COMPETITION LAW IN THE DIGITAL ECONOMY: A FRENCH PERSPECTIVE

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Keywords: Digital Economy, Competition Law, Platform, Online, Abuse of Dominance, Merger Control

Abstract: The digital economy has a number of characteristics which may produce both pro and anticompetitive outcomes. On the one hand, digital markets are generally perceived to benefit consumers through lower prices, increased transparency and improved product quality. On the other hand, they also have a certain tendency towards market concentration. Because of these characteristics, competition Authorities are faced with traditional enforcement challenges, albeit in a refined way. In the presence of highly concentrated markets, it may indeed be tempting for the Authorities to infer abusive conduct from mere market power, which may lead to over-enforcement or over-regulation. Conversely, in the presence of disruptive innovation and fast-evolving markets, the Authorities might place too great a reliance on the alleged contestability of digital markets, which may lead to the opposite risk of under-enforcement. Finally, digital markets may raise novel competition concerns which require a refinement of the legal and economic concepts traditionally used by the competition Authorities, in particular for the measurement of market power and for the assessment of innovative pricing strategies.

Drawing upon the recent decision-making practice of the French Competition Authority, this article provides a brief account of some of the challenges raised by the application of competition rules in the digital economy.

1. INTRODUCTION

In recent years, the French Competition Authority (“FCA”) has been particularly active in the digital sector in terms of enforcement, advocacy and prospective reflection. It has adopted a number of decisions concerning digital companies such as Google, Microsoft and Booking. It has issued a number of opinions warning public authorities against the temptation

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1 Lawyers. The views expressed in this article are personal and only reflect the opinions of the Authors. The law firm the Authors work for has been involved in some of the cases discussed in this article, namely Uber, Vente-privee.com and FNAC/Darty. This article is based on a presentation given at a conference held on May 25, 2017 by the Associazione Antitrust Italiana on “E-commerce and digital markets: European and national prospects and expectations”.


3 Decision n°12-D-14 of the 5 June 2012, Microsoft Corporation and Microsoft France.

4 Decision n°15-D-06 of the 21 April, Booking.com B.V., Booking.com France SAS and Booking.com Customer Service France SAS on the «secteur de la réservation hôtelière en ligne».
to over-regulate emerging Internet platforms. And it has published a number of reports addressing a range of new issues resulting from the rise of internet platforms and big data.

Drawing upon these recent developments, this article aims to illustrate the challenges associated with the application of competition law rules in the digital economy.

2. THE DIGITAL ECONOMY: NEW CHALLENGES FOR COMPETITION AUTHORITIES

2.1 Ambivalent features of the digital economy from a competition law perspective

The digital economy has a number of characteristics which set it apart from the more traditional economic sectors familiar to the competition authorities.

These distinctive characteristics have ambivalent effects on the competitive process. Indeed, while digital markets are generally perceived to benefit consumers through lower prices, increased transparency and improved product quality, they also have a manifest tendency towards market concentration.

On the one hand, some of the digital markets’ features may clearly have pro-competitive effects:

i) More efficient connection between offer and demand: many digital platforms aim at matching supply and demand more efficiently, and in doing so they often contribute to expanding both, thus increasing total welfare. Uber, Airbnb or Amazon’s Marketplace are some examples.

ii) Increased transparency and better flow of information: online markets greatly increase transparency on price and quality, which enables consumers to make more informed choices. In addition, the improved flow of information has been accompanied by a dramatic reduction in search costs.

iii) Lower barriers to entry and to expansion: new entrants in digital markets typically face lower fixed and sunk costs and lower informational barriers, which arguably makes such markets more contestable (for instance, it is no longer necessary to run a brick and mortar shop to reach consumers). As The Economist puts it, within the digital economy, there is “a potential
for incumbents to be blindsided by a start-up in a garage or an unexpected technological swift\textsuperscript{9}.

iv) \textit{Two-sided markets}: many digital platforms can be considered to be “two-sided” since they allow an interaction of two or more user groups located at different levels of the value chain. Users from both sides of the platform benefit from its use, which entails network effects.

The two-sided nature of digital markets forces platform operators to get “both sides on board”\textsuperscript{10}, i.e. to reach a critical mass by attracting users on both sides. Platform operators are thus incentivized to set a pricing structure that favors the user group which is the most price-sensitive and/or the most important to attract the other side. Such pricing is not necessarily anticompetitive as it may increase the platform size, to the benefit of all users\textsuperscript{11}.

On the other hand, some of the digital markets’ features may have anti-competitive effects:

i) \textit{Critical mass}: two-sided platforms must attract a sufficient number of users on both sides and especially on the side that will be the most attractive for the other. As a result, the need to reach a tipping point and the corresponding critical mass can discourage new entrants. Even when entry occurs, it may be less efficient in terms of competitive pressure exerted on incumbents since new entrants will not be able to compete on a level playing field. Network effects can thus contribute to raising barriers to entry and expansion.

ii) \textit{Club effect}: network effects may also increase switching costs with the result that users may be locked in to the product.

iii) \textit{Winner takes all}: two-sidedness, critical mass and network effects make dominance – or even monopoly – the virtually inevitable outcome of success\textsuperscript{12}.

2.2 New challenges for competition authorities

In light of these features (complexity, disruptive innovation, tendency to concentration, increased transparency, network effects, fast-paced evolution, etc.), it may be more difficult for competition authorities to determine whether a given market operates in an optimal way from a competition law standpoint and to clearly draw the line between competition on the merits and abusive conduct. They thus face traditional enforcement challenges, albeit in a refined and, perhaps, exacerbated way:

i) \textit{Over-regulation and over-enforcement}: when faced with disruptive business models which manage to achieve significant market power in a short period of time, competition authorities may be tempted to adopt a static approach and to infer competition concerns from market concentration. One natural reaction would then be to regulate too rigidly or to apply competition rules too strictly to these emerging companies,

\textsuperscript{9} The Economist, May 6, 2017, “The world’s most valuable resource is no longer oil, but data”.


\textsuperscript{11} Ibid.

thereby discouraging the development of innovative business models.

ii) Under-enforcement: the opposite pitfall for competition authorities would be to place too great a confidence in the contestability of digital markets, which would lead to sub-optimal levels of enforcement.

iii) Refinement of traditional antitrust analytical tools: the rise of new competition concerns in the digital sector does not necessarily call for the creation of entirely new legal and economic tools. In fact, traditional analytical tools have proven to be sufficiently robust and flexible to address a vast array of practices, provided they are refined when necessary.

3. A FEW ILLUSTRATIVE PRECEDENTS

3.1 The risk of over-regulation: the Uber case

The Uber saga provides a good illustration of how internet platforms may disrupt entire industries, even, or perhaps particularly, when the latter have been historically protected by sector-specific regulations\(^\text{13}\).

In France, the entry and expansion of Uber has given rise to multiple and complex litigation revolving around the notion of “electronic hailing”, a term coined by the taxi industry to refer to what it perceived as unfair competition infringing on its legal monopoly over street hailing.

The following section provides a brief account of some of the competition considerations raised by the evolution of the private transportation sector in recent years.

Traditionally, this sector has been divided into two potential relevant markets. On the one hand, the ply-for-hire market, which is a legal monopoly reserved for licensed taxis. On the other hand, the pre-booking market, which had been marginal until the arrival of Internet platforms such as Uber and others.

Ply-for-hire (also known as “hailing”) refers to picking up clients directly from the roadside and designated taxi ranks, without any pre-booking. Historically, the ply-for-hire market has been relatively shielded from competition by the existence of a legal monopoly, and heavily regulated in terms of access to the profession and prices:

i) Legal monopoly: taxis hold an exclusive right to accept street hails and to pick up passengers at designated taxi ranks, without reservation, for a specific transport service in exchange for services are defined by Article L. 3121-1 and are heavily regulated.

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payment. In addition, they have a special right to use bus lanes.\textsuperscript{14}

ii) Access to the profession: as taxi services are provided on public streets, taxi drivers need to obtain a parking permit (“license”). At present, taxi candidates have two ways to obtain a taxi license. They can either enroll on the administrative waiting lists to obtain a free license (the average waiting period for a free license is between 15 and 20 years),\textsuperscript{15} or they can purchase a license from another taxi driver or taxi company (the average price for a license was around € 240,000 in 2014).\textsuperscript{16}

iii) Prices: taxi prices are regulated by the State. Price increases are decided by the Minister for Economic Affairs and adapted through the “préfecture” which approves prices at “département” level. They include a fixed fee plus a price which takes into account both the time and distance travelled.

In a series of opinions, the FCA stressed that the regulatory framework applicable to taxis resulted in a significant imbalance between supply and demand, especially in the Paris area.\textsuperscript{17}

On the pre-booked market, clients book a driver in advance, either by phone, online, or via a mobile app, with different pricing models. Prior to 2009, private hire vehicles (“PHVs”) were also subject to a heavy regulatory framework which included a license requirement and a limitation of the number of PHV licenses at “département” level. However, as of 2010, PHV services started expanding as a result of two major changes, namely (i) the loosening of the regulatory framework and (ii) the technological development of smartphones. Indeed, Law no. 2009-888\textsuperscript{19} partially liberalized the license system for PHVs, paving the way for an increase in supply, while the development of the use of smartphones enabled consumers to access online PHV reservation platforms through various applications, thus rendering transport services accessible to a wider range of clients.

These changes brought about a radical shift in the private transportation industry, with the emergence of a market for pre-booked services. In this respect, the FCA stressed that the emergence of online platform services enabled more demand to be met.\textsuperscript{20}

\textsuperscript{14} Article L. 231-3 of the French Tourism Code. See also Case C-518/13 Ezentec [2015] EU:C:2015:9.
\textsuperscript{15} Avis de l’Autorité de la concurrence n°13-A-23 of the 16 December 2013 on « un projet de décret relative à la réservation préalable des voitures de tourisme avec chauffeur » (the “FCA 2013 Opinion”).
\textsuperscript{17} FCA 2013 Opinion, paras 39: “Au final, il apparaît que le nombre limité de taxis en région parisienne et les modalités de tarification des courses conduisent à un décalage marqué entre l’offre et la demande”. See also: FCA Opinion n°14-A-17 of the 9 December 2014 on « un projet de décret relatif au transport public particulier de personnes », paras 24-31 (the “FCA 2014 Opinion”), paras 2-21.
\textsuperscript{18} FCA 2013 Opinion, paras 52-64; FCA 2014 Opinion, paras 24-31; FCA Opinion n°17-A-04 of the 20 Mars 2017 on « un projet de décret relatif au transport particulier de personnes », paras 9-10 [the “FCA 2017 Opinion”].
\textsuperscript{19} Law no. 2009-888 of July 22, 2009.
\textsuperscript{20} FCA 2013 Opinion, para. 120.
Nevertheless, taxi unions alleged that pre-booked services amounted to “illegal hailing”, on the ground that the time between reservation and the client being picked up prevented any distinction between taxis and PHVs. In an apparent effort to appease the taxi drivers’ discontent, the French authorities adopted three measures imposing strict operational restrictions on PHV drivers:

i) The 15-minute waiting period: the French government adopted a décret introducing a mandatory 15-minute waiting period between the reservation and pick-up of a client, despite the fact that the FCA issued a negative opinion on this décret, stressing that it would have anticompetitive effects on the neighboring pre-booked market. On appeal, the Conseil d’État suspended the implementation of the décret, considering it went beyond the mere protection of the taxis’ legal monopoly on the “ply-for-hire” market, and that it unduly restricted the PHVs’ freedom of entrepreneurship on the neighboring market for pre-booked services, and eventually annulled it.

ii) The obligation to “return to base”: following the annulment of this décret, a law was passed on October 1, 2014 (the “Thévenoud Law”), which required PHVs to return to their base after completing a trip before they can receive a reservation for another trip. Again, the FCA delivered a negative opinion on the ground that “this provision would not discourage illegal hailing” and that other measures could be more efficient in this respect. According to the FCA “the legitimate discouragement of illegal hailing, which is part of the taxi’s monopoly, should not result in the distortion of competition on the pre-booking market, which is open to competition”.

iii) The limitation of the use of geolocation technologies: in addition, the Thévenoud Law has prohibited PHVs and intermediary platforms from informing clients of both the location and the availability of drivers. In practice, this means that French Law technically allows only one category of operator (taxis) to fully exploit geolocation technologies for the provision of private transportation services on the pre-booked market.

Such regulatory burdens may jeopardize innovation and may not be able to keep up with rapidly changing market conditions. While purportedly aimed at protecting some superior general interest, such regulations often...

23 Conseil d’Etat, Order of the 5 February 2014 n°374524 and n°374555.
24 Conseil d’Etat 6° et 1° joint-sections, Decision of the 17 December 2014, n°374525.
26 FCA 2014 Opinion, paras. 64-68.
27 Press Release, “7 January 2015: Taxis/Chauffeur driven cars (CDC)”.
seek to protect incumbent industries and may harm the development of new services.

In this context, the FCA has provided checks and balances and played an important advocacy role, issuing a series of opinions in which it warned public authorities of the risks of over-regulating a nascent industry largely praised by consumers.

### 3.2 The risk of under-enforcement: the Vente-privée.com case

In 2001, Vente-privée.com developed the concept of online “flash sales” whereby consumers are offered very significant discounts on well-known brands during a limited period of time.

The business model is that of a platform aiming to attract users on both sides: upstream, well-known brands will have a way of quickly moving the previous season’s stock; downstream, consumers who register and subscribe to the website will be offered very significant discounts.

In order to attract consumers downstream, the websites must have access to the most well-known brands. Conversely, the more subscribers the website has, the easier it will be to attract well-known brands upstream.

In 2005, new players entered the online flash sale market. In response, Vente-privee.com started imposing exclusivity clauses on major brands.

Brandalley, a competing website, lodged a complaint with the FCA alleging that Vente-privée.com was abusing its dominant position on the online flash sale market. In its complaint, Brandalley argued that:

i) the online flash sale market was a relevant market, distinct from both retail physical markets and generalist online sales markets;

ii) Vente-privée.com held a dominant position on this market;

iii) the exclusivity imposed by Vente-privée.com on major brands foreclosed competitors.

In its decision, the FCA reached a series of conclusions which tended to indicate that the exclusivity in question did raise competition concerns.

First, it reckoned that access to unsold stock upstream was “indispensable” to be able to compete downstream30, thus suggesting that imposing exclusivity on such essential inputs might have a foreclosure effect. Secondly, it raised doubts regarding the duration of the exclusivity, noting that Vente-privée.com was unable to justify exclusivity beyond sixteen weeks. Finally, it expressly concluded that “if such exclusivity clauses are inserted in contracts concluded by a dominant undertaking, such clauses could constitute an abuse”31.

In other words, the FCA clearly identified, if not abusive conduct, at least a competition concern. Yet, it decided to reject Brandalley’s complaint on the ground that it had not been

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30 Ibid.: “les produits destockés sont indispensables à l’activité de Vente-privée.com auprès des consommateurs finaux”.

31 FCA decision, op.cit., para. 126: “Inséré dans les contrats conclus par une entreprise qui serait en situation de domination sur le marché, ce type de clause pourrait être susceptible de constituer un abus”.

established that there was a distinct flash sales market. More precisely, it considered that because the sector had evolved significantly between 2005 and 2011, notably with the proliferation of e-commerce websites, it was no longer possible in 2014 to assess substitutability and, thus, to define the relevant market\textsuperscript{32}.

The legal reasoning of this decision raises important questions. Indeed, if the FCA concludes that a given practice would constitute an abuse if it were implemented by a dominant company, then one may argue that the only way to exclude the existence of a violation of article 102 TFEU is to positively define the relevant market and to rule on the existence or absence of a dominant position therein.

The alleged impossibility to define the relevant market appears questionable. Indeed, in a subsequent merger decision\textsuperscript{33}, the FCA carried out its competitive assessment on a hypothetical market for online flash sales comprising solely three players, including Vente-privée.com and Brandalley. This precedent tends to confirm the possible, if not likely existence of a distinct market for online flash sales at the time, as alleged by Brandalley in its complaint. It also seems to run contrary to the FCA’s claim that it was impossible to define the relevant market\textsuperscript{34}.

Admittedly, there may have been very valid reasons for the FCA not to intervene in this case: Vente-privée.com did create the business model of online flash sales and it may be that it achieved its leading position through competition on the merits. In that case, the FCA could have issued a decision with a more thorough motivation, explaining for instance why the relevant market was different from the one alleged by the complainant or why the exclusivity clauses in question did not have a foreclosure effect. But finding that such clauses would be abusive if applied by a dominant company and then declining to define the relevant market does not appear to be proper application of article 102 TFEU.

The FCA decision was upheld on appeal\textsuperscript{35} and confirmed by the French Supreme court\textsuperscript{36}.

3.3 Refining the predation tests: the Google and Microsoft decisions

Many Internet platforms offer services free of charge. The competitive analysis of so-called “zero-price” markets prompts the question of

\textsuperscript{32} FCA decision, op.cit., para. 115: “Les caractéristiques et les spécificités de la vente événementielle en ligne ayant évolué au cours de la période, notamment avec l’essor des sites de e-commerce proposant une offre de déstockage, les possibilités de substitution, notamment du côté de la demande, sont susceptibles d’avoir évolué. Dès lors, il n’est plus concevable, à ce jour, d’analyser la substituabilité du côté de la demande pour la période visée par le grief notifié.”

\textsuperscript{33} Decision of the FCA no. 16-DCC-166 of October 31, 2016.

\textsuperscript{34} Indeed, if the FCA is able to identify that market within the strict deadlines applicable to merger control, it should also be able to do so in the context of an article 102 TFEU investigation. In addition, the FCA has in recent years carried out thorough investigations in complex and fast-evolving markets such as online advertising.

\textsuperscript{35} Paris Court of Appeals, 12 May 2016, no. 2015/00301.

\textsuperscript{36} Cour de cassation, 6 December 2017, no. 16-18.835.
the relevance of traditional analytical tools in EU competition law. This is especially true for the predation test in the contexts of two-sided “platforms” and freemium services.

Most Internet platforms operate on two-sided markets, bringing together two categories of customers. Such markets are characterized by indirect network effects, whereby an increase in the number of users on one side of the platform increases the willingness of users on the other side to pay for an interaction with those users. As a consequence, the price structure on these platforms is often designed to optimize demand on both sides of the platform, so that the price charged on one side may not reflect the costs incurred to serve that side. In certain cases, it may even be profitable for an undertaking to provide free goods or services on one side, in order to increase the price charged on the other. Therefore, below-cost selling on such markets may be economically rational and does not necessarily reveal a foreclosure strategy. Under these circumstances, traditional price/cost tests are not necessarily appropriate to identify predatory conducts in such markets.

The term “freemium” services refers to a business model whereby basic services are provided free of charge while more advanced features must be paid for. The rationale for providing a simplified version for free is to generate demand for the upgraded version. These business models are pervasive in digital markets and have proved to be successful (e.g., Spotify, Deezer, LinkedIn). Therefore, in this context as well, below-cost selling is not necessarily intended to foreclose rivals and a mechanical application of traditional predation tests can be misguided.

The decisional practice of the FCA offers two cases in point.

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37 “Free goods and services: Is there such a thing as a free lunch?”, B. Lasserre, Conferences no. 3-2016, New Frontiers of Antitrust (Seminar organized in Paris on June 13, 2016).

38 The legal test for predation was established by the Court of Justice in Akzo v Commission (Case C-62/86 [1991] ECR I-3359) which has been followed and developed in later cases.


40 This phenomenon is sometimes referred to as “indirect network effects” (European Union Law of Competition, Bellamy and Child, Seventh Edition, Oxford, para. 4.059).


42 “Free goods and services: Is there such a thing as a free lunch?”, B. Lasserre, Conferences no. 3-2016, New Frontiers of Antitrust (Seminar organized in Paris on June 13, 2016).

43 Ibid.
3.3.1 The Microsoft case

In this case, Midprod and Livesynchrho alleged that Microsoft was dominant on the market for personal computer operating systems, and that it had committed an abuse of dominance on a related market for data storage, sharing and synchronization services, by providing these services for free. According to the complainants, this practice amounted to predatory pricing. Interestingly, the FCA rejected the complaint on two grounds.

First, the FCA noted that Microsoft’s business model for data storage, sharing and synchronization services was “frezimium” and considered that the purpose for providing a simplified version free of charge was to generate demand for the paid-for version, rather than to foreclose rivals.

Second, the FCA emphasized that data storage, sharing and synchronization services allowed Microsoft to put advertisers in touch with users, via online advertising, thus stressing the two-sided nature of the platform and the rationality of Microsoft’s business model. Accordingly, the FCA rejected the complaint without applying the Akzo test.

This decision appears to be confirmed by the recent findings of economic literature as to how two-sided markets operate. It, however, should not be construed as implying that the Akzo test can never be applied in the context of Internet platforms, as illustrated in the subsequent Google case.

3.3.2 The Google Maps API case

This case concerned mapping application program interfaces (“Mapping APIs”). Google provides mapping application services to both individuals (Google Maps) and businesses (Google Maps API). At the time, Google Maps API provided businesses with a basic version of Mapping APIs free of charge and/or a paid-for version (Google Maps API for Business).

Before the Paris Commercial Court, Bottin Cartographes (a competitor of Google Maps API) successfully claimed that Google was dominant on the market for Mapping APIs and that the provision of Mapping APIs free of charge amounted to predatory pricing. On
appeal, following an opinion from the FCA\textsuperscript{52}, the Paris Court of Appeals overturned the judgment\textsuperscript{53}.

In its opinion, the FCA applied the \textit{Akzo} test\textsuperscript{54}. To this end, the FCA made the conservative assumption that the relevant market encompassed both the free and paid-for versions of Mapping APIs (excluding mapping application services to individuals), although it ultimately left open the exact definition of the relevant market\textsuperscript{55}.

The FCA then applied the \textit{Akzo} test on the basis of the costs and revenues associated with both the basic and the paid-for versions of Google Maps API\textsuperscript{56}. For the period after 2010, the FCA came to the conclusion that the revenues generated through the paid-for version exceeded the long-run average incremental costs (“LRAIC”) incurred by Google for the provision of Mapping APIs.

By contrast, in 2010, these revenues were greater than average avoidable costs but lower than LRAIC\textsuperscript{57}. Consequently, for this period, the FCA assessed whether the provision of free Mapping APIs was likely to be part of a plan to eliminate competitors. In this respect, the FCA emphasized the lack of evidence of such a plan and pointed to a series of factors suggesting that a predation scenario was unlikely. First it was impossible for Google to foreclose open source Mapping APIs. Secondly, the existence of potential competitors and the low barriers to entry would make it difficult for Google to recoup its losses after the alleged predation phase\textsuperscript{58}. As a result, the FCA advised the court to overturn the judgment, which the Court did.

Taken together, these two cases offer a good illustration that traditional analytical tools can neither be mechanically applied to digital markets, nor completely ignored, but should be refined and applied on a case-by-case basis.

### 3.4 Market definition and market power in the digital sector: the Fnac/Darty merger

The \textit{Fnac/Darty} case\textsuperscript{59} concerned a merger between two brick and mortar operators active in the retail distribution market for brown products (TVs, cameras and audio sets: MP3, DVD and Blu-ray players, \textit{etc}) and grey products (communication and multimedia: tablets, laptops, smartphones, \textit{etc}). The merger appeared to be a defensive move by traditional retailers in order to adapt to the increased

\textsuperscript{52} FCA Opinion n°14-A-18 of the 16 December 2014 Bottin Cartographes SAS v. sociétés Google Inc. et Google France (the “FCA Opinion”).

\textsuperscript{53} Paris Court of Appeals, November 2015, Bottin Cartographes v Google, RG no. 2009061231.

\textsuperscript{54} FCA Opinion, para. 41.

\textsuperscript{55} \textit{Ibid}, para. 44. Both parties agreed with this view, see para. 44: “les hypothèses utilisées pour le test de sacrifice sont les suivantes: […] le marché pertinent retenu, sur lequel les parties s’accordent, est celui des API cartographiques permettant l’insertion de cartes sur le site internet. Ce marché […] inclut non seulement les API dites “gratuites” […] mais également les API payantes […]”.

\textsuperscript{56} \textit{Ibid}, paras. 64-65.

\textsuperscript{57} \textit{Ibid}, paras. 70-74 (prior to this date [from 2007 to 2009], no data were available)

\textsuperscript{58} FCA Opinion, paras. 78-88.

\textsuperscript{59} FCA decision no. 16-DCC-111 of July 18, 2016.
competition from Internet pure players, in particular Amazon.

This rationale had a significant impact on the approach taken by the FCA to deal with this case, as the central question was to find a way to take into account online sales when defining the market and assessing the parties’ market position.

Traditionally, while acknowledging a certain degree of convergence, the FCA has consistently considered that online and brick and mortar sales belong to distinct product markets due to persistent differences in prices, consumer experience, services offered, etc.

In its Fnac/Darty decision, the FCA departed from its traditional approach and considered that online and physical sales were part of the same relevant market.

The FCA reached this conclusion on the basis of strong evidence submitted by the notifying parties. From a demand-side perspective, consumers appeared to take into account both physical and online outlets when they consider buying a given product. From a supply-side perspective, internal documents showed that brick and mortar operators monitor prices and product ranges offered by pure players such as Amazon in order to define their commercial strategy.

Having defined the relevant market as comprising both physical and on-line sales, the FCA then turned to measuring market concentration. Given that retail markets are typically defined as local markets around the relevant point of sale, the FCA had to find a way to allocate a market share to on-line players on these local markets.

First, the FCA assumed that the on-line sales penetration rate was the same across the French territory. In other words, it considered that online sales represented the same proportion of physical sales in all regions (no distinction was made between urban and rural areas).

Then, the FCA calculated the total on-line sales in each area, applying the national online sales penetration rate to the total physical sales achieved in the corresponding area.

Finally, the online turnover of each area was then allocated to each competitor in proportion to its online market share at a national level, including for pure players, to which a local market share was then allocated at a local level.

With this method, the FCA reconstituted “virtual” local market shares held by on-line operators (pure players as well as on-line stores operated by brick and mortar distributors).

The FCA eventually cleared the merger subject to the divestment of six stores located in the Paris area, a figure that would probably have been higher had it failed to properly take into account the competitive constraints exerted by on-line sales on the merging parties.

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60 See in that sense the FCA decision no. 11-DCC-87 of 10 June 2011 and its opinion on e-commerce no. 12-A-20 of 18 September 2012.
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FCA, decision n°12-D-14, 5 June 2012.


Paris Court of Appeals, 25 November 2015, Bottin Cartographes v Google, n°2009061231.