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# The re-criminalization of competition law Not such a good idea

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The Ordinance of 1 December 1986 had overhauled and thoroughly reformed French competition law by decriminalizing it to a large extent. In a coherent and logical manner, it had entrusted the repression of anti-competitive practices by undertakings to an administrative authority (Competition Council, now Competition Authority) with the power to impose administrative penalties. The ordinary criminal regime maintained a subsidiary role in the sanctioning of natural persons guilty of having fraudulently taken a personal and decisive part in the design, organization or implementation of anticompetitive practices. This arrangement has been called into question, mainly from 2020 onwards. The ***Parquet National Financier*** or ***PNF*** (public prosecutor for economic and financial crime) was given its own powers in competition law by Law No 2020-1672 of 24 December 2020. More recently, the PNF has sought to extend this criminal offense, which is in principle reserved for natural persons, to legal persons. At the same time, the investigative service of the Competition Authority has developed a new procedural strategy of reporting competition law violations to the public prosecutor's office, so that the latter can refer the matter to an investigating judge with a view to opening a preliminary judicial inquiry. In this context, the Competition Authority agents may be included in criminal raids conducted by investigators from the police or the gendarmerie on the basis of letters rogatory. In the course of the investigation, the investigating judge may forward files relating to criminal proceedings to the Authority in connection with administrative proceedings initiated by the latter. Two particularly important cases that followed this pattern have recently led to convictions by the Competition Authority in the precast concrete and electrical equipment sectors. This circular procedure allows the Competition Authority to benefit from the flexibility of criminal procedure and to free itself from the constraints of Article L. 450-4 of the Commercial Code applicable to search and seizure operations (dawn raids). Ordinary civil law criminal procedure is effectively much less protective than the search and seizure procedure under competition law: no immediate right of appeal against the search warrant issued by the court, no immediate right of appeal against the search, no right to legal counsel during the search or hearings, no official report of the operation and no protection of business secrets. It is clear that it is in the interest of the Competition Authority to make use of this procedure, which makes it possible to take over a case without the undertakings benefiting from any of the guarantees offered by the Commercial Code. This re-criminalization of competition law is a badly conceived "good idea" and results in a procedural and substantive dead end.

## I. Badly conceived in terms of procedure

### 1. In clear contravention of European law.

The current circular procedure for appealing against criminal proceedings is in direct conflict with the procedural guarantees provided for by European law. Most of the Competition Authority's procedures apply both French and European competition law in parallel. They must therefore comply with the ECN+ Directive and the EU Charter of Fundamental Rights. Under Articles 3 and 14 of the ECN+ Directive, any competition investigation must be capable of effective judicial review and respect the rights of the defense. This right to an effective remedy is also guaranteed by the Charter. However, in this circular procedure, any right to an effective remedy and the rights of the defense are disregarded insofar as an appeal is only possible in the event of a ruling against the defendant by the Competition Authority (or much later in the criminal procedure). When we consider that the Competition Authority can take almost ten years after the facts to

render its decision (cf. Competition Authority Decision No 19 December 2024, No 24-D-11; 29 December 2023, No 23-D-15) and the court of appeal takes another two years to issue a ruling, it is clear that the right to an effective remedy is not guaranteed.

**2. A proven risk of abuse of process**

Even if, on the surface, each stage of the circular procedure appears to comply with a legal text, as the Competition Authority recently ruled (Competition Authority, Decision No. 24-D-11 of 19 December 2024; Decision No. 24-D-06 of 21 May 2024), the current practice is in reality akin to a diversion of the standard procedure and deprives undertakings of the guarantees afforded to them by the legislation that should apply to them. It is unconvincing to claim that the *rapporteur général* would be obliged to make a report under Article 40 of the Code of Criminal Procedure when he is advised of a possible offense: either we consider that an offense against competition law is never clear-cut since it generally takes the Competition Authority several years to characterize it, given the complexity of this law; or this notification would have to be systematic, which is not the case. Moreover, the Court of Cassation has already ruled that the application of a less protective ordinary law procedure instead of a more protective tax investigation procedure constituted such abuse, as the special protective rule should be applied (Cass. crim., 3 October 1996, No. 95-83.879). The same principles must apply, *mutatis mutandis*, to the use of special investigative measures, whether for tax or competition purposes. Finally, the Court of Cassation has sanctioned such abuses on multiple occasions based on the duty of the authorities to respect the principle that evidence must be obtained fairly (Cass. crim., 18 December 1989, No. 89-81.659).

## II. A fundamentally flawed good idea

**1. Unsuitability of criminal law when faced with the complexity of competition law.**

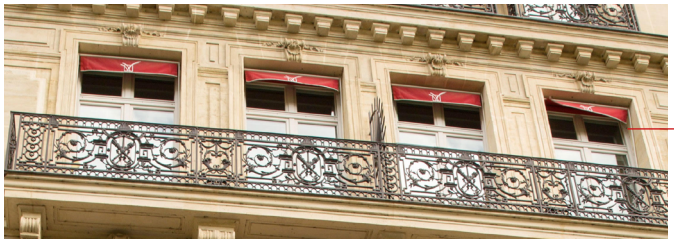
While the traditional practice of only prosecuting individuals in the case of offenses committed in the context of bid rigging could be understood due to the obvious elements constituting this competition infringement if it were established, the use of circular criminal law investigations for much more complex cases, particularly vertical restrictive agreements, appears, given the difficulty in characterizing these restrictions, incompatible with the rigor and strict nature of criminal law. Moreover, the criminal courts are already overwhelmed by the flood of cases they have to deal with and their pre-trial and sentencing time-limits are very long, and it does not appear to be in the interests of the proper administration of justice to increase their workload even further.

**A contradiction in the wording, which reserves criminal convictions for natural persons.**

Article L. 420-6 of the Commercial Code expressly reserves criminal sanctions for natural persons. The majority of legal opinions consider that it cannot therefore be extended to legal persons, not to mention the infringements of the *non bis in idem* principle that such a *contra legem* extension would be likely to generate.

**2. Sub-optimal allocation of scarce resources.**

**3.** In addition to the Commission's jurisdiction in the event of significant effects on trade between Member States, France already has two national administrations to enforce competition law: the DGCCRF and the Competition Authority. The re-criminalization of competition law would lead to the addition of the PNF and all the territorial public prosecutor's offices at a time when, due to the specialization of jurisdictions, in a difficult budgetary context, an attempt is being made to optimize resources. However, the PNF currently only deals with twelve live competition cases, representing barely 1.5% of its portfolio, and the competition activity of the various territorial public prosecutor's offices remains marginal. It is clear that in the current context those authorities have neither the means nor the required skills. In such circumstances, reason would dictate a return to the basic principles, renouncing the use of criminal law in a role that is not its own, while compromising the rights that the legislature has accorded to undertakings being investigated for anticompetitive practices.



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