France

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Nizar Lajnef

9.1 Introduction

9.1.1 Economic Background

Grocery retail distribution in France is mainly performed by large distributors operating self-service supermarkets of different sizes (minimarket, supermarket, hypermarket).[1] The six major distributors account for almost 80 % of the market at the national level, making this sector a low concentrated market on the basis of the concentration threshold used by competition authorities or the Herfindahl–Hirschmann index. The market share of the biggest distributor does not exceed 20 %.

Upstream, purchasing offices negotiate with food industrialists and agricultural cooperatives. The negotiating process is quite tense as large retailers are charged of securing a too high profit margin and of dictating terms and conditions to

The following members of the working group contributed to this report: Mathilde Boudou, Sarah Darmon, Hervé Delannoy, Gildas de Muizon, Emmanuel Durand, Clément Hubert, Pauline Le More, Charles Saumon, Joffrey Sigrist and Anaïs Taviot.

[1] Between 60 % and 70 % of the sales in the food retail sector are made in the large-scale distribution stores; *see* no 11 of the publication "ECO" of the DGCCRF entitled "Grande distribution et croissance économique en France," December 2012; http://www.economie.gouv.fr/files/directions_services/dgccrf/documentation/dgccrf_eco/dgccrf_eco11.pdf (accessed 11 August 2014).

N. Lajnef (✉)
UGGC Avocats, Paris, France

SciencesPo., Paris, France
e-mail: n.lajnef@uggc.com

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agricultural producers whose precarious financial footing reduces their negotiating power. This situation gets even worse if there is a large increase of the prices of raw materials. Aware of this tight negotiation process, the French Government has reinforced the role of the Commission for prices and margins for agricultural products whose mission is "to enlighten economic actors and public authorities regarding pricing and margins within the supply chain for agricultural commodities." An annual report submitted to the Parliament traces the evolution of captured margins for each step on the vertical chain (agricultural production, transformation, distribution).

Downstream, retail price level borne by the consumers has always been a concern for public authorities. Many regulatory changes in the sector have occurred in the past years (Galland Act (1996),[2] Sarkozy agreements (2004),[3] Dutreil II Act (2005),[4] Chatel Act (2008)[5]). One meaningful impact of these regulatory changes was the gradual lowering of the threshold of resale at a loss, thanks to the integration of different rebates, refunds and back margins.

So far, paradoxically, large retailers are subject to a limited amount of litigation before the *French Competition Authority* (the "FCA"). Most of the concentrations filed relate to small operations at the local level. Cases of anticompetitive practices are not numerous: the FCA has been involved in the grocery retail distribution sector essentially through sector inquiries.

9.1.2 Legal Background

9.1.2.1 Competition Law

The grocery sector is subject to general French Competition Law, which applies to all the economic activities. Under French law, competition rules concern "all the production, distribution and service activities," whoever the actors might be.[6]

Competition law provisions, in their broadest sense, are comprised of (1) the prohibition of anticompetitive practices, including anticompetitive agreements,[7] abuses of a dominant position,[8] abuse of economic dependency[9] and abusively low pricing,[10] on the one hand, and (2) a merger control regime, including specific thresholds for the grocery sector (see Sect. 9.3 below), on the other hand.

[2] Act no 96-588 of 1 July 1996 on loyal and balanced commercial relations.

[3] "Commitment for a non-transitory decrease of price" of 17 June 2004.

[4] Act no 2005-882 of 2 August 2005 in favour of small and medium sized enterprises.

[5] Act no 2008-3 of 3 January 2008 for the development of competition for consumers.

[6] Art. L 410-1 of the Commercial Code.

[7] Art. L 420-1 of the Commercial Code.

[8] Art. L 420-2, para. 1, of the Commercial Code.

[9] Art. L 420-2, para. 2, of the Commercial Code.

[10] Art. L. 420-5 of the Commercial Code.

9.1.2.2 Exemptions from Competition Law Prohibitions

In general and not specifically applied to the grocery sector, law may, by exception, exempt in part or in full implementation of antitrust law. According to Art. L 420-4 of the Commercial Code, the prohibition of anticompetitive practices does not apply to (1) those that result from the implementation of legislation or a regulation adopted in application thereof, (2) those whose perpetrators can prove that they have the effect of ensuring economic progress, including by creating or maintaining jobs, and that they reserve for users a fair share in the resulting profit, without giving the undertakings involved the opportunity to eliminate competition for a substantial part of the products in question. Similarly, agreements or concerted practices are not subject to the provisions of Art. L 420-2-1 of the Commercial Code when their perpetrators can justify that such agreements are based on objective reasons with respect to economic efficiency and award consumers a fair share of the resulting profit.[11]

Finally, although it is not an exemption in the true sense, it is interesting to note that in the fight against high cost of consumer goods, Art. L 410-5 of the Commercial Code, as modified by Act no 2012-1270 of 20 November 2012, introduced a statutory exception to the principle of free price setting. This text provides for the intervention of the state in certain overseas territories to negotiate "each year with professional organizations in the retail sector and their suppliers, be they producers, wholesalers or importers, an agreement moderating the overall price of a comprehensive list of consumer products." Art. L 632-14 of the Rural Code also provides for such an exception in the dairy sector.

9.1.2.3 Laws Against Unfair Trade Practices

Title IV of Book IV of the Commercial Code lays down rules on transparency and forbids practices restrictive of competition (*pratiques restrictives de concurrence*).

Rules on Transparency

These rules, generally applicable to all traders, can be considered as regulating contractual relationships between large-scale food retailers and small suppliers or small-scale retailers. Their aim is to insure a better transparency of relationships between suppliers and retailers[12] by imposing a certain formalism regarding the contractual documentation governing these relationships.

Formal requirements apply to different levels of the contractual relations: (1) obligation for any producer, service provider, wholesaler or importer to issue General Terms and Conditions of Sale (the "GTCS")[13]; (2) obligation to respect maximum legal payment terms of 45 days from the end of the month or 60 days

[11] Art. L 420-4 of the Commercial Code.

[12] First Chapter of Title IV of Book IV of the Commercial Code, "Of Transparency" ("*De la transparence*"), include Art. L 441-1 to L 441-7 of the Commercial Code on the contractual documentation applicable to the relationship between suppliers and distributors.

[13] See Art. L 441-6 I of the Commercial Code. GTCS are the foundation stone of the commercial negotiation. They must mention certain information such as selling conditions, unit prices, price reductions and payment conditions.

from the date of the invoice[14]; (3) obligation to sign a single convention (convention unique) before 1 March of each year[15] indicating the obligations to which the parties are bound in order to determine the price following commercial negotiations[16]; (4) obligation for the seller to issue an invoice as soon as the sale is completed or the service performed[17]; (5) requirement of a written contract for any case where a retailer would like to benefit from rebates, discounts, refunds or remuneration of services performed for the resale of perishable agricultural products or with short production cycles, living animals, carcasses or for fishing or aquaculture products, as listed in a decree[18]; (6) requirement of a written commitment on a proportionate level of purchase to benefit from an advantage before any order.[19]

In addition, Art. 1 of the "Lefebvre" bill presented to the Parliament on behalf of the Government on 1 June 2011, "reinforcing the rights, protection and information of consumers," created the "single document," a kind of "convention unique"[20] applicable to the affiliation relationship between independent businesses and grocery mass retail distributors. The bill was later abandoned by the Government.

Practices Restrictive of Competition

Although applicable to any trader, the rules relating to Practices Restrictive of Competition are intended to deal with the obvious imbalance in favour of large-scale retailers in France[21] by prohibiting *per se* a large range of negotiating practices.

[14] See Art. L. 441-6 I of the Commercial Code. The parties can decide on a longer payment term, the maximum term being 45 days end of the month or 60 days after the date of issue of the invoice. However, professionals of a particular sector, clients and suppliers can jointly decide to reduce this maximal term. They can also propose to set the date of reception of goods or performance of the service as the starting point of this term. Agreements are concluded to do so by professional organizations. A decree can extend this negotiated payment term to all the operators of this sector or—if needed—validate the new kind of computation and extend it to such operators.

[15] Or within two months after the starting point of commercialization of products or services that would be subject to a particular commercialization cycle.

[16] See Art. L 441-7 of the Commercial Code. The law provides for the obligation, in certain cases, to conclude a written contract composed of an annual master agreement and implementation contracts. This contract aims at determining—among others—selling conditions as decided during the commercial negotiation and the conditions on how the retailer commits to provide any service to ease commercialization to the supplier that is not related to selling or purchasing obligations. This convention must mention the object, the date, the implementing modalities, the remuneration of the obligations and the products or services involved.

[17] See Art. L. 441-3 of the Commercial Code. The purchaser is under the obligation to require the invoice, which has to be drawn up in duplicate, and mention compulsory elements such as (beyond the names of the parties and their address) the date of the sale or the service provision; quantities; a precise designation; the unit price, excluding VAT; the date of payment; and the amount of the fixed allowances for the recovery fees owed to the creditor in case of a late payment.

[18] See Art. L 441-2-1 of the Commercial Code.

[19] See Art. L 442-6, I, 3° of the Commercial Code.

[20] See Art. L. 441-7 of the Commercial Code.

[21] As formulated in the Hagelsteen report, which initiated the recasting of these legal provisions applicable to structures or behaviors on the grocery retail market: "the underlying logic is quite

Art. L 442-1 et seq. of the Commercial Code provide a list of practices restrictive of competition that involve the civil or criminal responsibility of their authors or the nullity of the clauses, without proving any anticompetitive object or effect of these practices on the market. Some of these provisions relate, at least partly, to retail selling.

Art. L 442-1 takes over the rules set in the Consumer Code relating to sales or services with premiums, refusals to sell a product or to provide a service, and supplies, effected in batches or imposed quantities.

Art. L 442-2 of the Commercial Code forbids any merchant to resell at a loss except—in particular—for food products sold in a store with a selling area below 300 m^2 and nonfood products sold in a store with a selling area below 1,000 m^2 and which price is in line with those imposed by law for the same products sold in the same shopping area.

The actual purchasing price (*prix d'achat effectif*), under which resale is prohibited, has been decreased by "the amount of all other financial advantages granted by the seller," which includes every kind of rebates or discounts a supplier could grant to the distributor. Once a "financial advantage" is granted to a distributor, this advantage will be in principle passed on to the price under which the reseller will not be able to sell to final consumers.[22]

However, Art. L 441-2-2 of the Commercial Code forbids suppliers of fruits and fresh vegetables to grant rebates, discounts or refunds to their resellers. Art. L 446-2 of the Commercial Code provides restrictions on how suppliers shall grant rebates or discounts,[23] which can indirectly influence their passing on the final price.

Art. L 442-5 of the Commercial Code, on the other hand, forbids the imposition, directly or indirectly, of a minimum resale price of a product or good, of the price of a service or of a trading margin.

Art. L 442-6 I of the Commercial Code provides that any undertaking is liable and may be condemned to pay damages arising from (1) obtaining (or attempting to obtain) from its commercial partner any benefit with no relation to a commercial service actually performed or obviously disproportionate with its value and/or

simple: it is based on the observation that there is structurally – because of the introduction of an oligopolistic situation in favour of retailers - a balance of forces unfavourable to producers, and particularly to small and medium-sized firms." (See Marie-Dominique Hagelsteen, La négociabilité des tarifs et des conditions générales de vente, 12 February 2008, p. 7.)

[22] This specification has been added by the Act of 2 August 2005, as amended by the LME (2008). Under the Act "on loyal and balanced commercial relations" (the so-called *Loi Galland*, 1 July 1996), the "actual purchasing price" was "the unit price mentioned on the invoice, increased by taxes on turnover, specific taxes relative to this resale and transportation costs."

[23] According to Art. L 442-6, I, 8°) of the Commercial Code, a retailer is forbidden to deduce at his own initiative, from the invoice of the supplier, any penalty or rebate sanctioning a noncompliance with a delivery date or nonconformity of the delivered goods, when the debt is not certain, of a fixed amount and collectable, and when the supplier has not been able to control the veracity of the alleged claim. Moreover, Art. L 442-6 II forbids clauses (a) allowing to retroactively benefit from rebates, discounts or commercial cooperation agreements or (b) allowing to automatically benefit from the most favorable conditions granted to competitors by its contractual partner.

(2) submitting a commercial partner to obligations creating a significant imbalance in the parties' rights and obligations.

For instance, monthly installments required by a distributor who also imposed to his supplier to pay only by bank transfers, without any contractual clause allowing the modification of the installments of rebates, have been considered as a "serious risk" for the supplier and, as such, as creating a significant imbalance.[24]

On the contrary, mere differences of prices between two partners of a same supplier are not sufficient to prove that there is a "significant imbalance" in a distribution agreement.[25] The Commercial Practices Review Panel (the "CEPC")[26] brought some valuable guidance on this notion.[27]

The other practices restrictive of competition of Art. L 442-6 I of the Commercial Code that are sanctioned by civil liability include (1) obtaining (or attempting to obtain) a benefit, as a prior condition to an order, without a written commitment on a proportionate level of purchase and—if relevant—without a service requested by the supplier and formalized in a written agreement; (2) obtaining (or attempting to obtain), under the threat of a total or partial termination of commercial relationships, obviously abusive conditions regarding prices, payment terms, selling conditions or any services that are not linked to the selling or purchasing obligations; (3) immediate termination—even partial—of an established commercial relationship without any written notice that takes into account the duration of the commercial relationship and complying with the minimal notice period as set by commercial customs or interprofessional agreements; when the relationship involves own brands (*marques de distributeurs*, the "MDD's"), the minimal notice period is doubled; (4) submission of a partner to obviously abusive payment

[24] Commercial Court of Lille, 6 January 2010, Castorama, 09-05184. The Court acknowledged the significant feature of the imbalance stating that "CASTORAMA's practices of monthly instalments do not respect the spirit of the LME; they are not mutual; they are without any counterpart and distinctly unfavourable to suppliers; their extent is characterised; they are based on a dependence linked to the purchasing power of the distributor; they are abusive; the resulting imbalance is therefore significant."

[25] Court of Appeal of Versailles, 27 October 2011, No 10/06093, SAS Dexxon Data Media c/Fujifilm Recording Media GmbH. According to the Court, "the significant imbalance between the rights and obligations of the parties has to be appreciated in the formation and implementation of the commercial relations of the contractual parties (. . .) and not (. . .) in the comparison between the commercial conditions and pricing policies granted [to the distributor's competitors]."

[26] Commission d'examen des pratiques commerciales, http://www.economie.gouv.fr/cepc.

[27] See, in particular, CEPC, *Les abus dans la relation commerciale: sur la notion de déséquilibre significatif*, Questions-Réponses, 11 October 2011, available on: http://www.economie.gouv.fr/cepc/abus-dans-relation-commerciale-sur-notion-desequilibre-significatif#q4. For the CEPC, "the new notion of significant imbalance between the rights and obligations of the parties is dedicated to be applied to all kind of situations, even if the practice at stake can also be condemned by another subparagraph of Art. L 442-6 of the Commercial Code. It will be assessed in the light of the effects of the convention by the parties. Proving that a practice generates a significant imbalance to the detriment of a commercial partner does not imply to prove in advance that the author of the practice owns a purchasing or selling power."

conditions[28]; (5) refusal or return of goods or deduction of penalty or rebate sanctioning a noncompliance with the delivery date or nonconformity of the delivered goods, when the debt is not certain, of a fixed amount and collectable, and when the supplier has not been able to control the veracity of the alleged claim[29]; (6) refusal to mention the name and address of the manufacturer on the label[30]; (7) benefiting from rebates, discounts or refunds for the purchase of fruits and fresh vegetables.[31]

Art. L. 442-6 II of the Commercial Code states that are void the clauses or contracts that enable an undertaking to (1) retroactively benefit from rebates, discounts or commercial cooperation agreements; (2) obtain payment of a right to be referenced before any order is made[32]; (3) forbid its contractual partner to assign receivables he holds over him to third parties; (4) automatically benefit from the most favourable conditions granted to competitors by the contractual partner; (5) obtain from a reseller operating a retail selling area below 300 m^2 that he supplies but to whom he is not linked (directly or indirectly) by a trademark or know-how licensing agreement the following advantages: (a) acquire a preferential right on the divestiture or transfer of his business or a postcontractual noncompete obligation, (b) make his supply conditional to the commitment of the reseller to exclusively (or quasi-exclusively) buy his products or services for a duration above 2 years.

Regarding the practices prohibited by Art. L 442-6 of the Commercial Code (which is the main source of these *per se* prohibitions), proceedings are initiated before civil or commercial courts having jurisdiction by: (1) any person who has a legitimate interest, (2) the public prosecutor, (3) the Minister in charge of economy or (4) the President of the FCA, when he notices a practice covered by Art. L 442-6 of the Commercial Code when examining a case under his jurisdiction.[33]

Although some of these *per se* prohibitions give rise to numerous court decisions (payment terms, resale at a loss or significant imbalance),[34] even abundant case law (sudden termination of commercial relationships),[35] others have raised very few litigation, or even not at all (for instance, the fact of benefitting from rebates for the purchase of fruits or fresh vegetables).

Act No 2010-874 dated 27 July 2010 relative to the modernization of agriculture and fishing provides an obligation to formalize by contracts the relationships between producers and buyers of some agricultural products.

[28] Art. L 442-6, I, 7° of the Commercial Code.

[29] Art. L 442-6, I, 8° of the Commercial Code.

[30] Art. L 442-6, I, 10° of the Commercial Code.

[31] Art. L 442-6, I, 13° of the Commercial Code.

[32] Art. L 442-6, II, b) of the Commercial Code.

[33] Art. L 442-6 III) of the Commercial Code.

[34] Although this quite recent notion has not raised extensive case law so far.

[35] Beyond the negotiating practices of large-scale distributors, this provision applies in fact to all economic relationships, which explains why the case law is so abundant.

The enforcement of the rules relating to the threshold below which resellers cannot sell their products (*seuil de revente à perte*) can potentially lead to a limitation of competition. For instance, in a notable case of the early 2000, suppliers of calculators for educational use were condemned for having artificially established such thresholds by alleged conditional refunds (which were in fact guaranteed) in order to set up a system allowing the resellers to charge the same prices (which did not result from fair competition).[36]

It has also been considered that the obligation made by Art. L 441-6 of the Commercial Code to a producer or a service provider to issue his GTCSs to any professional purchaser could ease, in certain circumstances, an agreement between suppliers to fix higher prices.[37]

The prohibition of the immediate termination of established commercial relationships[38] can possibly rigidify the retail grocery market: the obligation to grant a notice period beyond the one contractually decided and the deterrence of important fines[39] can have a negative effect on the flexibility of relationships between suppliers and retailers and help less-efficient operators to remain.

9.1.2.4 Other Laws and Regulations Applying to the Retail and Grocery Sector

Commercial planning law experienced many reforms in France. After having tried to vainly protect small shops, which inspired the so-called Royer Act in 1973, the legislation has sought to remove the purely economic criteria in the Commercial Code in 2008.

French planning law requires an authorization for the opening of commercial sites with a sales area exceeding 1,000 m^2 or for the extension of a sales area that have already reached the threshold of 1,000 m^2 or that should reach this threshold by overtaking the project.[40]

Similarly, any sale area shall be authorized for any change in commercial sector of a business with an area exceeding 2,000 m^2, or 1,000 m^2 when the new activity of the store is predominantly food retail.

[36] FCA, Decision No 03-D-45 of 25 September 2003, Practices carried out in the sector of calculators for educational use.

[37] The explanation is that transparency makes easier the observation of competitors' prices by other suppliers. In the case of a collusive agreement (possibly implicit), a supplier could hide a departure from reference prices. Therefore, transparency can give credence to such agreements by limiting departures (Marie-Dominique Hagelsteen, *La négociabilité des tarifs et des conditions gé nérales de vente*, 12 February 2008, p. 15).

[38] Art. L 442-6 I 5° of the Commercial Code.

[39] If the notice taking into account the length of the commercial relationship is not respected, the reparable losses are calculated by the court by multiplying the gross margin made by the victim of termination by the number of months uncovered by the notice actually granted.

[40] Book VII, Title V of the Commercial Code, Art. L 750-1 et seq. of the Commercial Code.

Such provisions with respect to planning law initially aimed at protecting small shops. They tend now to reach territorially a balance between commercial development and complementarities of the commercial offering.

Act no 2009-974 of 10 August 2009 also interferes with the behavior of large retail distributors in the retail sector in the way that, while reaffirming the principle of Sunday rest, introduced many exceptions to this principle in public, touristic and thermal areas, as well as some large cities for volunteer employees. In addition, shall also open on Sunday stores within the perimeters of exceptional use of consumption in public or touristic areas or within the scope of exceptional derogations issued by the administrative authority (*préfet*).

9.1.3 Market Studies

During the last few years, the FCA has been one of the most active competition authorities in the world to render opinions in the retail sector. Since 2009, the FCA has rendered four opinions dealing directly with the retail grocery sector: (1) opinion 09-A-45 of 8 September 2009 relative to the maritime freight and mass retail distribution in the French overseas departments (*departments d'outre-mer* or *DOM*); (2) opinion 10-A-25 of 7 December 2010 relative to category management agreements in the food retail sector; (3) opinion 10-A-26 of 7 December 2010 relative to affiliation contracts of independent stores and of purchase modalities of commercial real estate in the food retail sector; (4) opinion 12-A-01 of 11 January 2012 relative to the competitive environment in the food retail sector in Paris.[41]

9.1.3.1 Reasons for Conducting Market Studies

The motivations supporting the aforementioned opinions of the FCA appear to be various.

Opinion 09-A-45 (French overseas departments) was rendered after a referral on 18 February 2009 from the Secretary of State for overseas, following several weeks of all-out strike in Guadeloupe and Martinique, protesting notably against the prices of essential products on these territories. The aim of the referral was clearly to examine whether the competitive environment in the food retail sectors in the overseas departments could partially explain the level of retail prices in these areas.

[41] The FCA has also made on 18 September 2012 an opinion (Opinion 12-A-20) closing a sector inquiry started on July 2011 relative to the competitive operation of e-commerce. Focusing on three particular sectors (electrical domestic appliances, cosmetic and personal care products and luxury perfume and beauty products), the conclusions of this opinion may therefore have an impact on the retail grocery sectors. In this opinion, the FCA wished that manufacturers and traditional retailers ensure that their marketing agreements (selective distribution, different purchase prices or shipping terms, etc.) do not curb the development of online sales and the resultant increase in competitive pressure. More specifically, the FCA considers that it is essential that manufactures do not obstruct the expansion of pure player retailers.

Opinion 10-A-25 (category management) was the conclusion of proceedings opened at the FCA's own initiative. The FCA noticed that the practices at stake, which have been previously only briefly examined by the European Commission, developed quickly in France, which led the FCA to make exhaustive investigations on such potentially problematic agreements.

Opinion 10-A-26 (affiliation contracts), which was also rendered at the FCA's own initiative, followed a contentious case opened by a professional organization representing franchisees and involving the large retailer Carrefour. In its Decision 10-D-08 of 3 March 2008, the FCA concluded that, in this particular case, the elements were not sufficient to fine Carrefour. One may, however, notice that the issues analyzed in this decision and the ones examined a few months later, on a wider basis, in opinion 10-A-26, are exactly the same. The link between these two cases seems to be quite obvious.

Opinion 12-A-01 (food retail sector in Paris) was rendered after a referral on 8 February 2011, in which the Paris municipality asked the FCA to look into the competitive environment in the food retail sector in the city. It should be noted that, in opinion 10-A-26, mentioned above, the FCA already referred to the particularly high levels of concentration in the food retail market within Paris.

9.1.3.2 Main Topics Covered by the Market Studies

Opinion 09-A-45 (French overseas departments) mainly tried to identify the reasons for the price discrepancies of consumer goods between mainland France and the DOM (French overseas departments). The FCA identified several particularities of the procurement circuits of the DOM markets that allow operators to partially avoid the effects of competition, including specific entry barriers (e.g., length of the logistics circuits towards the overseas territories, scarcity and high price of commercial real estate), high level of concentration, territorial exclusivity practices binding manufacturers and importers in each DOM, etc.

In opinion 10-A-25 (category management), the FCA identified numerous potential risks for competition linked to category management partnerships, particularly (1) risk of shelf space eviction for competitors (for example, advantage taken by the category captain from its privileged relationship with the retailer in order to influence the assortment and the merchandising to the detriment of its competitors or exclusive information exchanges giving the category captain a competitive advantage); (2) potential horizontal agreements between retailers: the FCA considered that in the case where a same supplier is simultaneously category captain with several retailers, there is a risk that it serves as cartel cornerstone by facilitating information exchange between retailers.

In opinion 10-A-26 (affiliation contracts), the FCA expressed its concerns regarding the concentration level of some customer catchment areas, particularly in the markets for large superstores (above 2,500 m^2) and for convenience stores (located in city centres). It noticed that the current competitive situation might be blocked because of various entry barriers and of obstacles to the mobility of independent stores across retail groups. According to the FCA, although independent in terms of pricing and buying decisions, affiliate stores are often captive from

their retail group due to numerous clauses included in their agreements and status, which prevent them from moving to another retailing group (long duration of agreements, multiplicity of agreements with overlapping terms, entry rights with delayed payments, postagreement nonreaffiliation or noncompetition clauses). Finally, the FCA noted that priority rights included in the agreements may be activated by a distribution group when the independent shopkeeper tries to sell its store. They artificially restrict competition by limiting the competitors' ability to purchase independent stores and contribute to freezing the geographical establishment of distribution groups.

In opinion 12-A-01 (food retail sector in Paris), the FCA noted that the food retail sector is particularly concentrated in Paris, where the Casino group's stake in Monoprix has brought its market share to more than 60 % in terms of sales area, i.e., more than three times that of its main competitor. The FCA also noted that the arrival of competitors has had a negative impact on the net profits of Franprix outlets, which was probably due to a drop in customer numbers and to a rise in the costs associated with addressing increased competition in their neighbourhoods. Nevertheless, this new competition has not driven customer numbers down far enough for Franprix outlets to lower their prices significantly, despite the fact that net margins upstream (at central buying office level) and downstream (at retail outlet level) are such as would allow price cuts in the event of more intense competition.

9.1.3.3 Outcome of the Market Studies

In opinion 09-A-45 (French overseas departments), the FCA made different proposals in order to revitalize competition on the markets: (1) initiation of investigations in order to fine the anticompetitive practices identified during the examination of the request for opinion (imposed sale prices, horizontal anticompetitive practices, clientele exclusivity agreements, restrictions on parallel trade, etc.), (2) proposition to modify the law in order to facilitate competition by removing the regulatory entry barriers and by improving consumer information, (3) proposition that, in each DOM, the local and regional authorities and the state set up study missions with the objective of defining the provisions for the creation and operation of procurement and storage centres. The FCA expressly reiterated that, even in this case, price regulation may not be a solution.

In opinion 10-A-25 (category management), the FCA pointed out the lack of clarity within the current system and invited the sector operators and the *Commission d'examen des pratiques commerciales* (*commercial practices review panel*, CEPC) to publish a best practices code. It mainly underlined three points: (1) it wished that the appointment of a category captain is made public, for example, through a call for application proposition; (2) it called for more clarity and more formalization of this kind of partnerships; (3) it noted that the CEPC could play a very useful role in defining the best practices and monitoring the development of these collaborations at a time when the general framework lacks in clarity. To our best knowledge, such best practices code has not been established yet.

In opinion 10-A-26 (affiliation contracts), the FCA considered that, to revamp competition, behavioral barriers to entry, on the one hand (for example, practices aimed at freezing commercial estate), and obstacles to the mobility of independent stores across retail groups, on the other hand (in the form of agreements that are too long and too rigid), have to be removed. The FCA issued several recommendations. Among them are (1) removal of noncompetition clauses and of priority rights in the selling and purchasing commercial estate contracts, (2) limitation of the duration of affiliation contracts to a maximum of 5 years, (3) limitation of postagreement nonreaffiliation and noncompetition clauses, (4) prohibition of priority rights in the affiliation contracts.

In opinion 12-A-01 (food retail sector in Paris), the FCA made several recommendations in order to increase the market's fluidity and modify the structures. In particular, the FCA is in favour of abolishing the administrative authorization procedure for new outlets with floor space in excess of 1,000 m^2. It is also in favour of the Paris municipality ensuring that sufficiently large surface areas are provided for in commercial development zones to enable large supermarkets—or even hypermarkets—to be opened. Moreover, the FCA notes that, in its current form, the French legislation does not enable it to modify the structure of the market (i.e., to issue structural injunctions) in the absence of reiterated anticompetitive practices. In order to be able to modify the structure of the market, it therefore suggests the creation by the legislator of a new instrument—the structural injunction—the implementation conditions for which will need to be further defined. To our knowledge, such legislation is not under discussion yet.

9.2 Competition Law Enforcement

9.2.1 Case Law on the Conduct of Grocery Retailers in the Last 5 Years

Most of the relevant decisions in this sector have been made either by the FCA, but in opinions not in decisions with mandatory effects, or by courts, in disputes relating to the implementation of the rules set out in Title IV, Book IV of the Commercial Code (transparency and "restrictive practices," practices restricting competition). These decisions are very detailed and widely disseminated.

As for the decisions—in the strict sense—rendered by the FCA, setting aside merger control decisions, most of the decisions rendered in this sector relate to the behavior of suppliers. As far as we know, only three relevant decisions relating to the behavior of distributors in the sector of grocery retail have been rendered recently: (1) FCA, Decision No 11-D-03 of 15 February 2011 relating to practices carried out in the sector of wholesale distribution of fruits and vegetables and fresh products from the sea regarding postcontractual nonreaffiliation clause in the grocery retail distribution; (2) FCA, Decision No 11-D-04 of 23 February 2011 relating to practices carried out by Carrefour in the food retail sector regarding abuse of economic dependency, namely the hindrance to the exit of the network and

to freedom of supply, the brutal imposition of new commercial conditions in the mass retail distribution; (3) FCA, Decision No. 11-D-20 of 16 December 2011 relating to practices implemented by Carrefour in the food retail sector regarding exclusionary practices, abuse of economic dependency in the mass retail distribution.[42]

9.2.1.1 Competition Law Enforcement Against Horizontal Anticompetitive Practices at Local Level

Since the adoption of the LME,[43] the DGCCRF,[44] and not the CFA, has the power to make injunctions and to conclude financial transactions for local anticompetitive practices involving undertakings with limited turnovers.[45] This statute allows fast treatment of these cases.

The anticompetitive practices at stake are those (1) that concern markets of local dimension, (2) that do not affect intracommunity trade and (3) that relate to undertakings whose individual turnover is below EUR 50 million and aggregated below EUR 100 million.[46]

9.2.1.2 Horizontal Agreements Between Grocery Suppliers to Withdraw Quantities in Order to Keep Prices Up

In Decision no 13-D-03 of 13 February 2013 relating to practices implemented in the pork pig sector, the FCA fined undertakings active in the sector of pork slaughter for a total amount of EUR 4.57 million.

The FCA noted that the pork slaughter undertakings had together decided to coordinately reduce their demand of pork towards breeders/producers during 2009, in order to influence the price of the pork in the Breton Pork Market, which serves as a reference on the national level. However, the practice at stake aimed at reducing the cost of pork paid to the slaughterers, not to maintain high prices towards grocery mass retail distributors.

As far as we know, the other decisions made relate to price-fixing practices, not quantities. In Decision no 11-D-17 of 8 December 2011 relating to practices implemented in the laundry detergent sector, the FCA imposed a total fine of EUR 367.9 million to the four principal detergent producers of the market for

[42] The Court of Appeal of Paris has recently rendered several decisions of interest in this sector: Court of Appeal of Paris, 6 March 2013, *Prodim and CSF Champion Supermarché France vs Société Etablissements Segurel*, RG 09/16817, regarding exclusionary and anticompetitive practice and postcontractual nonreaffiliation clause in franchise relationships; Court of Appeal of Paris, 3 April 2013, *Distribution Alimentaire Parisienne Diapar vs Carrefour Proximité France*, CSF Champion Supermarché France and M Christian Richard, RG 10/24013.

[43] The Act on the Modernisation of the Economy, no 2008-776 of 4 August 2008.

[44] Directorate General for Competition, Consumption and Fraud Repression, administrative body placed under the authority of the Ministry of Economy.

[45] The so-called micro PAC, Art. L. 464-9 of the Commercial Code.

[46] On this subject, see the interview of Nathalie Homobono, Le rôle de la DGCCRF en matière de concurrence, Concurrences No 3-2010.

taking part in a cartel which object was to jointly set the selling prices and the promotions towards grocery mass retail distributors.[47]

In Decision no 12-D-08 of 6 March 2012 relating to practices carried out in the endive growing and marketing sector, the FCA imposed fines to endives producers and several of their professional organizations for anticompetitive practices that led to maintain minimal prices of the products.

Among the practices at stake, the FCA noted that the undertakings concerned managed the volumes of endives sold by destructing merchandise when the endives price rate lowered under a certain level, in order to maintain the artificial price of the endive jointly decided.[48]

In Decision no 12-D-09 of 13 March 2012 relating to practices implemented in the packaged flour sector, the FCA imposed a total fine of EUR 242.4 million to undertakings that took part in (1) a French–German cartel aiming at limiting the imports of flour between France and Germany and (2) two anticompetitive practices on the national territory between French millers aiming at fixing prices, limiting production and sharing of the clients of packaged flour sold to grocery mass retail distributors, on the one hand, and to hard discount grocery retail distribution in France, on the other hand. The object of the anticompetitive practice between French and German millers was to manage the French–German exports of packaged flour by maintaining them to a level determined in advance (15,000 tons).[49]

Moreover, investigations are currently taking place in the yogurt[50] and in the poultry[51] sectors.

There is no clear information relating to the possible private actions undertaken in order to obtain damages for the loss suffered resulting from an anticompetitive practice.

9.2.1.3 Internal Governance of Grocery Retail Networks

In Decision no 11-D-20 of 16 December 2011 relating to practices implemented by Carrefour in the food retail sector, Carrefour was accused of imposing more restrictive conditions at the occasion of the switch from the "Champion" franchise agreements to the "Carrefour Market" franchise. Commitments have been taken by Carrefour as to the duration clauses, the nonreaffiliation clauses, the postcontractual noncompetition clauses in order to align the new Carrefour Market agreement with the previous Champion franchise agreement.

[47] This case is currently pending before the Court of Appeal of Paris.

[48] This case is currently pending before the Court of Appeal of Paris.

[49] This case is currently pending before the Court of Appeal of Paris.

[50] http://www.lefigaro.fr/societes/2012/03/22/20005-20120322ARTFIG00810-soupcons-d-entente-dans-le-yaourt.php.

[51] http://www.lefigaro.fr/conso/2008/03/13/05007-20080313ARTFIG00428-soupcons-d-ententechez-les-geants-du-poulet-.php.

9.2.1.4 Recommended Resale Prices

There are no specific rules applicable to the sector of grocery retail distribution as to diffusion of recommended resale prices. One has to refer to the decisions made by the FCA and court decisions, which are anterior to 2008, in order to assess the validity of these practices under competition law.

Under French law, distribution of recommended prices or the setting of a maximum price is lawful,[52] provided that this does not dissimulate an imposed price.

Proving the existence of the vertical anticompetitive practice requires the following "beam of serious, precise and concurring indicia" (*faisceau d'indices graves, précis, et concordants*): (1) the retail selling price wished by the supplier is known by the distributor, (2) prices are monitored and (3) the prices wished by the supplier are significantly applied by the distributors.[53]

In its Decision no 07-D-50 of 20 December 2007 relating to practices carried out in the sector of toys distribution, the Competition Council (now FCA) imposed a total of EUR 37 million fine to five suppliers and three distributors for setting the price of sale of toys. These vertical anticompetitive practices were accompanied by actions aiming at monitoring the prices applied by the deviating distributors in order to obtain a prompt realignment of the prices of the toys.[54]

In some cases, anticompetitive practices relating to prices can also be prosecuted on the ground of restrictive practices.[55] In the toys distribution case cited above, for example, not only have the suppliers and distributors been condemned for their anticompetitive collusion on prices, but the President of the Competition Council also referred the matter to the courts on the ground of Art. L 442-6 III of the Commercial Code.

9.2.1.5 Resale Below Cost, Delisting of Suppliers, Resale Price Maintenance

Resale below prices can fall under the scope of the prohibition of the provisions relating to abusively low prices,[56] resale at a loss[57] and predatory prices, which can

[52] FCA, Decision 94-D-60, 13 December 1994, laundry detergent sector.

[53] FCA, Decision no 06-D-04 of 13 March 2006 relating to practices observed in the luxury perfume sector. This decision has been appealed and referred to different courts several times. This case is currently pending before the Supreme Court (*Cour de cassation*).

[54] See also, in this case, Court of Appeal of Paris, 28 January 2009, RG 2008/00255, and Supreme Court, Commercial section, 7 April 2010, 09-11936.

[55] "Practices restricting competition," Title IV of Book IV of the Commercial Code.

[56] See Art. L 420-5 of the Commercial Code.

[57] See Art. L 442-2 of the Commercial Code.

constitute an anticompetitive agreement or an abuse of a dominant position,[58] according to the same criteria as under EU competition law.[59,60]

Delisting of suppliers is governed by Art. L 442-6, I, 5° of the Commercial Code, and resale price fixing is prohibited under the conditions described above.

A retailer is prohibited from obtaining obviously abusive conditions regarding prices, payment terms, selling conditions or any services that are not linked to selling or purchasing obligations under the threat of a (total or partial) delisting of his supplier, and "imposing, directly or indirectly, a minimum resale price regarding a product or a good, a service or a commercial margin is punished by a € 15,000 fine."[61]

9.2.1.6 Small Suppliers Retaliating Against Large Grocery Food Retailers for Selling Low Priced Imported Agricultural Products

In the agricultural branch, spontaneous demonstrations by producers (fruit, vegetables, dairy) generally endorsing political opinions undeniably exist, even if they do not lead to any anticompetitive behavior. Nevertheless, the FCA is said to have opened an inquiry aiming at a number of undertakings in the diary industry intervening in retail brands, suspecting them to have agreed not to answer to bids of large/medium-sized stores because of too low prices.[62] The inquiry is said to be ongoing.

These situations mainly reflect the difficulty to take into consideration the high price volatility of agricultural row materials in respect to commercial transactions in the whole agrifood branch,[63] both for the retail brands (annual contracts concluded at fixed prices) and for producers' brands (*marques de fabricants*–the "MDF"), without any possible price review.

These aspects falling within the scope of contractual agreements, in 2011 and 2012, the CEPC attempted to deal with the issue of the absence of price review clauses or the refusal to integrate one, which can lead to a situation of "significant

[58] See Art. L 420-1 or L 420-2 of the Commercial Code.

[59] French competition authorities apply the principles developed by the Court of Justice of the European Union in the decisions Akzo Chemie (ECJ, 3 July 1991, case C 62/86) and Tetra Pak (ECJ, 14 November 1996, case C-333/94).

[60] For illustrations under French law, see FCA, Decision no 07-D-09 of 14 March 2007 relating to practices implemented by GlaxoSmithKline France laboratory; Court of Appeal of Paris, 8 April 2008, RG no 2007/07008 and Supreme Court, Commercial Section, 17 March 2009, 08-14503; FCA, Decision no 07-D-39 of 23 November 2007 relating to practices implemented in the sector of railway passenger transport of on the Paris-London line.

[61] See Art. L 442-5 of the Commercial Code.

[62] "*Yaourts: huit entreprises de l'industrie laitière soupçonnés d'entente sur les prix?*" Les Echos, 21 March 2012.

[63] Price increase on "raw" products: eggs in 2012, price tensions on salmon in 2013 or ingredients used for industrial products (*pork, wheat flour, milk*…) DGCIS study: "*Enjeux et perspectives des industries agroalimentaires face à la volatilité des prix des matières premières,*" October 2012.

imbalance."[64] In 2012, CEPC advised regarding a fixed price contract (procurement/public bids) to introduce a "useful" price review clause allowing the contract to be implemented, "even if these measures results in a review of the initial agreement."[65]

Such opinions are a first step in the battle against raw material price increases in a context of growing tensions in the food sector. In the same vein, a recent bill that suggests that contracts should contain clauses that allow price reviews following raw material price fluctuations (increase or decrease), has been proposed regarding agreements lasting longer than 3 months and targeting certain agricultural products.[66] This clause will refer to "one or more public indexes related to agricultural or food products defined by the parties to the agreement and aiming at allocating in an equitable manner between the parties the increase or decrease of the costs of production resulting from these fluctuations."

Actions are undertaken by producers—in particular in the fruits and vegetable sector—against large-scale food retailers, as demonstrations, destruction of extra stock on car parks or in front of grocery shops or distribution of free products. Usually, all brands are concerned. Actions carried out by distributors are brought before criminal or civil courts (which can enjoin the people prosecuted to put an end to their actions and/or to pay damages to the victims). Such actions hardly ever fall within the scope of competition law.

However, Decision no 12-D-09 of 13 March 2012 concerning practices on the wheat flour market can be cited on this topic. The FCA condemned the practices consisting in counterpromotions on pork meat organized twice a year by large-scale food retailers. National Syndicate for the Pork Trade invited pork slaughters to refuse selling pork meat to large-scale food retailers lower than a certain reference price (fixed by the Syndicate). Similarly, two pig slaughters have been fined in this case for having agreed on a minimum price of certain pieces of pork meat towards a large-scale food retailer and on the price of pork meat intended to national promotions of this brand.

9.2.2 Abuse of Buying Power, Abuse of Dependency

9.2.2.1 Definition

Art. L 420-2, para. 2 of the Commercial Code prohibits "when it is likely to affect the functioning or the structure of competition, abusive exploitation by an undertaking or a group of undertakings of the state of economic dependency in which is a client or supplier undertaking."

[64] CEPC, Opinion 11-06.

[65] CEPC, Opinion 12-07, Opinion of a professional federation operating in the electronic devices sector (about scarce components in fluorescent lamps).

[66] New Art. L 442-8 of the Commercial Code in the draft Act in favour of consumption, presented on 2 May 2012 to the Council of Ministers.

According to the FCA, in order to characterize the existence of a situation of economic dependency, one should take into account "the notoriety of the supplier's brand, the importance of the supplier's market share, the importance of the share of the supplier in the turnover of the reseller, and finally, the difficulty for the distributor to obtain equivalent products from other suppliers."[67]

For the Court of Appeal of Paris, "the state of economic dependency is defined as a situation of a firm which does not have the possibility to substitute to its supplier (s) one or several suppliers that can satisfy its demand for supplies under similar technical and economic conditions; it follows that the only circumstance that a distributor realises a substantial or exclusive share of its supply with a single supplier is not sufficient to characterize its state of economic dependency under Art. L 420-2 of the Commercial Code."[68]

9.2.2.2 The Prohibition of Abuses of Buying Power or Dependency

The demonstration of an abusive exploitation of a state of economic dependency is not enough to impose sanctions to the undertaking concerned on the basis of that provision. Those practices also need to hinder competition, at least potentially. The FCA verifies if the challenged practices had "an anticompetitive object or anticompetitive effects," or had "*the object or effect to limit supply capacities or to reduce competition on the market*."[69]

The FCA tends to consider that this condition is satisfied when this abuse is implemented by a dominant firm on the relevant market. It even occurred that certain practices were described both as an abuse of a dominant position and as an abuse of economic dependency.[70] However, in practice, the demonstration of a notable change in the organization of competition is hard to prove, which often dissuades to take this action.

Also, the LME repealed the former Art. L 442-6 I 2° b) of the Commercial Code, which punished the abuse of a relation of dependency and buying or selling power. The sanction of such practice involved the characterization in advance of the buying (or selling) power of the author of the suspicious practice on the market. The LME liberalized the negotiations between suppliers and distributors. As a consideration to this greater freedom left up to operators, the LME introduced a new "practice restrictive of competition": the "significant imbalance in the parties' rights and obligations."[71]

[67] FCA, Decision no 04-D-26 of 30 June 2004 relating to a referral by SARL Reims Bio against practices implemented by the public interest group Champagne Ardenne, para. 55.

[68] Court of Appeal of Paris, Judgment of 15 October 2008, SCEA Vergers de la Motte.

[69] See Art. L 420-2 of the Commercial Code.

[70] FCA, Decision no 04-D-44 of 15 September 2004 relating to a referral by movie theater du Lamentin in the distribution and exploitation of movie sector; Court of Appeal of Paris, 29 March 2005.

[71] See the new Art. L 442-6 I 2° b) of the Commercial Code.

In practice, certain distributors appear to be inspired by the 22 % threshold observed in the European Commission's practice,[72] fixing for the supplier the portion of total turnover "from which it starts to be difficult to find any other sales potential." Reaching this "threshold of threat" generally includes various requirements (in particular, providing worthy information about the firm) to avoid the possibility of a dependency.

The FCA and French courts have not condemned any abuse of economic dependency in the food distribution sector since 2007.

In its Decision no 10-D-08 of 3 March 2010 relating to practices implemented by Carrefour in the local food and groceries retailing sector, the FCA stated that the alleged practices (obstruction to the exit of the network, disproportionate infringement to the freedom of procurement and to the commercial freedom of franchisees, in particular to the freedom of price) did not characterize, in this case, an abuse of economic dependency.

Similarly, in its Decision no 11-D-04 of 23 February 2011 relating to practices implemented by Carrefour in the food distribution sector, the FCA stated that the decision not to renew a commercial lease for the space where a supermarket was operating did not characterize an abuse of economic dependency, as the lessor simply used the right of each party to terminate the lease contract at the end of its term.[73]

9.3 Merger Control

Since 2009, the FCA has been in charge of monitoring mergers, including local operations if the notification thresholds are reached.[74]

For retail trade (which food distribution is part of), the LME has lowered the notification thresholds for mergers.[75] For overseas departments and territories, Art. L 430-2-III of the Commercial Code sets even lower thresholds.

[72] European Commission, COMP M.1221, *Rewe/Meinl*, 3 February 1999; European Commission, COMP M1684, *Promodes/Carrefour*, 25 January 2000.

[73] FCA, Decision no 11-D-04 of 23 February 2011 relating to practices implemented by Carrefour in the food distribution sector, paras 58 to 60. See also Decision no 11-D-20 of 16 December 2011 relating to practices implemented by Carrefour in the food distribution sector, para. 58.

[74] The three following conditions must be met: (i) the total worldwide turnover, taxes excluded, of all the undertakings or group of natural persons or undertakings involved is above EUR 150 million; (ii) the total turnover, taxes excluded, realized in France by at least two of the undertakings or group of natural persons or undertakings involved is above EUR 50 million; (iii) the transaction does not fall within the scope of Council Regulation (EC) no 139/2004 of 20 January 2004 on the control of concentrations between undertakings (Art. L 430-2, I of the Commercial Code).

[75] The three following conditions must be met: (i) the total worldwide turnover, taxes excluded, of all the undertakings or group of natural persons or undertakings involved is above EUR 75 million; (ii) the total turnover, taxes excluded, realized in France in the retail trade sector by at least two of the undertakings or group of natural persons or undertakings involved is above EUR 15 million; (iii) the transaction does not fall within the scope of Council Regulation (EC) no 139/2004 of 20 January 2004 on the control of concentrations between undertakings (Art. L 430-2, II of the Commercial Code).

9.3.1 Market Definition

9.3.1.1 Product Market

The FCA's practice differentiates between several categories of food stores on the basis of their size, selling technique, accessibility, the nature of the service provided or the magnitude of their product portfolios. There are, namely, hypermarkets (mainly selling food products with a sales space over 2,500 m^2), supermarkets (sales space between 400 and 2,500 m^2), specialist stores (bakery, butchery, etc.), small retail stores (including small supermarkets with a sales space of less than 400 m^2), discounters and online sales companies (for instance, online supermarkets).

The FCA takes into account the asymmetric substitutability among the different sizes of general food retailers. It considers that for some consumers a hypermarket might be a local substitute for a supermarket, and so the former will be included in the relevant market of the latter. By contrast, it considers that the converse is rarely verified: supermarkets are not part of the relevant market of hypermarkets. Under the same logic, the FCA stated[76] that "small retail stores and supermarkets were competing between each other and, following this, that they both face competitive pressures of large supermarkets (sales space of over 1000 m^2) and hypermarkets." The FCA also considers competitive pressures of discounters towards other general food retailers, leading to the conclusion that discounters should be included in the same relevant market.

On the flip side, the FCA considers that the competitive pressure vested by specialist stores and street markets is too limited to be included in the relevant market of general food stores. Thus, it excludes specialist stores (bakeries, butcheries, fishmongers, cheese boutiques or fruit and vegetable merchants) from the relevant market of general food stores.

9.3.1.2 Geographic Market

The geographical delineation of markets in the grocery sector is defined by the FCA as being the trade zone surrounding a targeted store. More precisely, it looks at local competition conditions according to the size of the concerned stores for two different areas: (1) a market where consumers' demand and supermarkets' offer or equivalent businesses' are situated less than a 15-min car ride; those forms of business can include, besides supermarkets, hypermarkets situated nearby consumers and discounter stores; (2) a second market where consumers' demand of an area meets the offer of hypermarkets to which they have access in less than a 30-min car ride and that are, from their perspective, substitutable. Other criteria can be taken into consideration to evaluate the impact of a merger on the competitive environment of the retail grocery sector. Those criteria might help fine-tune the

[76] FCA, Opinion no 12-A-01 of 11 January 2012 relating to the competitive situation in the food distribution sector in Paris, para. 81.

usual demarcations presented above. For example, the FCA held that a trade zone of a range between 2 and 4 km corresponds to a 5-min car ride.[77]

9.3.2 The Countervailing Force of Retailers

In 2008, the FCA, while noting the imbalance between upstream and downstream, held that "In itself, the (first) issue a priori does not originate from competition policy, whose main objective is not to intervene in the surplus sharing between operators. Nevertheless, in medium term, the weakening of the upstream sector through the market power close to an oligopsony in the downstream market is likely to drive a reduction of the supply or its diversity which might be detrimental to social welfare."[78] It is thus the role of the Legislator to intervene to compensate and to correct the sectorial imbalance towards distribution, which has been made in the particularly atomized primary production of agricultural products.[79]

As far as this imbalance is concerned, the FCA can also take into account "the role of counter-power of large-scale distributors in the case of mergers between producers" that would raise a competition issue. Many criteria are taken into account to illustrate the counterpower or the mitigating factors of an anticompetitive impact of a proposed concentration, including (1) the buying or the bargaining power of the partners "deriving from, in particular, to their size, the size of the supplier, the possibility to resort to other suppliers and the power to de-list certain products"[80]; (2) distributors' freedom of choice towards suppliers' brands, in particular with the possibility to diversify sources of supply, given the reinforcement of a supplier's market shares or the role played by retailer's brands, thus creating direct competition with suppliers' brands in the absence of a notorious trademark.[81]

[77] FCA, Decision no 10-DCC-25, para. 20.

[78] Similarly, see FCA, Opinion no 11-A-04 relating to a draft decree specifying the content of the agreements on margin reductions in the distribution sector as stated by Art. L 611-4-1 of Rural and Fisheries Code for the fruit and vegetable sector.

[79] Act on the modernization of agriculture and fisheries no 210-874 of 27 July 2010, in particular through the reinforcement of the powers of producers and organizations operating a transfer of ownership of the products. Since 2004 and in this regard, see the "Canivet" report (2004), "*Restaurer la concurrence par les prix. Les produits de grande consommation et les relations entre industrie et commerce,*" Paris, La Documentation française, 2004.

[80] FCA, Opinion no 98-A-09 of 29 July 1998 relating to the proposed acquisition of Pernod Ricard assets by the Coca-Cola Company relating to the branded soft drink "Orangina," p. 10.

[81] FCA, Decision no 12-DCC-92 of 2 July 2012 relating to the acquisition of six companies owned by Patriarche group by the SAS Castel Frères, para. 136; FCA, Decision no 10-DCC-48, LDC Traiteur/Marie surgelé; FCA, Decision no 10-DCC-110 relating to the acquisition of sole control of the cooperative group Entremont by Sodiaal group.

As far as *retailer's own brands* (*marques de distributeurs—MDDs*) are concerned, and for some products, the FCA acknowledges that "MDDs exercise a strong anticompetitive pressure on the suppliers' brands," leading to substitutability between MDDs and suppliers' brands.[82] Market tests have tended to demonstrate that the price and product quality criteria overcome the brand criterion (for instance, that is the case for packaged salad "4th range salads"): (1) monoproduct/multiproduct supplier capable of implementing much more complex bargaining strategies[83]; (2) absence of constrained demand by the final purchaser (in particular, in the absence of a strong brand backed by an advertising campaign); (3) precarious trading relationship: limited duration and annual trade agreements, selection through a tendering process, denunciation at all time with a notice; (4) allocation and variety of the sources of supply[84]; (5) size and degree of integration of the distributor in the production chain[85]; (6) excess of production capacities.[86]

The compensating effect of the retailers' bargaining power is limited when retailers do not retain the "real possibility of alternative supplies" (production capacity of others suppliers, essential product).[87]

9.3.3 Merger Remedies

The FCA having been in charge of the merger control only since 2009, the statistics are only available for 4 years, between 2009 and 2012. Over this period, 212 proposed concentrations have been examined in the food distribution sector (roughly 30 % of overall proposed concentrations, taking all sectors into consideration; see Fig. 9.1).

The vast majority of proposed concentrations have been authorized without conditions. Only six proposed concentrations have been authorized subject to remedies, which represent less than 3 % of the overall proposed concentrations (see Table 9.1).

[82] FCA, Decision no 13-DCC-23 of 28 February 2013 relating to the acquisition of sole control of many companies owned by Bakkavör group by cooperative group Agrial, para. 43.

[83] FCA, Decision no 12-DCC-84, Holding Saint Amand Cristaline brand, para. 48.

[84] FCA, Decision no 09-DCC-67, LDC Volailles/Arrivé. For instance, for the opening to other products' origins.

[85] FCA, Decision no 12-DCC-84, Holding Saint Amand, exploiting its own sources and bottling capacity.

[86] FCA, Decision no 10-DCC-60, Soparo/R&R Ice cream.

[87] FCA, Decision no 11-DCC-150 of 10 October 2011 relating to the acquisition of the sole control of the cooperative Elle-et-Vire by the cooperative group Agrial.

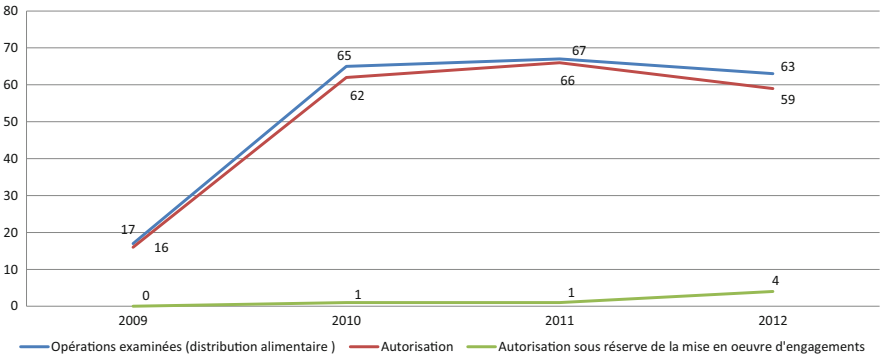

Fig. 9.1 Statistics on mergers. *Source*: FCA website, the number of proposed concentrations may slightly differ from the number of authorizations due to some cases of control unenforceability

Each time the competitive issue identified was of horizontal nature (market share additions, creation of a dominant position or duopoly), the proposed commitments were structural. They generally consisted into divesting stores to avoid overlapping in the same area or to limit the market share addition effect. In one case, the chosen remedy consisted in reducing the sales space of the store. By doing so, the store switched from hypermarket category to the supermarket category. The only behavioral remedy responded to a risk of vertical anticompetitive foreclosure effect linked to vertical integration of the new merged entity at the retail distribution level, and also upstream at the supply level.

In March 2013, the FCA decided to open an in-depth investigation phase on the acquisition of sole control of Monoprix by Casino Group, considering that "the proposed concentration raises serious doubts about harm to competition." It is the first "phase II merger case" in the food distribution sector in France.

Internet stores. Up to now, online sales carried out by supermarkets have not been taken into account in the analysis of proposed concentrations of brick-and-mortar retail stores. The FCA considers e-commerce for food products, leading to home delivery or "drive" store delivery, as not substitutable to predominantly food retail stores. The main argument finds its roots in the fact that at this time online sales only account for a small share of the total food expenditures of households (less than 1.1 % for the people living in Paris, for example).[88]

[88] FCA, Opinion no 12-A-01 of 11 January 2012 relating to the competitive situation in the food distribution sector in Paris, para. 89.

Table 9.1 Synthesis of the commitments concerning concentrations between grocery retail distribution stores

FCA decision	Competition issue	Remedies/commitments
10-DCC-25	**Dominant position on a local area** The market share of the entity would have reached 77 %.	**Structural** Suppression of any overlap in the concerned area by selling the target store
11-DCC-134	**Vertical foreclosure** The new vertically integrated entity, both at the retail distribution and wholesale supply levels, would have closed the access of competing large-scale retail distributors to the supply of grocery products and nonfood products that it distributes at the wholesale level.	**Behavioral** During 3 years, commitment to renounce any clause limiting the freedom of the suppliers to commercialize their products to competitors, transparency of the allocation of commercial cooperation budgets, nontransmission of information
12-DCC-48	**Dominant position on four local areas** Market shares would have reached, respectively, 50–60, 80–90 and 100 %. **Creation of a duopoly on a local area** The new entity would have held 40–50 % behind the leader, holding 50–60 %.	**Structural** Suppression of any overlap on the five concerned areas by selling target stores
12-DCC-57	**Dominant position on two local areas** Market share of the new entity would have reached 60–70 and 50–60 %.	**Structural** Selling of a store allowing to lower the market share of the new entity to 40–50 and 30–40 %
12-DCC-58	**Dominant position on a local area** Market share of the new entity would have reached 50–60 %.	**Structural** Selling of a store allowing to lower the market share of the new entity to 40–50 %
12-DCC-59	**Dominant position on a local area** Market share of the new entity would have reached 40–50 %.	**Structural** Reduction of the selling space of a hypermarket, turning it into a supermarket and allowing to reduce the market share of the new entity to 40–50 %

9.4 Other Related Issues

9.4.1 Price Control of Grocery Products

Although prices of grocery products are in principle freely determined by competition, Art. L 410-2, para. 2 of the Commercial Code provides that a State Council decree (*décret en Conseil d'État*) can rule on prices (following an advice of the FCA) in sectors or areas where price competition is limited because of (1) monopolistic situations or lasting supply difficulties or (2) statutes or regulations.

In addition, in order to cope with excessive price increases or decreases, the French Government can adopt a State Council decree providing temporary measures justified by a situation of crisis, exceptional circumstances, a public disaster or an obviously abnormal situation of the market in a specific sector. The decree can only be issued after having consulted the National Council of Consumers (*Conseil national de la consommation*). The decree specifies its period of validity, which cannot exceed 6 months.[89]

In the dairy sector,[90] since 2009, Art. L 632-14 of the Rural Code has enabled interprofessional bodies of this sector to develop and disseminate "trend indicia, including forecast expectations, of the milk markets, and any information enable to enlighten the actors of the dairy industry" and even "values which are a component of the sale price between collectors and processors." The text explicitly specifies that these practices are not subject to the prohibition of anticompetitive agreements or abuse of dominance. The operators of the dairy sector can thus refer to such indicatives and values in their contractual relationships.

In Opinion No 09-A-48 dated 2 October 2009 on the functioning of the dairy sector, the FCA had advocated a greater formalization of the relationship between producers and processors by concluding written contracts.

Moreover, on 18 March 2010, the European Commission has involved the national competition authorities, including the FCA, in the preparation of guides that present the solutions that competition law can provide so as to strengthen the negotiating power of producers towards processors.[91]

9.4.2 Role of the FCA in the Adoption and Enforcement of Regulations of Large-Scale Food Retailing and Vertical Relationships Between Suppliers and Retailers

Art. L 462-2 of the Commercial Code provides a mandatory consultation of the FCA by the Government for any draft regulation creating a new regime implying (1) to submit the access to a profession or to a market to quantitative restrictions, (2) to establish exclusive rights in certain areas or (3) to impose uniform practices regarding prices or selling conditions.

[89] Art. L 410-2, para. 3, of the Commercial Code.

[90] Particular attention has been paid to this sector by EU and French competition authorities. Dairy farmers as sellers are often in a weaker negotiation position vis-à-vis their stronger counterparts, the dairy companies and large-scale distributors. In many respects, dairy farmers also face more difficulties than other farmers. While both need to adjust their production to respond to changes in often volatile markets, dairy farmers have high stranded investment costs in installations and production animals, and milk production is constant and cannot be reduced in the short term. In addition, milk is a highly standardized product, and there is fierce competition on the international milk product markets.

[91] The press release of the FCA on these guides is available at the following address: www.autoritedelaconcurrence.fr/user/standard.php?id_rub=367&id_Art.=1374.

Otherwise, the FCA can be consulted on an optional basis by the Government or parliamentary commissions on any question relating to competition,[92] in particular when adopting a regulation on vertical relationships between suppliers and distributors. For example, the Opinion of the FCA of 13 December 2010, on two draft decrees imposing a formalization by contract in the agricultural sector, was issued on this legal basis. Moreover, the FCA must give its assent before any decree exempting categories of agreements or certain agreements aiming at improving the management of small and medium-size enterprises.[93] Finally, the FCA must be consulted for any State Council decree aiming at ruling prices in areas where price competition is limited.[94]

9.4.3 Small-Scale Farmers and Suppliers of Food Products

The agricultural sector remains subject to the prohibition of anticompetitive practices.[95] However, inspired by EU Regulation no 1182/2007, France has wished to facilitate the joining by small producers of more structured organizations of producers (either through organizations of producers acting as representatives without any transfer of property of products or through the PO governance associations). The FCA acknowledged that these kinds of structures could be exempted from competition rules because of their contribution to economic progress for the commercialization of products, provided that the practice remains proportionate to the objective.[96]

Nevertheless, food industrialists, who are not included in the primary agricultural sector, are subject to competition law without any restriction.

More generally, Art. L 420-4 II of the Commercial Code provides that categories of agreements can be exempted from competition law, after a decree issued after the consent of the FCA, in particular when they aim at improving the management of the small and medium-size firms. To our knowledge, this provision has never been applied to date.

More precisely, Art. L 632-2 II of the Rural Code provides that agreements concluded within one of the interprofessional organizations recognized to be specific to a product under official identification label, and aiming at adapting supply to demand, are allowed to bring limitations to competition rising from (1) a forecast and coordinate planning of production based on the outlet, (2) a planning aiming at improving the quality of products having as a direct

[92] See Art. L 462-1 of the Commercial Code.

[93] See Art. L 420-4, II of the Commercial Code.

[94] See Art. L 420-2, para. 2 of the Commercial Code.

[95] See for instance, regarding resale price maintenance, FCA, Decision no 12-D-08, 6 March 2012, cited above.

[96] FCA, Opinion no 08-A-07, 7 May 2008, relative to the economic organization of the fruits and vegetables sector.

consequence the limitation of the production volume, (3) a limitation of production capacity, (4) a temporary restriction of the access of new operators based on objective criteria and implemented in a nondiscriminatory manner or (5) price fixing by producers or recovery of raw material price fixing.

Beyond the fact that no party to the agreement has to hold a dominant position on the relevant product market, such agreements have to be notified, after their conclusion and before they are enforced, to the Minister of Agriculture, to the Minister of the Economy and to the FCA.

In the dairy sector, Art. L 632-14 of the Rural Code allows interprofessional organizations to develop and issue information on product prices, without these practices being subject to the prohibition of anticompetitive practices.

9.5 Recommendations to Improve the Competitive Landscape in the Grocery Retail Sector in France

The rules applicable to commercial town planning (urbanism) seem to constitute some kind of barrier to entry to the grocery retail distribution market in France: they hinder the entry of new operators on the market, such as the American wholesaler/retailer Costco. A reform of these rules could be contemplated.

In view of the recent opinions and decisions made by the FCA, postcontractual nonreaffiliation clauses can appear as a hindrance to the change of store chain, thereby affecting competition. Rules limiting its duration could be usefully introduced.

This being said, the solution consisting in retaining a fixed duration does not appear to be satisfactory since *in concreto* assessment of the contractual situation between the operators involved is required, as is done by the FCA and the courts in their recent decisions.