

## The New Caledonian Competition Authority announces pursue competition law enforcement in the context of Covid-19 pandemic

### I) Introduction

The coronavirus pandemic has and will have a huge impact on our economy. This health crisis will undoubtedly be one of the worst crises in our history and is turning into an important financial crisis for a myriad of undertakings. Indeed, a phenomenal number of companies are already in bankruptcy. At the moment, it is still too early to accurately assess the damage caused by the Corona crisis. Nevertheless, competition authorities around the world have reacted swiftly to deal with this unprecedented challenge<sup>1</sup>. The crisis affects drastically both consumers and companies. On the one hand, consumers are prisoners of the containment imposed by their Government. They lost their freedom of choice and have to shop at the stores closest to their homes (pharmacies, food retail stores etc.). Thus, a higher price can be charged for these consumers with an inelastic demand. In the other hand, some companies no longer have consumers while others seeing the demand for their products and services soar. This situation raises serious competition concerns for competition authorities. The cardinal question is whether competition law should apply or not in this times of pandemic outbreak. Most competition authorities answered yes. For example, the European Competition Network highlighted in a joint communication that competition law « *remains relevant also in a period when companies and the economy as a whole suffer from crisis conditions* »<sup>2</sup>. In France, the *Autorité de la concurrence* (*Autorité*) takes competition issues particularly seriously. Following a report made by a Guianese company to the *Autorité* on 30 March 2020, the *Autorité* has opened an initial investigation into exclusive import practices likely to be implemented by companies active in the supply for hospitals of respiratory systems and products intended for patients suffering from respiratory disorders. These respiratory devices are particularly used for patients suffering from Covid-19. In this case, the *Autorité* suspected a company having recently entrusted the import of its medical products in French Guiana, Guadeloupe and Martinique to the only company located in the United States. Such behavior could have effectively preventing any other alternative from supplying local distributors. On 6 April<sup>3</sup>, the *Autorité* has announced closing its initial investigation

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<sup>1</sup> For a presentation of the situation in France and in the European Union, see our study : Entre intensification et assouplissement : le droit de la concurrence à l'épreuve du coronavirus, *JCP E* 2020, No 15-16, p. 31 (only in French).

<sup>2</sup> See : Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis, 23 March 2020 : [https://ec.europa.eu/competition/ecn/202003\\_joint-statement\\_ecn\\_corona-crisis.pdf](https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf).

<sup>3</sup> See : French Competition Authority, Respiratory assistance equipment in French Guiana and the French West Indies: investigation closed for exclusive imports, Press release, 6 April 2020 : <https://www.autoritedelaconcurrence.fr/en/press-release/respiratory-assistance-equipment-french-guiana-and-french-west-indies-investigation>.

and taking note of the decision of the company to clarify the conditions for the distribution of its products in overseas territories in order to strengthen competition. The *Autorité* indicated it is very careful that no company can abuse its market power or agree with other companies to the detriment of consumers and the community. What about the New Caledonian Competition Authority?

## II) Current reaction

The New Caledonian Competition Authority (NCCA) is a new entrant into the ranks of competition authorities<sup>4</sup>. The Authority was installed in March 2018<sup>5</sup> on the « Caillou » and celebrated its two years of existence only a few weeks ago. Despite its young age, the Authority already has a substantial activity. The NCCA has delivered many opinions and examined several merger cases. Recently, the NCCA has opened a sector inquiry in the airline market and has for the first time of its history fined companies for engaging in exclusive import practices prohibited under competition law in New Caledonia<sup>6</sup>. In its announcement on its priorities for 2020<sup>7</sup>, the Authority stressed that it will focus its control on the risk of cartels in public procurement. Will these priorities be compromised by the ongoing covid-19 pandemic? In a press release dated 19 March, the NCCA responded clearly by the negative. The NCCA considers that weakening competition law enforcement is not the way to go. In contrast, the NCCA will pay more attention to the implementation of anticompetitive behaviours. It declares that « *in this period of collective efforts, the NCCA will be particularly vigilant in detecting and then punishing anti-competitive practices carried out by companies that would exploit the current situation to the detriment of New Caledonia's citizens and economy* ».

Does that mean that the authority will proceed in the same way as usual? Absolutely not. The NCCA is aware that it has to adapt its enforcement to the constraints of containment and that it will be more difficult for it to detect dubious practices in the market. The NCCA states that « *given the exceptional situation in New Caledonia and throughout the world, the Authority will take into account any difficulties encountered by companies or third parties in responding to its requests. This may nevertheless have an*

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<sup>4</sup> For more information, see : R. Simpson & A. Zoude-Le Berre, New competition kid on the Pacific block : The Competition Authority of New Caledonia (CANC), *Concurrences* No 4-2018, p. 23.

<sup>5</sup> The establishment of the New Caledonian Competition Authority was made possible by the adoption of Caledonian Law No. 2014-12 of 24 April 2014 establishing the New Caledonian Competition Authority and amending Book IV of the legislative part of the Commercial Code applicable in New Caledonia.

<sup>6</sup> NCCA, 26 December 2019, Decision No 2019-PAC-05 Decision relating to practices implemented by Kone Elevators Ltd, Otis SCS, Socometra SAS and Pacific Ascenseurs SARL in the elevator sector in New Caledonia : *Concurrences* No 2-2020, L. Martinez Reillo, forthcoming.

<sup>7</sup> See : NCCA, Priorities of the New Caledonian Competition Authority in 2020, Press release, 28 January 2020 : <https://autorite-concurrence.nc/actualites/28-01-2020/les-priorites-de-lautorite-de-la-concurrence-de-la-nouvelle-caledonie-en-2020>.

*impact on the time required for the investigation and hearing of cases*». In other words, the NCCA acknowledges, without saying so ostentatiously, that it will be difficult to respect usual timeframes for the treatment of cases. Certainly, merger cases will have a lower priority than antitrust cases because, as the NCCA pointed out, « *anticompetitive practices in this context will tend to worsen the situation of families and the economy and will therefore have to be heavily penalised* ». For these reasons, the NCCA invites any person or company aware of possible anticompetitive practices to report them. An email address has been created to enable the investigation service to gather the first evidences and react promptly to carry out investigations.

### III) What's next ?

The NCCA is composed of a small team of rapporteurs with one rapporteur general supported by an assistant rapporteur general<sup>8</sup>. Therefore, it will not be easy to carry out investigations as quickly as in France. Indeed, the *Autorité de la concurrence* has several investigation services which work in close collaboration with DGCCRF agents. This is not the case in New Caledonia. That's why, in the archipelago, it will need to make full use of all tools at the disposal of the NCCA. For instance, leniency programmes will have to be promoted more than usual. Pursuant to article Lp. 464-2 of the Commercial Code, a company involved in a cartel and cooperates voluntarily with the NCCA by providing critical evidences receives in return immunity from, or a reduction in, fines for its involvement in the cartel. This negotiated procedure, which has shown its efficacy in the European Union, could be a powerful instrument to detect anticompetitive practices during the Corona crisis.

The Authority could also be inspired by the French Authority, which has decided to assist companies in the evaluation of their collaboration agreements. Given the size of the island, supply problems will certainly arise in New Caledonia. Consequently, initiatives such as collaborations between companies for manufacturing masks should not be discouraged. As in France, on an informal basis, the NCCA could secure certain agreements.

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<sup>8</sup> It explains by the fact that the island is small and that the markets are very narrow. There are only a small number of companies that compete with each other.

Finally, the NCCA must be very vigilant to prevent some profiteers from taking advantage off the Corona crisis to demand excessive prices for essential goods. Such behaviour could be qualified as an abuse of dominance.

#### **IV) Conclusion**

In New Caledonia, as elsewhere, competition law has not been temporarily shelved due to the Covid-19 crisis. The NCCA will ensure that products considered as essential remain available on the market at competitive prices. This position must be approved because, during this economic and health crisis, the first victims of anticompetitive practices will be the most vulnerable people in our society, such as low-income families and people suffering from severe diseases.