

Modernising French competition law: Report of the Club des Juristes' Competition Law

Report Overview

Celebrating the 30th anniversary of the Order of 1 December 1986 on freedom of prices and competition, the *Club des Juristes'* Competition law Committee sought to determine whether this founding legislation was still suited to our current economic model. To that end, a working group was set up to assess the situation and to make proposals for the improvement of French competition law.

Composed of lawyers and economists from various backgrounds, the group started its reflection process in late 2016 defining a working method and program, held numerous work meetings, interviewed experts in the field and launched a general consultation of all stakeholders. Over the past year, the members of the group engaged in a common dynamic reflection through inspirational exchanges and a shared objective to modernise French law, although consensus could not always be reached.

Its approach was to list the objectives of the *Commission Donnedieu de Vabres* which drafted the 1986 Order, and recall the environment in which they were defined, in order to examine as a second step the evolution of the economic, sociological, cultural and legal background against which this legislation was applied and to understand the political and institutional power struggle which governed and shaped its evolution until now. Finally, the group sought to determine whether the current legal system, as it has evolved, has met the objective of creating a balanced market economy and what adjustments would be necessary today for French competition law to further promote a modern and competitive economy.

Overall, the findings of the group are quite positive. After almost a third of a century since its adoption, the legal system created by the Order of 1st December 1986 proved strong, flexible and evolving.

Strong, since it has enabled the set-up and preservation of market-economy structures. It has imposed its rules to market players, which have integrated its principles in their strategies. It has infused all sectors of the economy and has opened to competition a large number of protected markets, even though efforts still need to be made in some of them. The enforcement mechanisms have proved reliable. The French Competition Authority, whose powers have been strengthened, has confirmed its role, improved the efficiency of its procedures and the guarantees attached to them. According to market participants, it has become a key player in economic life. Finally, the law derived from the 1986 Order has infused all areas of private and public Economic Law, and has fostered the creation of relevant teaching and research units in law and in economics. The practice of competition law, still limited to a handful of expert lawyers at the end of the 80s, keeps now many lawyers and

highly qualified experts busy, and all renowned law firms have competition law teams supporting their clients at all stages of business life, from audit missions, contract negotiations, cessions and corporate restructurings to litigation.

Flexible, as it has adapted to the developments of the economy, survived globalisation, overcome crisis, taken head on the opening of historic monopolies, found its place in sector-specific regulations and in EU competition policy. Moreover, it has been shaken by the digital revolution but has stood its ground.

Evolving, it has followed the evolutions of economic theories, conformed to standards set by international organisations, found its place in a global cooperation network and now ranks among the best antitrust laws in the world.

Based on these findings, the challenge of modernisation which the working group had at heart revolved around four elements: improving the efficiency of the institutions enforcing competition law, taking better account of economic analysis in the decisions, realigning the rules with the objectives of the competition policy and refining their harmonisation with European law. 60 propositions are made to that end in the report published by the Committee.

Improving the efficiency of administrative and judicial institutions enforcing competition law would involve, first and foremost, reducing the deadlines for handling cases to make them compatible with the constraints of economic life. The need for swiftness, already understood in 1986, has been overlooked for various reasons. It must become a priority again. The proposed improvement also concerns the legal and economic expertise of the staff of the French Competition Authority and of the courts involved in competition law cases. Finally, appeals against the French Competition Authority's decisions before both administrative and judicial courts should not be further complicated.

Taking better account of economic analysis in the decisions means strengthening the influence and the place of the team of economists within the French Competition Authority through their closer involvement in the decision-making process. The judges of the specialised chambers of the Paris Court of Appeal should be supported by assistant economists and by a new set of judicial experts. Enhancing the economic expertise of the courts is all the more necessary since the EU Damages Directive of 26 November 2014 aims at making "private" competition law enforcement by the courts as important a competition policy instrument as public competition law enforcement.

Realigning the rules with competition law objectives requires deleting the multiple provisions added in the legal system by the numerous amendments to the initial 1986 legislation which are driven by objectives unrelated, and sometimes even contrary to the promotion of competition and the protection of consumer surplus. Thus, the provisions contained in Title IV of Book IV of the French Code of Commerce should be thoroughly revised bearing in mind their specific objective of ensuring balance and fairness of all trading practices implemented in distribution agreements.

Refining EU harmonisation of French antitrust law and Merger Control by evening out the conceptual discrepancies and lingering incompatibilities introduced since 1986 between French and EU

competition laws, in order to abide to the convergence rule which requires since 2003 for all competition law rules to be aligned.

The free reflection carried out by the working group for the common economic good only aims at contributing to the current public discussion on the ongoing modernisation of the economy.

*The report is available at
www.leclubdesjuristes.com*

