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Proposed in 2021, the expression and notion of "systemic cases" (M.-A. Frison-Roche, The Hypothesis of the Category of Systemic Cases Brought Before the Judge, 2021, https://mafr.fr/en/article/lhypothese-des-causes-systemiques/), constituting the unified category of "systemic litigation" (M.-A. Frison-Roche, Systemic Litigation, 2024, https://www.mafr.fr/en/article/definition-du-contentieux-systemique-emergent/), designates all the lawsuits in which a system, whose interests are involved, is present before a judge. Its interests, which are specific to it and distinct from the interests of the parties who are disputing by developing claims, must be expressed and defended before the judge. Despite the diversity of different systems, the primary interest of a system is not to collapse but to remain. It is therefore always the consideration of the future that the judge must have in mind when identifying the interests of the system, over and above the interests of the parties.

Competition law is exemplary of this category of systemic litigation: it generates it naturally. Firstly, because a free competitive market can only continue to function in the long term if it has a judge—a necessary character because the judge is both external to the system and understands its specific interest. To meet this dual requirement, legal systems often entrust the competition authority directly with the handling of this systemic litigation. But judges are also involved. They must then be able to hear the expression of the specific interest of the competitive system, which justifies the special place of the competition authority in judicial systemic litigation.

The competitive market, a system whose sustainable equilibrium requires an integrated and independent judge

It is rare to affirm that free competitive markets are self-regulating and that the meeting of the mass of supply and demand is sufficient for them to form, develop and endure. But because competition law is based on the principle of individual freedom and must not depart from this principle, each operator has the opportunity to use this freedom to try to avoid the instability inherent in competition, reflected in the variation of prices and contractors. If an operator succeeds, alone or with others, in evading this fluidity of competition, the return to legal normality is achieved by sanctioning and repairing the market.

Sanctioning anti-competitive behaviour, repairing damage to the market, and allocating rights of action are thus an essential part of competition law, which, like criminal law and tort law, is traditionally only activated through litigation. To prevent the market from collapsing under its own weight, a judge is needed to impose sanctions and provide redress. The main beneficiary of the judge's action is the competitive market itself, which is thus restored in its own rule: free competition.

Litigation arising from allegations of anti-competitive behaviour is therefore naturally systemic: it is the competitive system that comes seeking protection and remedies. This nature is also apparent, if not more so, in merger control. This is an *ex gratia* procedure, in which the market, whose structure could be affected by the proposed merger, asks for consideration to be given to its own interests, whose future could be compromised, and for the project to be refused or adjusted after an adversarial procedure.

* This article is based on a bilingual working paper, along with additional developments, numerous technical references and hypertext links. It is freely accessible at the following address: https://www.mafr.fr/en/article/antitrust-natural-field-of-systemic-litigation/.

Systemic litigation naturally integrated into the functions of the competition authority

It is therefore logical that these disputes should be referred to the competition authority and not just to the ordinary disputes judge. This is notably the European choice. Indeed, because the party "most interested" in the sanction, remedy or authorisation is the market itself, it is up to the market guardian, i.e. the competition authority, to know about them.

European Union law considers that an administrative competition or regulatory authority more naturally takes the market's interests as the primary criterion for an appropriate jurisdictional solution. Considering that it is in the interest of competitive markets to remain so in the future, for instance, having to take account of environmental imperatives, the authority will use the technique of commitments to find remedies, a method customary in merger control and then used in proceedings concerning anti-competitive behaviour. In this way, the market is consolidated.

It is also logical that the plaintiff is often primarily the administration, because it is itself the guardian of systems. The liberal nature of the economy thus defended does not contradict this administrative organisation generated by the systemic dimension of the protected object.

If private operators are present in proceedings, in particular merger proceedings, which are regulatory proceedings, it is insofar as they provide information and are also legitimate in making their interests heard, with private enforcement supporting public enforcement (on the articulation between public enforcement and private enforcement, M.-A. Frison-Roche and J.-C. Roda, *Droit de la concurrence*, 2nd ed., Dalloz, Paris, 2022, 842 p., esp. pp. 133 et *seq.*, paras. 168-177 and 242-248).

The judge's symmetrical ability to hear competitive systemic litigation

The competition authority's natural inclination to deal with systemic competition disputes does not, however, exclude the courts from this role. In many legal systems, it is the judge alone who decides disputes that call into question the integrity of competitive markets. The American system is based on this principle. This is not a contradiction:

– Firstly, the judge can also apprehend the systems, as the criminal judge has always done.

– Secondly, even if the competition authority and the regulator are well placed to reflect the interests of the competitive system, the judge has the cultural advantage of more naturally taking account of diverse interests, as a result of the adversarial culture that consists of hearing interests other than those of the system in question.

This raises a basic procedural difficulty, that has often been highlighted when competition litigation is integrated into the competition authority. Although the sanctioning body is functionally independent within the authority, there are calls for the rights of defence to be activated earlier, before the statements of objections are notified. Moreover, while the interests of the competitive system must be taken into account, they are not the only interests that must be heard: the judge, guardian of the adversarial principle, protects against the excesses of the "total market" (on the idea of "total market" and its well-founded critique, A. Supiot, *The Spirit of Philadelphia: Social Justice vs. the Total Market*, Verso, London, 2012, 160 p.).

Therefore, Law places the judge at the centre of this systemic litigation in two ways, one vertical, the other horizontal. When an administrative authority makes a jurisdictional decision, an appeal is always possible before a court. The latter is seized by way of full litigation; consequently, this judge has to deal with the systemic nature of the case. Horizontally, when a dispute arises between two operators, for example over an allegation of unfair competition or an intellectual property issue, damage or an obstacle to the market being alleged, the judge must then apprehend the competitive market system, because the systemic nature of the dispute appears. To do this, it will be useful to take inspiration from the way in which the competition authority reasons not only legally but also economically, in the same way that the authority must always take inspiration from classical general procedural law, based on the rights of the defence.

The natural place of the competition authority in the judicial procedure for competitive market systemic litigation

In the systemic litigation that is now emerging before ordinary courts concerning the banking, financial, energy, climate, information, algorithmic and other systems, competition law should serve as an example, since it is built on the very idea of

defending the proper functioning of the system through sanctions and commitments controlled or obtained.

Thus, when a judge hears an appeal against a sanction or dispute settlement decision, the competition authority defends its point of view before the court and justifies its decision. The very principle of this rule has been criticised since the decision attacked is an act of a judicial nature, and a court should not defend its judgment before the higher court: it would not be possible to recognise that the authority acts as a court and then is able to defend its case as a party—one cannot be judge and party, and the functional autonomy of the sanctioning body not being sufficient to justify this singular exception.

But this can be justified by the very idea of systemic litigation: the authority rules, sanctions, remedies and prescribes commitments because it represents the interests of the competitive system. These interests must continue to be heard before the appeal judge, and the authority is the best placed to do so.

The same reasoning makes it an *amicus curiae* of choice for the judge. Indeed, it may appear in ordinary proceedings that the competitive system sees its interests implicated—for example, in an unfair competition dispute or when an intellectual property right is at stake. In such a case, the judge will be well advised to seek the opinion of the competition authority, whether national or not, which is best placed to express the interests of the competitive system or systems at stake, in order to incorporate this dimension into their judgment.

Much is already there: opinion procedures, authority's presence in appeals against its decisions, which are nonetheless jurisdictional. This is understandable since competition law—of which this authority is the guardian—is itself the guardian of the system of free competition. Its specific procedural features are given new legitimacy here, through systemic litigation, and must be enhanced. They constitute a vanguard for all the other systems which, similarly involved, will give rise to the systemic litigation that is emerging today. ■