Fairness in French competition law

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Fairness – what do we mean ?

"IS THERE SOMETHING ROTTEN IN THE STATE OF COMPETITION LAW?"

- **What does "fairness" mean?**
  - Difficulties to translate "fairness" into French ; double meaning "equity" and "loyalty"

- **Fairness to whom and with which objective(s)? A need for clarification**
  - Protecting consumers?
    - Consumer welfare is a competition law standard
    - Is the objective to intervene in the distribution of surplus? Objective of distributive justice?
  - Protecting competitors?
    - New economy, more concentration and more importance of "winner-take-all markets"
    - Is the objective to protect competitors? Which ones? Small ones? Less efficient ones?

- **This presentation proposes a short review of the French approach**

  (1) Is fairness historically part of the design of competition rules in France?

  (2) Does it evolve?

  (3) Is fairness taken into account in the current enforcement of antitrust law?

Fairness – how is it considered under French competition law?

HISTORICAL APPROACH

- **Purposes of competition law – traditional approach**
  - Competition law protects, in principle, the market and competition (fight against price increases)
  - Strictly speaking, it does not encompass the notion of fairness of competition
  - What is sought is the economic efficiency and the well-being of consumers
  - No concern for fairness, neutrality in the allocation of resources, in principle it is not driven by the idea of retributive justice
- **Purposes of competition law – French approach**
  - Economic efficiency has never been the traditional aim of French competition law. Price theory is not the only objective. It is sensible to other considerations than prices, such as employment, environment, small businesses, fight against abuses of purchasing power…
  - However, this approach knows evolutions

Period *ante* 1986

HISTORICAL APPROACH

- **Before the Ordinances of 1945**
  - The Allarde Decree (freedom of trade and industry) and the Law Le Chapellier (guilds' abolishment) are aimed at punishing artificial price changes
  - There is no significant evolution in the 19th century (such as the Sherman Act in the US) despite industrialisation and concentration of the economy
  - After WW1 and the 1929 crisis (scarcity and inflation), the State intervenes increasingly in order to control prices (a Code on prices is adopted in 1941)
- **Ordinances of 30 June 1945: an administrated economy**
  - The Ordinances regarding prices, detection, prosecution and punishment of infringements to economic legislation introduce a system of price control and an administrated economy (at a scarcity and inflation time).
  - Competition law is seen as a tool of economic policy
  - Progressively, rules on anticompetitive practices are introduced (cartels in 1953, abuses of dominance in 1963, merger control in 1977)
  - Meanwhile, specific rules are developed to tackle unfair business practices and discriminatory conditions of sale (Ordinance of 1967, Law of 1973)

1986: entry into the modern area, but with some specificities (1)

HISTORICAL APPROACH

- **Ordinance of 1 December 1986 regarding price and competition freedom**
  - Paradigm shift
    - End of the administrated economy ; the principle of free competition is affirmed
    - The approach adopted is more in line with European law principles
  - The Competition Council (independent body) is created, and becomes the French Competition Authority later on (2008)
  - But French specificities are maintained – considerations of fairness?

- **Specificity in antitrust and merger law**
  - Specific abuses (infringements without dominance)
    - Abuse of economic dependency (inspired by German law) (1986) – introduced to protect suppliers in their relations with large retailers
    - Abusively low prices (1996) – introduced to protect small businesses
  - Specific derogations / exemptions
    - Access or stability of employment are listed among the exemption factors as an economic progress
    - The Ministry may grant exemptions by decree to certain categories of agreements, especially when they are intended to improve SMEs' management

1986: entry into the modern area, with some specificities (2)

HISTORICAL APPROACH

- In merger control
  - Control remains in the hands of the Ministry of Economy
  - Control test: balance between lessening of competition and contribution to the economic and social progress, which includes employment (and later to the competitiveness of the merged entities)

- **Specificity by introducing rules regarding "*Transparency and restrictive practices*" with a fairness purpose (Title 4 Fr. Com. Code)**
  - The purpose of this title is mainly to introduce transparency in business relationships
  - Behaviours impacting relationships between business partners (resale below costs, fixed prices, discriminatory practices…)
    - Punished by means of civil or criminal sanctions
    - Prohibited *per se*, independently of their effects on the market

1986 and after: evolution (1)

RESTRICTIVE PRACTICES

- **Diversification and intensification over the time of restrictive practices rules**
  - Manifold objectives: protection of the weakest economic actors, search for a trade-off in relationships…
  - Common feature: *per se* prohibition, no assessment of the impact on competition
- **Development implicitly allowed by EU law**
  - As opposed to antitrust law, Members States enjoy a wider latitude in that respect because EU law did not intervene in this field yet
  - Regulation 1/2003 enshrines the Member States' latitude (under French initiative) – see Article 3§3 (possibility to maintain provisions *"that predominantly pursue an objective different"* from Art. 101 and 102)
- **Interaction between antitrust and restrictive practices**
  - Example of overlap – different purposes and enforcers
    - Booking case regarding the parity clauses imposed on hotels (prohibiting hotels using online booking platforms to display lower night stay prices on other hotel distribution channels including themselves)
      - Commitments before certain competition authorities (French, Italian and Swedish) were taken by Booking in order to restore price competition
      - French commercial tribunal considered the parity clauses null and void on the basis of Title 4 of the French Commercial Code

1986 and after: evolution (2)

RESTRICTIVE PRACTICES

- **Questioning about a new reform**
  - Recent report « *For a reform of competition law* » - January 2018
  - Various questions and options
    - Are restrictive practices part of competition law?
    - Are the existing rules efficient and successful? Serious debate. See French gouvernement *Etats généraux de l'alimentation* (Summit conference on food)
    - Shall restrictive practices be withdrawn from the commercial code? And rely on other rules:
      - antitrust law when restrictive practices have an effect on the market
      - French civil code (tort law) in other situations (to sanction unfair competition, "unfair" contractual negotiations, ensure compensation to consumers through damages actions)
    - Shall restrictive practices be simplified or reorganised?
      - Simplification: deletion of certain restrictive practices considered as obsolete
      - Reorganisation: limit the number of rules; facilitate their implementation; introduce a assessment of the impact of the practice on the situation of the operator on a market?
- **A debate which also exists at EU level**
  - Initiatives of the Commission (Internal Market) in 2013 – *Green paper on unfair trading practices in the BtoB food and non-food supply chain in Europe*
  - But recent initiatives seems limited to two specific sector (i) food supply chain and (ii) digital sector

1986 and after: evolution (3)

ANTITRUST

- **An unsuccessful application of the provisions regarding French specific abuses**
  - Permitted by Regulation 1/2003 - Art 3§2 (possibility to maintain "*stricter national laws which prohibit or sanction unilateral conduct*")
  - Abusively low prices: no application - very strict conditions (pricing for consumers, predatory test, foreclosure effect...)
  - Abuse of economic dependency: few applications, strict conditions - overlap with restrictive practices
- **Almost non-use of specific derogations**
- **Progressive orientation of antitrust law towards the protection of consumer welfare and economic efficiency**
  - Integration and development of economic analysis
  - FCA President B. Lasserre in 2006 in the annual report "*Competition law and policy have no other objective than to contribute to economic efficiency and consumer welfare*"
  - New President I. de Silva in 2016: mentions finding her inspiration in the contribution of her predecessor, i.e. competition on the merits and the need for an open and fair playing field
- Although soft law instruments and communication policy have increased in the recent period, we do not observe – to date – a more frequent occurrence of "fairness" in speeches and publications

1986 and after: evolution (4)

ANTITRUST

- **Reform of merger control in 2008**
  - Decision-making power transfered to the FCA
  - No more reference to social progress or to competitiveness
  - SLC test and efficiencies approach are favoured

Fairness and the current enforcement of antitrust law (1)

FAIRNESS DOES NOT APPEAR AS A DIRECT RELEVANT POLICY CONSIDERATION

- **No specific trend showing a new evolution in the approach**
- **But, consideration of fairness can be mentioned at three levels**
  - Sometimes when sanctions are set out (but no impact on the qualification)
    - 2010: Steel cartel - Court of Appeal reduces the fine from 575 M€ to 75 M€ in particular because of the context of the economic crisis
    - 2015: FCA Poultry case – takes into consideration the peculiarity of the sector (economic crisis; need of an inter-professional organisation) to exclude application of the Guidelines on fines
  - Consideration of fairness in network industries?
    - Where the monopoly or the dominant position of incumbent companies does not result from competition on the merits
    - Reflects the Authority's desire to regulate rather than to sanction

Fairness and the current enforcement of antitrust law (2)

FAIRNESS DOES NOT APPEAR AS A DIRECT RELEVANT POLICY CONSIDERATION

- Consideration of fairness in network industries - examples
  - EDF case 2007 – production highly concentrated. Margin squeeze approach to force the creation of a wholesale electricity market
  - ENGIE case 2014 and 2017 – access to the clients database to foster entry on the market of new entrants
  - In all of these cases, no final decision on the merits (and therefore no modification of the economic test) – either commitments or settlement procedures
- Consideration of fairness in statements provided by the FCA in its advisory function
  - 2008: the FCA obtains the ability to deliver opinions on an *ex officio* basis
  - Use of this power in order to promote competition but with a large approach (market design)
    - The FCA has considered that the grant of access to essential facilities (railway sector) or the grant of advantageous trade conditions (in the telecoms sector as regards call terminations) to new entrants by the sectorial regulator was necessary to restore "*competitive equity*"
    - Further, it also considered that the question of "regulatory equity" falls more properly within the competence of the government and, where appropriate, international instances, than within the competence of the FCA (Opinion n° 12-A-08 dated 20 Mars 2012)

Final remarks

DOES PROMOTING FAIRNESS IN ANTITRUST LAW INCREASE RISK OF DIVERGENCE?

- **Regulation 1/2003**
  - Coincides with a more economic and effect-based approach at the time of its adoption
  - Introduction of the rule of convergence (Article 3)
  - Cooperation and coherence ensured through the ECN

- **How to deal with fairness in the context of the decentralisation?**
  - What would the test for a "fair" approach?
  - This concept of fairness is subjective - Different NCAs in Europe may have a different sense of whether an outcome is fair or not
  - How do we ensure a consistent approach throughout Europe?

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