LATHAM&WATKINS
Client Alert
Commentary

Latham & Watkins Antitrust & Competition Practice August 26, 2015 | Number 1870

The Macron Law Modifies French Competition Rules and Procedures

After seven months of discussions before the French Parliament, the bill on "Growth and Activity and Equality of Economic Opportunities" known as the "Macron law" or Loi Macron, named after the French Minister of the Economy, Emmanuel Macron, was finally adopted on 10 July 2015 and promulgated on 6 August 2015.[1] Unless otherwise specified below, the provisions of the Macron law entered into force immediately.

The Macron law sets out a number of amendments to competition law. In particular, the provisions of the law grant the French Competition Authority (the FCA) new powers and responsibilities regarding both anticompetitive practices and merger control, by amending a number of procedures relative to competition law. The law also includes a wide-ranging set of measures, some of which were the subject of intense debate either before the National Assembly or before the Senate (for example, reform of regulated legal professions, less stringent rules governing Sunday trading and liberalization of bus transportation). However, on 5 August 2015, some of the Macron law's provisions were declared inconsistent with the French Constitution by the Constitutional Council — the competent body to rule on the constitutionality of a law prior to enactment — in its Decision No 2015 751 DC. Notably one of the most emblematic measures of the Macron law, relating to the extension of the structural injunction applicable in the retail sector to the whole French territory, was quashed.

Antitrust Practices

Introducing a Settlement Procedure

The Macron law brings a key change in relation to the competition procedure, introducing a settlement procedure into French law. The new procedure will enable the Rapporteur Général of the FCA (*i.e.* the general case manager) to submit a settlement proposal to a company that has decided not to challenge the objections contained in the statement of objections. Such a proposal would set the maximum fine that could be imposed on said company and set out the company's commitments, if any.

This new procedure will replace the current procedure pursuant to which a company could waive its rights to challenge the objections the FCA raised and allow the company to commit to change its future behavior in exchange for the FCA imposing a reduced fine (*i.e*. from a 10% reduction up to 25% reduction), although this discount was applied to a fine for which the amount had not yet been set (see Article L. 464-2, III of the French commercial code, "FCC").

With the new procedure, a company's discussion with the Rapporteur Général will focus directly on the amount of the fine and will no longer be limited to a reduction rate applicable to a hypothetical fine.

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However, the amount of the fine will remain uncertain since the investigative and decision-making bodies within the FCA are separate. The College of the FCA ultimately determines the amount of the fine, not the Rapporteur Général.

In addition, the new law deleted the provision that guaranteed a 50% reduction of the legal maximum amount of the fine for companies that waive their rights to challenge a statement of objections.

Despite deleting this guarantee, the change to Article L. 464-2, III of the FCC is likely to enhance the attractiveness of this negotiated procedure, by increasing the legal certainty relating to the fine reduction that can be granted to companies.

This settlement procedure is applicable to restrictive horizontal conducts, vertical agreements and abuses of dominant position. Therefore the procedure has a wider scope than the European settlement procedure, which only applies to cartels.

Provisions regarding this new procedure will apply to proceedings in which the statement of objections is received after the publication of the law.

Simplification of the Leniency Procedure

The Macron law further simplifies the leniency procedure which has already undergone a revision through the FCA's revised leniency notice dated 3 April 2015 (see our 21 April 2015 *Client Alert*, *French Competition Authority Adopts Revised Leniency Procedural Notice*).

As a reminder, under the French leniency program, when a company provides the FCA with information that contributes to the establishment of an anticompetitive practice, the company may receive a full immunity (type 1 leniency) or a reduction of its fine (type 2 leniency). The current procedure before the FCA takes place in two steps. During the first step, companies that have received the statement of objections have two months to respond. In the second step, the FCA's investigative bodies answer arguments of the companies involved, including the leniency applicants, in a report to which the parties must reply within two months.

In accordance with the new version of Article L. 464-2, IV of the FCC, the leniency procedure will benefit from a simplified procedure, under which the FCA can issue its sanction decision without a report. Leniency applicants thus would no longer be required to answer the report established by the investigative bodies after the statement of objections. However, companies that have not applied for leniency can still challenge the FCA's objections and retain the right to a second round of responses to the objections.

Likewise the provisions regarding the settlement procedure, provisions simplifying the leniency procedure will apply to proceedings in which the statement of objections is received after the publication of the law.

Enhancement of Investigative Powers

The Macron law reinforces the investigative powers which can be exercised by agents of the FCA, the General Directorate for Fair Trading, Consumer Affairs and Fraud Control (DGCCRF),[2] and authorized agents of the competition authority of another member state in cases in which investigations are conducted in the name or on behalf of another member state's competition authority.

According to the new version of Article L. 450-3 of the FCC stemming from the Macron law, in the course of a competition inquiry that does not require prior judicial authorization, the above-mentioned agents may

request the communication and/or copies of all documents which are likely to facilitate the performance of their duties.

Among these documents, the law makes particular reference to data retained and processed by electronic communications operators and services, including detailed telephone invoices. According to the Constitutional Council, this reference manifestly infringes the right to privacy of individuals as the law does not provide for judicial intervention, penalties for disclosure of such information or guarantees for the protection of the rights of individuals. This part of the law was therefore declared unconstitutional by the decision No 2015-715 DC dated 5 August 2015. In that respect, the government has already announced that provisions declared unconstitutional are likely to be submitted once again to the legislator in a future draft law.

Merger Control

Introduction of a Stop-the-Clock Mechanism in Phase I

The Macron law grants the FCA the possibility to suspend the 25-day review period of a Phase I, if the FCA determines that the notification is incomplete as a new fact occurs, information is missing and/or further information would be needed. The suspension lasts until the FCA considers the notification is complete (*i.e.* after the submission of all necessary information). For now, such a stop-the-clock mechanism is exclusively available during Phase II.

According to the head of the FCA's mergers unit, the introduction of this mechanism will allow the unit to acknowledge receipt of complete notification more quickly, thereby providing companies with greater visibility and flexibility.

The Clarification of Phase II Time Limits

The Macron law specifies that a Phase II (*i.e.* in-depth review of a merger) will end — at the latest — 20 days after FCA receives commitments, when the parties propose remedies, but also when they modify initial remedies, less than 20 days before the 65-day legal review period. In any case, the Phase II cannot extend beyond 85 days after the initiation of the in-depth review period.

Given that the initial version of the commitments is almost systematically amended by the parties before being submitted to the FCA, it is reasonable to conclude that an 85-day Phase II will become a standard in commitment cases.

New Remedies in the Event of Non-Compliance with Commitments Conditioning a Clearance Decision

The Macron law also captures situations in which a company does not comply with merger commitments.

Up until now, in such cases, the FCA could either withdraw its authorization decision and therefore require a new notification and a new review of the merger, or order the company to comply with the commitments it undertook. The new law provides the FCA with a third option: to substitute new injunctions or directions to the initial remedies that the company did not comply with.

While this third option provides the FCA with more flexibility, difficulties may arise in the provision's practical application, as the law does not stipulate how the option should be applied, in particular with regard to the holding of a contradictory debate between the parties and the FCA.

Other Substantial Changes

Legal Duty to Inform the FCA Before the Conclusion of a Joint Purchasing Agreement

Pursuant to a new provision that will be introduced into the FCC at Article L. 462-10, if a turnover threshold — which will be set by decree — is reached, parties to a joint purchasing agreement must inform the FCA prior to its conclusion. While such agreements generally do not fall under merger control, with this new provision, the FCA intends to closely monitor agreements which tend to develop between large retailers.

Affiliation Agreements

The Macron law introduces in the FCC a new Title IV in Book III called "Commercial distribution networks" that contains provisions relating to affiliation agreements that aim to ensure more protection to affiliated distributors. According to the new provisions, such agreements, when concluded with the same affiliated distributor, must have a common termination date. Also, the agreements may not contain any clause that could restrict the freedom of exercise of the affiliated distributor, with the exception of those necessary to protect the know-how transferred by the supplier, in accordance with the Regulation No 330/2010.[3]

Prohibition of Rate Parity Clause

Through the Macron law, France is the first European country to adopt a legislative provision that prohibits rate parity clauses in agreements concluded between hoteliers and Online Travel Agents (OTAs). Indeed, the Macron law stipulates that agreements between hoteliers and OTAs relating to the rental of hotel rooms to customers must be contracts in form of mandates, concluded in the name and on behalf of the hotelier and governed by Articles 1984 and following of the French civil code. In addition, the law specifies that hoteliers retain the freedom to choose to offer their customers any rebate or any discount: any clause contrary to this principle will be deemed unwritten.

Therefore, with the promulgation of the law, hoteliers can charge lower prices than those available on online sites of OTAs (both in online and offline channels).

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Endnotes

[1] Law No. 2015-990 of 6 August 2015.

[2] As a reminder, the DGCCRF is an administrative service under the responsibility of the Ministry of the Economy which ensures consumers' economic protection and safety as well as the regulation of competitive markets. As part of the latter, the DGCCRF contributes to the identification and detection of anticompetitive practices through its extensive territorial network.

[3] See Regulation No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, Article 5(3).