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COMMITMENT DECISIONS IN ANTITRUST CASES

-- Note by France --

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FRANCE

1. INTRODUCTION

1. The task of the *Autorité de la concurrence* (hereinafter the “*Autorité*”), is not just to detect and sanction breaches of competition law, it also consists of ensuring that there is a healthy, long-lasting and effective competitive dynamic in the market. The commitment procedure was introduced in France in 2004, and is a product of this approach. It favours the correction of problematic conduct on the market by means of seeking pragmatic and negotiated solutions.

2. In the ten years of its application, the *Autorité* has adopted more than fifty commitment decisions (56). The success of these commitment procedures is based on a benefit shared between the *Autorité* and the undertakings concerned.

3. The commitment procedure thereby offers benefit for the *Autorité* and undertakings which will benefit from a massive reduction in the reduced cost of case handling, and defence costs. Commitments represent a significant administrative saving, freeing up resources and time for all parties concerned. However the absence of penalties represents the most obvious plus point for undertakings, not only from a financial point of view but also in reputational terms as it thus avoids public condemnation. The fact that there is no notice of infringement may also constitute a benefit for the undertaking from the point of view of subsequent compensatory action.

4. The market as a whole benefits from the development of the commitment procedure, by allowing a dynamic approach to competition concerns. It means solutions can be swiftly adopted in the market, based on a voluntary change in private conduct, by the market itself, and self-monitored by means of a market test mechanism allowing the opinions of relevant third parties to be gathered. The commitments empower undertakings by giving them the opportunity to play an active role in resolving competition concerns arising from their conduct. Furthermore, by allowing rapid solutions to be adopted in the context of a streamlined investigation, the commitments mean competition regulation time can be beneficially aligned with market time.

5. This success by no means implies that the commitment procedure has overshadowed the work of characterizing anticompetitive practices. At 31 December 2015, the majority of the *Autorité*'s decisions had still been made on the merits of the case. Commitment decisions only account for around 15% of the decisions adopted by the *Autorité* on the merits and 37% of decisions adopted excluding horizontal practices.

6. The commitment procedure gives the *Autorité* significant procedural leeway, both in terms of choosing to have recourse to this procedure, and the power of deciding whether or not to accept the proposed commitments. This significant flexibility allows the *Autorité* to refine its approach and regulate the intensity of the remedies adopted. Commitments also mean a decrease in the risk of appeal. In France, so far no undertaking that has agreed commitments has lodged an appeal against the *Autorité*'s decision.

7. This contribution, after an initial overview of the procedure applicable in France (I), provides an opportunity to study how this procedure has been implemented in France (II), and then to tackle the question of the long-term future of these commitments and how they will be monitored (III).

2. Procedural context

8. The commitment procedure was introduced into French law by Order 2004-1173 of 4 November 2004¹ and codified in Article L. 464-2 of the French Commercial Code *Code de Commerce*, a few months after Regulation 1/2003 came into force, which provides, within the common set of powers held by the national competition authorities, for the power to accept commitments². The *Autorité* has thus been vested with the power to “*accept commitments proposed by undertakings or association of undertakings and to put an end to anticompetitive practices, in compliance with Articles L. 420-1, L. 420-2, L. 420-2-1 and L. 420-5*”. This provision was supplemented by Article R. 464-2 of the French Commercial Code *Code de Commerce* which sets out the general procedural context in which commitments made by undertakings may be accepted by the *Autorité*.

9. The *Autorité de la concurrence* has specified the main phases and operation of the commitments procedure in a procedural notice³.

10. When the commitment procedure was being put into place in France, the *Autorité* was confronted by three particular problematic issues.

11. First, the *Autorité* had to reconcile the commitment procedure with the strict separation made between the investigation services and the decision-making body (the *Autorité*'s Board). Given the pre-litigation stage of the commitment procedure, and that it does not result in the ruling of an offence, the *Autorité* implemented a flexible procedure, under which the Board is associated with the negotiations between the undertaking and the investigation services, so that the undertaking can be guaranteed that the proposals negotiated upstream with the *rapporteur* (case handler) in charge of the file will be accepted as a basis for discussion by the Board at a hearing.

12. Secondly, the commitment procedure introduces a procedural innovation into the organisation of discussions with the undertaking concerned. Thus the *Autorité* informs the undertaking of its “competition concerns” in the context of a “preliminary assessment”, which does not take the form of a statement of objections but rather the characterisation of practices similar to the one that is used in relation to interim measures, aiming to establish whether the facts are “*liable to constitute anticompetitive practice*”⁴. This assessment must, however, be sufficient to enable the monitoring of the appropriate nature of the commitments.

13. Thirdly, the *Autorité* had to put a mechanism into place which would involve interested third parties in the process; parties that are not part of the procedure before the *Autorité*, i.e. neither plaintiffs or defendants. It is important to gather the opinions of these third parties before establishing, first, whether and to what extent the proposed commitments affect their interests and, secondly, whether these commitments are appropriate and sufficient to address the competition concerns expressed in the initial assessment. For this purpose, the *Autorité* implemented a “market test” which in practice consists of publishing the proposed commitments on the *Autorité*'s website and allowing a minimum of one month from the date of publication for third parties to submit their observations.

14. One of the main characteristics of the commitment procedure before the *Autorité* is its flexibility, within a framework that guarantees the soundness of the analysis that is the basis for acceptance of the commitments.

¹ Ordinance no. 2004-1173 of 4 November 2004 adapting certain provisions of the French Commercial Code *Code de Commerce* to EC competition law.

² Article 5 of (EC) Regulation no 1/2003 of 16 December 2002, on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty.

³ Procedural notice of 2 March 2009 on commitments in competition.

⁴ Cour de Cassation judgement of 4 November 2008 (Canal 9).

2.1 The scope of application of the commitment procedure

15. Current law does not set out the type of conduct that is liable to become the subject of a commitment procedure.

16. Article 464-2 simply refers to “*competition concerns liable to constitute anticompetitive practices*”. The courts have accepted this broad definition, but have specified that the competition concerns must be on-going⁵. The procedural notice specifies that the commitment procedure applies to situations that arise on the basis of competition concerns that are still on-going and which can be brought to an expeditious end.

17. The commitment procedure is particularly suitable for unilateral or vertical practices of a kind likely to reduce access to a market, as indicated by analysis of the *Autorité*'s decision-making practice (cf. Part II below). However, the *Autorité* does not apply this procedure to practices deemed so serious that the harm caused to the public economy necessitates the issue of a fine: this is particularly the case with cartels and certain abuses of a dominant position which cause major economic damage⁶.

2.2 Implementation of the procedure

18. There are several stages in the implementation of the commitment procedure: (1) initiation of the procedure at the undertaking's initiative, (2) preliminary assessment, (3) offer of commitments, (4) market test and publication of the offers of commitments, and (5) conclusion of the procedure.

2.2.1 Initiation of the Procedure

19. An undertaking, the conduct of which is the subject of a referral by the *Autorité* may, as soon as it is aware thereof and as long as there has not yet been any notification of objections, approach the investigation services with a view to exploring the possibility of embarking on the commitments procedure.

20. The initiation of the commitment procedure thus leads to a strategic assessment of the undertaking on the basis of the relevant facts; such facts must fall within the procedure's scope of application, and its capacity to provide a credible, serious solution to address the competition concerns.

21. It is essential that the initiation of the procedure takes place prior to any statement of objections. As the procedural notice highlights, unlike under EU law where undertakings can negotiate commitments until an advanced state of investigation, it is not possible to have recourse to commitments in France after a statement of objections has been issued⁷.

22. The undertaking approaches the *Autorité*'s investigation services, in the context of preparatory steps which can be informal (telephone or email contact for example), provided that they demonstrate that the undertaking is determined to seriously explore the commitments route⁸.

23. It should be noted that this approach can also be taken in the context of an interim measures procedure: with this in mind, the prospect of an interim measures decisions may encourage undertakings to address competition concerns upstream. In this case, commitments may be accepted

⁵ Appeal Court of Paris, 6 November 2007, Canal 9 v. EIG “Les indépendants”, 06/18379: “applicable laws only imply the finding of an on-going anticompetitive effect on competition”.

⁶ Point 11 of the Procedural notice on commitments in competition.

⁷ Point 13 of the Procedural notice on commitments in competition.

⁸ Point 15 of the Procedural notice on commitments in competition.

prior to any decision being reached on the application for interim measures⁹. Alternatively, an interim measures decision may constitute the basis for discussions on an offer of commitments, with regard to injunctions issued by the *Autorité*¹⁰ or, failing this, the preliminary assessment of practices appearing in the judgement rejecting the application and continuing investigation on the merits¹¹.

2.2.2 *The Preliminary Assessment*

24. If on first analysis the undertaking's initial offer of commitments appears likely to provide a satisfactory conclusion to the procedure, the rapporteur will draw up a preliminary assessment specifying how the anticompetitive effects on competition are liable to constitute an anticompetitive practice.

25. The preliminary assessment does not intend to determine the merits of the allegation: consequently, it does not constitute a criminal charge in the meaning of Article 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms because “*its aim is not to prove the reality of and imputability for competition law infringements with a view to sanctioning them*”¹².

26. The sole aim of this analysis from a competition law point of view is the identification of competition concerns, the free assessment of which is left to the *Autorité*. The rapporteur merely clarifies the way in which the competition law infringements are “*liable to constitute anticompetitive practices*”¹³.

27. Characterisation of the practices must be sufficient to enable the undertaking to draw up suitable commitments as well as to allow the judge to monitor whether or not the commitments are appropriate.

28. After having been informed of the competition concerns expressed in the preliminary assessment, the undertaking concerned shall formalise its offer of commitments. The *Autorité* is not bound by this request and is free to formally initiate the procedure or not at its discretion further to its opportunity assessment.

2.2.3 *The Offer of Commitments*

29. Within a time period that, except for an agreement to the contrary, may not be less than one month from the preliminary assessment, the company must formalise its offer of commitments. This offer of commitments must address the competition concerns expressed by the *Autorité* and must be relevant, credible and verifiable.

⁹ See, for example, Decision 06-D-24 of 24 July 2006 on the distribution of watches sold by Festina France.

¹⁰ See, for example, interim measure 10-MC-01 of 30 June 2010 on the request for interim measures submitted by Navx and Decision 10-D-30 of 28 October 2010 on practices implemented in the internet advertising sector. See, likewise, interim measure 08-MC-01 of 17 December 2008 on practices implemented in the the distribution of iPhones and Decision 10-D-01 of 11 January 2010 on practices implemented in the distribution of iPhones.

¹¹ See, for example, Decision 13-D-16 of 27 June 2013 on a request for interim measures in relation to the practices implemented by the SNCF group in the public transport sector and Decision 15-D-05 of 15 April 2015 on practices implemented by the SNCF group in the public transport sector.

¹² The Cour de cassation judgement of 4 November 2008 Canal 9 v. EIG "Les indépendants".

¹³ Ibid.

30. The form that these commitments may take is up to the undertakings and will depend on the circumstances of the case. By way of example, they may include: changes to contractual clauses¹⁴, review of the general conditions applicable to the provision of goods or services¹⁵, provision of a wholesale offer via a tender mechanism¹⁶ or internal reorganisation¹⁷.

2.2.4 *The Market Test*

31. Once the commitments proposal has been received, it will be passed on to the party that made the referral, the Government auditor and any third parties whose interests may be affected. These parties then have the opportunity to submit their observations on the offer of commitments and contribute to their examination.

32. For this purpose, the *Autorité's* general *rapporteur* shall post a notice on the *Autorité's* website, setting out a summary of the case and the offer of commitments so as to allow interested third parties to submit their observations within a time period of no less than one month from publication of the notice.

33. This market test allows the *Autorité* to check that the commitments are relevant, credible and verifiable and that they are proportionate to the competition concerns expressed in the preliminary assessment - namely necessary and sufficient to address the competition concerns. The key part of this stage is the reduction of the asymmetry of information between the *Autorité* and market operators and increased transparency.

34. The observations received from third parties, which are included in their entirety in the file, may lead the *Autorité* to seek improvements to the proposed commitments or an extension of their scope¹⁸.

2.2.5 *Negotiation and Conclusion of the procedure*

35. Both the party that has made the referral and the undertaking concerned have “access to the documents used by the rapporteur to establish the preliminary assessment and to those used by the *Autorité* to decide on the commitments”¹⁹, subject to business secrets protection.

36. A hearing is organised before the Board when the latest version of the commitments will be examined in relation to the applicable standard, taking into account any improvements made on the basis of the results of the market test.

37. Changes may be made to the proposed commitments during the hearing or the commitments may be rejected if the *Autorité* considers that they do not address the competition concerns. In fact,

¹⁴ Decision no. 15-D-06 of 21 April 2015 on the practices implemented by the companies Booking.com B.V., Booking.com France SAS and Booking.com Customer Service France SAS in the on-line hotel reservation sector.

¹⁵ Decision no. 10-D-30 of 28 October 2010 on practices implemented in the online advertising sector.

¹⁶ Decision no. 07-D-43 of 10 December 2007 on practices implemented by Electricité de France.

¹⁷ Decision no. 14-D-04 of 25 February 2014 on practices implemented in the sector for online horse racing betting activity.

¹⁸ See for example, Decision 11-D-11 of 7 July 2011 on practices implemented by the Groupement des Cartes Bancaires: following the market test, the scope of the commitments was extended to cover interbank commission on cash withdrawals as well as commission on the use of professional bank cards [cards made available to employees by their employers for their professional expenses] and not just “consumer” cards.

¹⁹ Cour de cassation judgement of 4 November 2008 Canal 9 v. EIG “Les indépendants”.

the *Autorité* is never bound to accept commitments rather than take action in the form of penalties or injunctions against the undertakings.

38. If the commitments are not upheld, due to failure to reach agreement with the undertakings concerned, the commitment proposals and observations by interested third parties are withdrawn from the file. The investigation procedure then resumes.

39. If the *Autorité* considers that the proposed commitments address the competition concerns identified in the preliminary assessment, it adopts a decision rendering these commitments obligatory and bringing the procedure to an end without any ruling of an infringement offence.

40. By contrast, the *Autorité* does not accept commitments that exceed what is necessary to address the identified competition concerns. It may, however, formally acknowledge additional measures proposed by the undertaking. It proceeded in this way, for example, in relation to changes made by Google to the content policy of its AdWords service beyond the single sector targeted in the *Autorité*'s investigation (relating to devices aimed at evading road traffic speed cameras), extending it to all sectors, in every country where the service is offered²⁰.

41. In short, the *Autorité* is not bound to address competition concerns nor *a fortiori* to accept commitments connected to all the practices alleged by the party or parties making the referral. In fact, as the Court of Appeal held, "*the commitments procedure is one of the tools that allows a competition authority to carry out its mission of guaranteeing the free operation of competition on the markets; this mission to defend the public economy authorises the authority to make commitment decisions, not in order to satisfy the request of an applicant but to bring to an end situations liable to harm competition*"²¹

42. The decision to accept commitments makes a decision unilateral, bringing to an end a situation that is potentially contrary to competition law. However, it does not pass judgement on the guilt or otherwise of the company and cannot be used as the first term of the reiteration of the facts.

43. If the *Autorité* is acting on a complaint regarding practices that have already been the subject of a commitments decision, it cannot close this complaint on the basis of the *non bis in idem* principle, in the absence of any characterization of the practices in question in the commitments decision. However, the *Autorité* will find, if relevant, that there are no grounds for action, on the basis that the facts in question no longer exist.

3. Application of the commitment procedure

44. Undertakings have great freedom in the drafting of the commitments that they may propose, although they must meet the conditions set out above. The 56 commitments decisions adopted since 2004 attest to how undertakings have used this freedom.

45. Classification of the *Autorité*'s decision-making practice may thus be made on the basis of the practices in question (**A**) or by the sector concerned (**B**).

²⁰ Decision of 28 October 2010, cited above, paragraph 93: "During the meeting of 4 October 2010, Google's representatives stated that in practice, the undertaking would apply the principle of improvements and clarifications made in application of the proposed commitments to all the content and rules of the AdWords service, in all the countries concerned by this service. In accordance with Point 39 of the procedural notice of 2 March 2009 referred to above, it is appropriate for the *Autorité* to formally acknowledge the measures proposed by Google."

²¹ Judgement of 19 December 2013 of the Appeal Court of Paris, Cogent Communications France.

3.1 *Analysis of decision-making practice on the basis of the practices in question*

46. As stated previously, the *Autorité* refuses to use the commitment procedure in cases where harm to the public economy justifies the handing out of fines, and explicitly excludes cartels as well as certain abuses of dominant position that cause major damage to the economy.

47. Of 56 commitment decisions adopted since 2004, 59% relate to concerns connected to practices of abuse of dominant position²².

48. Concerns linked to anticompetitive agreements, for the most part vertical,²³ only account for 27% of the commitment decisions adopted by the *Autorité* since 2004. Finally, 14% of commitment decisions since 2004 relate to mixed practices²⁴ (anticompetitive agreements and abuse of dominant position).

49. As the procedural notice highlights²⁵, the commitment procedure seems more suited to unilateral or vertical practices where the effect is to restrict access to a market.

3.2 *Analysis of decision-making practice by sector*

50. Commitment decisions cover a wide range of sectors, in particular:

- (i) telecommunications services: six decisions were adopted and involve France Télécom²⁶ and TDF²⁷;
- (ii) advertising services: five decisions adopted, of which two in relation to Les Pages jaunes²⁸ and one in relation to Google²⁹;
- (iii) the press: six decisions adopted of which four in relation to "nouvelles messageries de la presse parisienne" (NMPP, now Presstalis)³⁰;
- (iv) distribution, in particular on line³¹.

51. The commitment procedure is particularly suited to handling the relationship between competition law and the exercise of intellectual property rights³², the effectiveness of opening up to

²² See in particular *Autorité de la concurrence* Decisions 14-D-11 of 2 October 2014 on practices implemented in the train ticket distribution sector and 14-D-09 of 4 September 2014 on practices implemented by the companies Nestlé, Nestec, Nestlé Nespresso, Nespresso France and Nestlé Entreprises in the espresso coffee machines sector.

²³ See in particular *Autorité de la concurrence* Decisions 15-D-12 of 30 July 2015 on practices implemented by the Fédération française des clubs alpins et de montagne and Compagnies de guides de Chamonix et de Saint Gervais in the high-mountain guide sector.

²⁴ See in particular Decision 15-D-06, Booking.com, referred to above.

²⁵ Point 12 of the Procedural notice on commitments in competition.

²⁶ See *Autorité de la concurrence* Decisions 06-D-20, 08-D-21, 09-D-11 and 12-D-18.

²⁷ See *Autorité de la concurrence* Decisions 07-D-30 et 15-D-09.

²⁸ See *Autorité de la concurrence* Decisions 06-D-20 and 12-D-22.

²⁹ See *Autorité de la concurrence* Decision 10-D-30.

³⁰ See *Autorité de la concurrence* Decisions 06-D-01, 07-D-32, 08-D-04 and 12-D-16.

³¹ See *Autorité de la concurrence* Decisions 06-D-24 (Festina), 06-D-28 (hi-fi and home cinema equipment), 07-D-07 (personal hygiene products), 15-D-06 of 21 April 2015 on the practices implemented by the companies Booking.com B.V., Booking.com France SAS and Booking.com Customer Service France SAS in the on-line hotel reservation sector.

competition a market formerly under a legal monopoly,³³ and the risks of pre-emption of rapidly-growing emerging markets³⁴.

4 Monitoring the commitment procedure

52. Effective monitoring of commitments determines how useful they prove to be. With this in mind, several questions can be put to the undertakings and the *Autorité*, related to the duration of commitments (A), the mechanisms put into place to ensure they are monitored (B), and the penalties for failure to respect them (C). In addition, the long-term effects of the decision to accept commitments also extends to the initiation of actions in redress following its adoption (D).

4.1 Duration of commitments

53. Depending on the type of commitments, practices and the market in question, commitments may be adopted for an indefinite duration, when competition concerns must be addressed in a durable fashion or, by contrast, may be limited in time, when the restoration of effective competition can be envisaged.

54. The *Autorité's* recent practice highlights a more or less equivalent proportion of fixed-term durations and decisions entailing commitments of unspecified duration. It should also be noted that some decisions combine both types of commitments.

55. If the duration is not specified, commitments may contain a review clause specifying that when legal or factual circumstances so justify, the undertaking may refer a request to the *Autorité* for review or cancellation of commitments: these clauses mirror the review mechanism to which Point 46 of the procedural notice expressly refers. Less often, commitments include a review clause under which the *Autorité* and the undertaking agree to look into whether it is relevant to keep the commitments in place. The formality and the obligations attached to this clause vary³⁵. Thus in the Booking.com case referred to previously, the commitments agreed included a comprehensive, intermediate review of their effectiveness, on the basis of a report drawn up by the undertaking, at the latest eighteen months after the commitments accepted by the *Autorité* came into force. This report will be the subject of examination in a hearing before the *Autorité's board*.

56. In any case, as specified in Point 46 of the procedural notice, it is up to the *Autorité* to assess the need to review the commitments in the light of any changes to the market in question.

57. Consequently, in November 2015, the *Autorité* issued a decision under which it released the French Golf Federation from commitments accepted three years earlier, in the sector of supplementary insurance distribution to golfers. At the Federation's request, the *Autorité* issued an opinion at its own initiative, concluding in the light of a market test that the main commitment was of a non-obligatory nature from the notification of its decision. Furthermore, the other instantaneous and peripheral commitments had become redundant³⁶.

³² Decision 07-D-31 of 9 October 2007 on practices implemented by Automobiles Citroën. See also the Nespresso decision, cited above.

³³ Decision 07-D-30 of 5 October 2007 on practices implemented by TDF in the sector of terrestrial analogue broadcasting of audiovisual services.

³⁴ See in particular Decision 10-D-01, Iphone.

³⁵ See for example Decision 14-D-11 of 2 October 2014 on practices implemented in the train ticket distribution sector.

³⁶ Decision 15-D-16 of 27 November 2015 on the request for review of commitments by the French Golf Federation, rendered obligatory by Decision 12-D-29 of 21 December 2012

4.2 *Monitoring the commitments*

58. Above and beyond the question of the duration of the commitments and their possible review, is the question of the monitoring of their implementation and respect; according to Article L.464-8 of the French Commercial Code *Code de Commerce*, this monitoring is the *Autorité*'s responsibility: "*The Autorité de la concurrence shall oversee the execution of its decisions*".

59. Thus, in addition to the monitoring by the *Autorité*'s services themselves, there is a wide variety of procedures for oversight of the commitments which will depend on the nature of the commitments adopted.

60. Some decisions also provide for internal monitoring mechanisms in the form of an annual report that will be submitted to the *Autorité*³⁷ or by the creation of an internal committee to assess and monitor the commitments³⁸.

61. There is also the possibility of using an independent third party to monitor the commitments. Less widespread than in the context of merger control, this means of monitoring is all the same starting to develop: three of the eleven commitment decisions adopted by the *Autorité* between 2013 and 2015 envisaged the appointment of a representative. PMU appointed a representative to provide monitoring of its commitment to unbundle high-street and online betting pools³⁹; Nestlé Nespresso SA appointed a "reliable third party" to monitor its commitment to communicate technical modifications made to Nespresso machines⁴⁰; the SNCF group appointed a representative with the job in particular of monitoring conditions of access to SNCF's know-how and resources that could not be replicated by its competitors and necessary for responding to calls to tender in the market for technical assistance to an authority organising transport⁴¹.

4.3 *Respect of commitments*

62. As commitments are at the undertakings' initiative, they are well-placed to have a specific appreciation of their scope and significance. It is therefore necessary for any future penalty for failure to respect the commitments to be exemplary.

63. The *Autorité*'s consistent decision-making practice highlights that failure to respect commitments is a practice that is "*serious in itself*"⁴². Along similar lines, the Appeal Court of Paris held that failure to respect injunctions was, "*in itself (...) a practice of exceptional seriousness*"⁴³.

64. In addition, independently of the intrinsic seriousness of the offence, the *Autorité* is likely to examine the impact that violation of commitments may have had on the competition that these commitments were aimed at maintaining, as well as the scope of the violated commitments.

³⁷ See *Autorité de la concurrence* Decision 13-D-18 of 20 September 2013 on Visa's practices in the payment cards sector.

³⁸ See *Autorité de la concurrence* Decision 07-D-30 of 5 October 2007 on practices implemented by the company TDF in the sector of terrestrial analogue broadcasting of audiovisual services.

³⁹ Decision 14-D-04 of 25 February 2014, cited previously.

⁴⁰ Decision 14-D-09 of 04 September 2014, cited previously.

⁴¹ Decision 15-D-05 of 15 April 2015 on the practices implemented by the SNCF group in the public transport sector.

⁴² *Autorité de la concurrence*, Decision 10-D-21 of 30 June 2010 on the respect, by Neopost France and Satas, of undertakings made in the decision of the *Conseil de la concurrence* 05-D-49 of 25 July 2005.

⁴³ Appeal Court of Paris, 11 January 2005, France Télécom.

65. Failure to respect commitments shall give rise to a fine with a threshold identical to the fine applicable to infringements of competition law (Article L. 464-3 of the French Commercial Code *Code de Commerce*), reflecting the importance granted by legislation to the proper application of the remedies applied by the undertakings themselves.

66. To date, however, very few decisions related to a failure to respect commitments have been adopted (3 since 2000⁴⁴), which may be interpreted as the result of the higher likelihood of undertakings abiding by solutions that they have contributed to devising, compared, for example, with the number of decisions for the failure to respect injunctions (10 since 2000).

67. In its latest decision to date, the *Autorité* fined the economic interest group (EIG) “Les Indépendants” for failure to respect commitments regarding the forms of joining and leaving the EIG active on the market for radio advertising. Within the context of monitoring commitments, the *Autorité* started proceedings ex officio and found the existence of several breaches for which it issued fines of 300,000 euros, namely approximately 4% of the annual turnover of EIG “Les Indépendants”. It also issued several injunctions, subject to penalties, aimed in particular at going back on the amendments that had been made to the EIG's internal regulation since they were contravening the commitments.

4.4 *The commitment procedure and compensatory actions.*

68. Commitment decisions do not represent either acknowledgement by the undertaking, or the finding by the *Autorité* of the existence of an anticompetitive practice. If an undertaking considers itself to be the victim of a practice that has been the subject of a decision to accept commitments, it must establish the anticompetitive nature thereof within the context of its compensatory action. The forthcoming transposition of the Directive on actions for damages⁴⁵ will not, in this regard, change positive law by limiting the effect of irrefutable presumption before the national courts attached to a final decision by the *Autorité* to those of its decisions that acknowledge an abuse on the basis of Articles 101 and/or 102 of the Treaty on the functioning of the European Union (TFUE).

69. However, the adoption of a commitment decision has no bearing on whether victims may file action for damages against an undertaking that has agreed to commitments. In fact, there is nothing under French law to prevent a potential victim or party to the procedure from taking such legal action⁴⁶.

70. Several judgements⁴⁷ illustrate the possibility of undertakings obtaining compensation for harm that they claim to have suffered due to practices which have been the subject of a commitment decision and have led to the handing down of rulings against undertakings which have adopted commitments.

⁴⁴ See *Autorité* Decisions 10-D-21, Neopost cited previously, 11-D-10 of 6 July 2011 on the respect, by the City of Marseille, of the commitments made in Conseil de la concurrence Decision 08-D-34 of 22 December 2008 and 15-D-02 of 26 February 2015 on the respect, by the EIG "Les Indépendants", of commitments made in Conseil de la concurrence Decision 06-D-29 of 6 October 2006.

⁴⁵ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

⁴⁶ Point 43 of the Procedural notice on commitments in competition.

⁴⁷ See in particular Commercial Court of Paris, DKT International/ Eco emballages and Valorplast, 30 March 2015. See also Commercial Court of Paris, Google NavX, 27 December 2012: in this case, abuse of a dominant position and economic dependency was dismissed by the judge, who admitted, however, Google's liability for the brutal breakdown of commercial relations, on the basis of Article L.442-6 of the French Commercial Code *Code de commerce*.

71. There is, however, an issue in the context of these instances: whether the file documents from the procedure before the *Autorité* can be produced before the judge ruling on compensation.

72. Thus in two cases, the applicant had, on the basis of Article 138 of the *Code de procédure civile* (French Code on Civil Procedure), sought to order the *Autorité* to produce the file documents which the applicant already had in its role as party to the procedure before the *Autorité*. For the applicant, the objective was to avoid criminal sanction for breach of the confidentiality of the investigation, as set out in Article L. 463-6 of the French Commercial Code *Code de commerce*⁴⁸.

73. The Appeal Court of Paris, in reference to the jurisprudence of the Commercial Division of the Cour de cassation⁴⁹, has confirmed on two occasions⁵⁰ that an applicant, who was already in possession of the documents in question but was fearful of producing them, could legitimately introduce these documents obtained during an investigation before the *Autorité*, subject to proving their necessity for the exercise of his rights. Furthermore, the *Autorité* does not have to assume the possible risk of a criminal offence, the applicant and complainant at that instance being perfectly qualified to provide the justification of this need, on a case by case basis: “*the Autorité and its officers are not obliged to assume the risk infringement of professional confidentiality in the place of the party who is alone in knowing exactly which documents (of those which it already has in his possession) are required for the exercise of his rights*”. The forthcoming transposition of the Directive should, in any case, limit the occurrence of such problems in the future, by the double impact of Article 7 (which authorises, under well-defined circumstances, the production of file documents from a procedure before the *Autorité* by parties thereto, in the context of action for compensation) and Article 6, paragraph 10 (under which the *Autorité de la concurrence* can only be the recipient of an injunction to produce documents in the absence of the reasonable possibility of any other party, or third party, of providing them).

⁴⁸ See in particular the case *Ma Liste de courses*: French Commercial Court Paris, Div 15, 24 August 2011, RG no. 2011014911; Commercial Court. Paris, Div. 15, *MLDC*, 16 March 2012. See also case *DKT*: Paris Commercial Court, *DKT*, 16 March 2012.

⁴⁹ Cour de cassation, commercial division, *Semavem*, 08-19761, 19 January 2010.

⁵⁰ Appeal Court of Paris, *Ma liste de course*, 20 November 2013 (RG no.12/05813). Appeal Court of Paris, *DKT*, 24 September 2014 (RG no.12/06864).