and its legal and economic context, an exchange may be qualified as a restriction of competition by object, or may be assessed through the lens of its effects.

Leniency

15 Is a leniency programme available to companies or individuals who participate in a cartel in your jurisdiction?

The possibility of applying for leniency was introduced in 2001 (articles L.464-2 and R.464-5 FCC). The most recent procedural notice on leniency was published by the FCA in 2015 (the Leniency Notice). Leniency is only available in cases involving conduct prohibited by article L. 420-1 FCC (namely, anticompetitive agreements), and is only available to companies and not to individuals. An application for leniency can be made orally by appointment with the FCA or through registered, signed-for mail.

In its application, the applicant must provide at least the following information: name and address of the company concerned; circumstances that have led to the application; names of the cartel participants; and products and territories on which the cartel is likely to have an impact. The applicant must also provide leniency applications completed in relation to the same cartel. In order to be eligible for leniency, the applicant must cooperate with the FCA throughout the entire procedure and must disclose all relevant information on the cartel.

There are two types of leniency applicants: the first leniency applicant may benefit from a full immunity from any financial penalty imposed by the FCA. Subsequent applicants will only be eligible for fine reductions up to 50 per cent (depending of their ranking). A rank is attributed to each applicant, depending on the date of the application and the nature and level of detail of the information provided.

The applicant is prohibited from providing information to other competitors involved in the cartel. A failure to comply may lead to withdrawal of the application, imposition of fine, or a lower fine reduction. The level of penalty reduction is calculated based on rank and the evidence provided to the FCA.

16 Can the company apply for leniency for itself and its individual officers and employees?

The company applies for leniency for itself through one representative. Leniency only applies to administrative sanctions and, therefore, does not extend to individual officers and employees, who instead face criminal charges, or damages that could be claimed on the basis of the FCA decision.

The Leniency Notice provides that leniency is a legitimate reason for not referring a case to the prosecutor. Therefore, neither the company nor the employees may be subject to criminal proceedings during the leniency proceeding. Under French law, criminal proceedings related to competition infringements are extremely rare.

The name of the applicant is kept confidential throughout the investigation. A company may contact the FCA's leniency officer, who can provide advice on the leniency procedure.

17 Can the company reserve a place in line before a formal leniency application is ready?

The FCA operates a marker system: when an undertaking applies for leniency, the chief general case handler usually allows the applicant one month from registration to provide further evidence in support of its leniency application.

18 If the company blows the whistle on other cartels, can it get any benefit?

There is no benefit when a company blows the whistle on a cartel it is not involved in.

Dealing with commercial partners (suppliers and customers)

19 What types of vertical arrangements between the company and its suppliers or customers are subject to competition enforcement?

There are no specific rules on vertical agreements under French law. Vertical agreements that have as their object or effect the restriction of competition are prohibited. In practice, such agreements are assessed on a case-by-case basis by the FCA, in line with guidance issued by the European Commission. As a general rule, restrictions on resale price, territory and customers, sourcing, exports or parallel imports are considered anticompetitive. Selective and exclusive distributions, as well as franchises, are also closely monitored.

Under French law, as under EU law, antitrust rules do not apply to agreements entered into between commercial intermediaries because the principal bears the commercial and financial risks related to the selling or purchasing. All obligations imposed on the agent in relation to the contract concluded or negotiated on behalf of the principal will be considered to form an inherent part of the agency agreement.

Vertical agreements may also be subject to competition enforcement where they facilitate collusion. A hub-and-spoke is the intentional transmission of sensitive information from A to a competitor C, via an intermediary B (client or supplier).

20 Would the regulatory authority consider the above vertical arrangements per se illegal? If not, how do they analyse and decide on these arrangements?

The above vertical arrangements are not considered per se illegal.

As under EU law, the FCA distinguishes between agreements that have anticompetitive objects and agreements that have anticompetitive effects. Article L.420-1 FCC prohibits practices that have as their object or effect the prevention, restriction or distortion of competition. Restrictions of competition 'by object' are those that by their very nature have the potential to restrict competition. Their high potential for negative effects on competition obviates the need to demonstrate any actual or likely anticompetitive effect on the market. This is due to the serious nature of the restriction.

For vertical arrangements, the category of restriction by object includes, for instance, imposed fixed minimum resale prices and customer and territorial restrictions. If the vertical arrangement does not have the object of harming competition, the FCA will assess its effect on competition, taking into account the economic and legal context and the competitive comparison of the market with and without the vertical agreement, on a case-by-case basis.

21 Under what circumstances can vertical arrangements be exempted from sanctions?

Vertical arrangements are exempted from sanctions, pursuant to EU Regulation 330/2010, if the parties have a market share of less than 30 per cent and there are no hardcore or excluded restrictions.

In addition, as for horizontal arrangements, article L.420-4 FCC provides that arrangements that result either from the implementation of an applicable law or that satisfy certain requirements (namely, if an arrangement creates economic progress and if a fair share of the profit derived from it is allocated to consumers, without enabling the companies concerned to eliminate competition for a substantial part of the products concerned) are exempted.

To that end, the agreement must fulfil some requirements. The most serious restraints, such as price fixing, will not generally meet the conditions set out by article L.420-4.

How to behave as a market-dominant player

22 Which factors does your jurisdiction apply to determine if the company holds a dominant market position?

As under EU law, a company is deemed to hold a dominant market position when it is in a position that allows it to behave independently from its competitors and customers.

There is no formal dominance threshold set by the FCC. The market share of a company is considered a first useful indication when assessing a possible dominant position. The FCA generally considers that a company is unlikely to be dominant with a market share below 40 per cent, but likely to be dominant with a market share in excess of 50 per cent. However, a number of other factors are also taken into account in assessing whether or a not a company must be regarded as dominant; the structure of the market and strength of competitors, the reputation of the firm, the range of products offered, the presence on related markets and the competitive behaviour of the firm on the market.

23 If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance? Describe any recent cases.

A company that holds a dominant position has a special responsibility not to harm competition. All practices exceeding the limits of healthy competition from a firm holding a dominant position, where the only justification is the elimination of existing or potential competitors, or undue benefit, are generally considered as abusive.

Article L.420-2 FCC sets out a non-exhaustive list of abuses, including refusal to sell, tying, discriminatory sale conditions and range agreements. In practice, the FCA assesses the anticompetitive impact of the practice on the market by using an effect-based and economic approach.

In 2015, the FCA imposed the highest fine ever on an individual company (€350 million), for implementing four anticompetitive practices on markets for telecommunications services for business clients. The company had abused its dominant position on the mobile telecommunications services market, by implementing various mechanisms aimed at ensuring the loyalty of its clients through marketing programmes, anticompetitive discounts and commitments in terms of contract duration. It had also implemented discriminatory practices in the fixed telecommunications services market by not sharing with third parties information it had on the network (as a former monopolist) that was essential to providing satisfactory service to clients .

24 Under what circumstances can abusing market dominance be exempted from sanctions or excluded from enforcement?

Abuses of dominance can benefit from individual exemptions under article L.420-4 FCC: when the practice results from the application of a statute or a regulation, where the abusive practice has the effect of ensuring economic progress, when the undertaking is entrusted with the operation of a service of general economic interest (article 106 TFEU). Moreover, the behaviour is exempt when the abuse has no appreciable effect on competition in the national market.

Such an exemption is, however, rarely granted.

Competition compliance in mergers and acquisitions

25 Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

Under article L.430-1 FCC, a concentration is defined as where two or more previously independent undertakings merge, or where one or more persons already holding control of at least one undertaking or one or more undertakings acquires 'control' of all or part of one or more other undertakings. The creation of a joint venture may also constitute a concentration under L.430-1.

Control is conferred through rights, contracts and any other means that confer the possibility of exercising decisive influence on an undertaking. This includes, in particular, the right to use the assets of an undertaking and the rights or contracts that confer decisive influence on the composition, voting or decisions of an undertaking.

Where the following cumulative thresholds are met, French merger control applies, unless the EU thresholds are met: the undertakings achieved in the previous financial year a worldwide combined pre-tax turnover of more than €150 million; and at least two of the undertakings

achieved, in the previous financial year, a pre-tax turnover in France of more than €50 million. Separate threshold criteria apply in the retail sectors and to concentrations in French overseas departments and communities.

Prior notification to the FCA is mandatory for all concentrations that meet the requisite thresholds, and it is the individuals and corporate entities acquiring control that are under an obligation to notify.

Notification has a suspensory effect on transactions, meaning that the transaction cannot be completed before the FCA makes its decision. The suspension obligation may be derogated from in exceptional circumstances, such as the takeover of a firm in insolvency proceedings.

Implementation of the transaction in breach of the standstill obligation (gun jumping) is liable to a fine of up to 5 per cent of the pre-tax turnover of the undertakings concerned in the previous year. In November 2016, the FCA issued a decision clearly meant as a warning to companies that decisive enforcement action will be taken against gun jumping. In its decision, the FCA imposed an €80 million fine, the highest ever for gun jumping, on a company. The fine imposed is representative of a global trend in which competition authorities have shown greater willingness to penalise companies for gun jumping.

26 How long does it normally take to obtain approval?

There are two phases in the statutory timetable for examination of a concentration:

- all concentrations must at least undergo a Phase I review, which requires a maximum of 25 working days (this can be extended by a maximum of 30 working days in certain circumstances); and
- where there are serious doubts following the first phase, the FCA will initiate a second phase, which requires an additional 65 working days (which can be extended by a further 40 working days in certain circumstances).

Both of these timetables are subject to the clock being stopped by the FCA (if the parties fail to provide requested information within the set time frame, for instance).

In the event that there are no competition issues, the parties may obtain clearance within an average of 15 working days following the filing of a complete notification, through the simplified procedure.

The statutory timetable only starts from the formal notification to the FCA. However, it is advisable to pre-notify, by sending the draft application form to the FCA in advance of the formal filing. Pre-notification discussions typically cover the scope and amount of information to be provided, market definition issues and initial competition concerns. They last between two weeks and a few months in more complex cases.

In its final decision, the FCA can authorise the concentration with or without commitments proposed by the parties, or it can prohibit the transaction. It may also take injunctions that impose conditions that were not proposed by the notifying parties.

27 If the company obtains approval, does it mean the authority has confirmed the terms in the documents will be considered compliant with competition law?

There are no specific French law provisions on this. Under EU rules, any decision that declares a merger compatible with the common market is deemed to cover restrictions that are 'directly related and necessary to the implementation of the concentration' (ie, ancillary restraints).

28 What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any recent cases?

Sanctions for failure to file fall on the acquirers and may include the following:

- parties may be directed to either file the concentration or demerge; or
- the FCA may fine corporate entities up to 5 per cent of their pre-tax turnover in France from the previous financial year (plus, where applicable, the turnover in France of the acquired party over the same period) and may fine individuals up to €1.5 million (these are the maximum fines for corporate entities and individuals).

In 2013, a company was subject to a €4 million fine for deliberate failure to notify the acquisition of several companies within a group, though this was reduced ultimately to €3 million, as the company did not intentionally fail to notify, and was cooperating with the authority. This is the highest fine that the FCA has imposed to date. Infringements are subject to a five-year limitation period from the date when the change of control materialises.

Closing before clearance, or gun jumping, is considered as equivalent to an absence of filing and triggers the same sanctions as above. As discussed in question 25, the FCA imposed an €80 million fine on companies in 2016 for starting to implement two transactions that had been notified to the FCA before the clearance decision was issued. Specifically, the company in question had exercised decisive influence over and accessed commercially sensitive information from the targets. This was this first decision of the FCA regarding gun jumping, and the highest fine ever imposed for the offence.

Investigation and settlement

29 Under which circumstances would the company and its officers or employees need separate legal representation? Do the authorities require separate legal representation during certain types of investigations?

Authorities do not require separate legal representation during certain types of investigations.

As stated in question 16, under French law, where any person is responsible for a personal and decisive part of implementation, the organisation where that anticompetitive practice has taken place can be prosecuted under criminal law.

If the company and the prosecuted employee are represented by the same attorney, this may lead to conflicts of interest that are prohibited under the lawyers' code of ethics.

30 For what types of infringement would the regulatory authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

According to article L.450-1 FCC, the regulator can launch a dawn raid for anticompetitive practices such as cartels and abuse of dominant position, as well as for mergers. There are two types of dawn raids in France. Under ordinary investigations (article L.450-3 FCC), after explaining the aim of the investigation, officers are allowed to access business premises and computers, request access to pre-identified business documents and conduct interviews. Under the judicial investigation (article L.450-4 FCC), previous legal authorisation from the liberties and detention judge is required. The order must detail the practice for which evidence is sought and the premises that will be searched. Judicial investigations require the presence of a police officer and the representative of the company.

Regarding digital searches, the FCA now implements a procedure whereby it puts a temporary seal on the data it wishes to seize, thus allowing the company to request that the privileged correspondence or out of scope data be deleted before the data is seized (instead of such correspondence being seized and later restored, as was done in the past).

31 What are the company's rights and obligations during a dawn raid?

The company has an obligation to collaborate with the officers and to respect the seal when the investigation lasts several days.

The investigation will only occur in the presence of the occupant or its representative. Moreover, the company has the right to access a lawyer during the investigation; the lawyer has a right of access to all selected documents before they are seized and a right to challenge any document. The company can call upon a judge when it considers that a seized document is unrelated to the investigation or protected by legal privilege. Further, the company must receive an inventory of all documents seized during the dawn raid.

32 Is there any mechanism to settle, or to make commitments to regulators, during an investigation?

Article L.464-2 FCC sets out the settlement procedure and the possibility of making commitments to regulators during an investigation. This mechanism can be implemented in every case dealt with by the FCA.

A company that has received a statement of objections from the FCA may request to settle the case, namely, agree not to challenge the substance of the objections in exchange for a fine reduction. Under this procedure, the chief case handler will set a maximum and minimum

amount of the fine incurred, which it will present to the board of the FCA. In addition, the company may offer commitments to change its behaviour, which can also be taken into account in its settlement proposal.

On 8 March 2018, the FCA launched a consultation procedure on a draft procedural notice on the settlement procedures (Draft Notice). According to the Draft Notice, the settlement procedure is available to leniency applicants. The Draft Notice also provides that when assessing whether the settlement procedure is appropriate in a case, the chief case handler will take into account the number of undertakings involved that request a settlement, since the expected procedural efficiency gains will be limited if some parties challenge the objections. Finally, the FCA also indicated in the Draft Notice that it will only consider settlements that have been finalised within two months from the receipt of the statement of objections. The final Notice should be published in the coming months.

The commitment procedure applies in situations with ongoing situation concerns, where such situations could be quickly brought to an end by applying the procedure. Commitments are given pursuant to a preliminary assessment of the conduct in question (unlike the settlement procedure, which can be undertaken only when the company has received a statement of objections). The FCA must notify the undertaking concerned as to how the abuse of competition found at this stage of the process is liable to constitute a prohibited practice. After it has been informed of the competition concerns, the undertaking submits commitments to the FCA. Commitments can be structural (accountant division, subsidiarisation, etc) or behavioural (modification of contracts' clauses, of terms and conditions of sale, of pricing schedule, etc). The commitments must be relevant, credible and checkable.

33 What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

As indicated in the October 2017 Statement, the FCA will no longer reward the implementation or amendments to compliance programmes with a fine reduction, especially in the context of serious infringements such as agreements and information exchanges on future prices or commercial strategy.

34 Are corporate monitorships used in your jurisdiction?

The FCA generally monitors the implementation of the commitments. The commitments will generally include an obligation on the undertaking to provide regular reports to the FCA on the implementation of the commitments. The report is sent to the legal service of the FCA, which may request any additional information, and investigate.

35 Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class actions or representative claims?

According to article L.480-5 FCC, the judge cannot request agreed statements of facts in a settlement. Under article L.480-1 FCC, where conduct has already been sanctioned by the FCA, the anticompetitive practice and its author are irrefutably presumed guilty.

36 Can the company or an individual invoke legal privilege or privilege against self-incrimination in an investigation?

The company can retain business documents that are covered by French legal privilege, namely, correspondence between an external lawyer and the company and communication aimed at giving legal advice or relating to actual or potential litigation. Correspondence with in-house legal counsel is not privileged under French law. The privilege against self-incrimination is also protected.

37 What confidentiality protection is afforded to the company or individual involved in competition investigations?

A firm can refuse to provide a document protected by legal privilege. During the investigation phase, the employee has one month to ask for protection of business secrecy. For each record or piece of record, the person must explain the purpose and the reasons for confidentiality protection.

38 What are the penalties for refusing to cooperate with the authorities in an investigation?

The FCA can fine the firm refusing to cooperate up to 1 per cent of the highest worldwide turnover in the years since the anticompetitive practice began. Moreover, the FCA can fine up to 5 per cent of the average daily turnover for each day that the firm fails to respond within the time limit.

In addition, article L.450-8 FCC sanctions the refusal to cooperate with six months of prison and €300,000.

39 Is there a duty to notify the regulator of competition infringements?

No.

40 What are the limitation periods for competition infringements?

According to article L.462-7 FCC, the limitation period precludes suing a company more than five years after the end of the anticompetitive practice if the FCA did not take any action to investigate or initiate proceedings. In any case, the limitation period shall expire, at the latest, 10 years after the anticompetitive practices have stopped.

Miscellaneous

41 Are there any other regulated anticompetitive practices not mentioned above? Provide details.

Not applicable.

42 Are there any proposals for competition law reform in your jurisdiction? If yes, what effects will it have on the company's compliance?

Not applicable.

C L I F F O R D

C H A N C E

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