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# French Competition Law Newsletter

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## The French *Cour de Cassation* upholds the Paris Court of Appeals' decision in the *Groupement des Installateurs Français* case

On May 18, 2020, the French *Cour de Cassation* upheld the Paris Court of Appeals' judgment which had confirmed the French Competition Authority's ("**FCA**") fining decision against *Groupement des Installateurs Français* ("**GIF**"). The *Cour de Cassation* held that the FCA's *Collège* could re-open the investigation to allow the FCA's investigation services to add evidence on which they relied for establishing the statement of objections ("**SO**") but that they "inadvertently omitted" to include in the case file. The defendant's response to the flawed SO can remain in the case file despite the fact that the defendant did not have access to that evidence when preparing its response, as long as the defendant is given the chance to reply to a supplementary SO after the investigation is re-opened.

### Background

This decision related to the November 24, 2016 decision of the FCA fining GIF €0.9 million. The FCA decision found that GIF had organized a territorial distribution agreement between its members—independent installers of professional kitchen supplies.

In this case, the FCA's investigation services had issued a SO without including, in the SO's case file, the DGCCRF report that had triggered the investigation. GIF responded to this SO without having had access to the report. When the case was transmitted to the FCA's *Collège*, it found the investigation to be incomplete and decided to refer the case back to the investigation services on the basis of Article R. 463-7 of the French Commercial Code.[1] The investigation services added the report to the case file and issued a supplementary SO to GIF a month later. This supplementary SO relied, in particular, on GIF's response to the first SO.

On appeal, GIF claimed that the procedure was flawed. It argued that, first, the FCA had misused Article R. 463-7 of the French Commercial Code, arguing that this article allows the FCA's *Collège* to refer a case back to the investigation services when the "*investigation*" – not the "*case file*" – is incomplete. GIF argued that, in this case, the FCA had used this article to cover a procedural flaw (that is, the investigation services' failure to include a key piece of evidence in the case file), not to complete the investigation. Second, GIF argued that the FCA should have removed its response to the first SO from the case file when it re-opened the investigation, and that failure to do so violated the principle of equality of arms and the right to a fair trial.

The Court of Appeals dismissed all of GIF's claims. GIF appealed in cassation.

### The *Cour de Cassation* ruling

The *Cour de cassation* rejected both of GIF's claims. First, it upheld the FCA's use of Article R. 463-7, confirming that the FCA can re-open the investigation for the sole purpose of adding a missing piece of evidence, and not only to carry out further investigative acts. Second, the *Cour de cassation* confirmed that the FCA's investigation services could rely on GIF's response to the first SO in the supplementary SO without violating the principle of equality of arms. The *Cour de cassation* considered that this situation was similar to that of the investigation services responding to the defendant's arguments orally at the hearing, which they are legally entitled to do. It also noted that GIF had been given the chance to submit new observations in response to the supplementary SO.

### Take-aways

The *Cour de Cassation*'s ruling raises interesting strategic considerations for situations where a defendant suspects that an important document is missing in the FCA's file. Indeed, defendants should be aware that in such cases, they may obtain access to the missing document after the FCA's *Collège* hearing, but that they will not be able to challenge the decision on the grounds of a procedural flaw or rescind any submissions made in the proceedings.

## The Paris Court of Appeals upholds the French Competition Authority's ("FCA") fining decision against Akka Group for obstructing dawn raids

On May 26, 2020, the Paris Court of Appeals confirmed the €0.9 million fine imposed on Akka Group for obstructing dawn raids conducted on its premises, including by breaking seals. This was the second decision issued by the FCA for dawn raid obstruction and the first one for breaking seals.

### Background

On May 22, 2019, the FCA fined Akka Group ("**Akka**") €0.9 million for obstructing dawn raids conducted in November 2018 on Akka's premises. The FCA found, in particular, that an employee had intentionally removed a colleague from an

[1] Article R. 463-7 of the French commercial code provides that when it find the investigation incomplete, the French Competition Authority can decide to refer the case back in full or in part to the investigation stage. This decision cannot be appealed.

internal email chain while the computer of that colleague was being searched by the FCA's agents. This employee also admitted to deleting other emails during the dawn raid. The FCA also found that an employee had negligently broken a seal affixed to an office door during the dawn raid.

Akka appealed the decision. Its principal claim was that (i) the alleged facts did not constitute obstruction under Article L. 464-2(5), 2° of the French Commercial Code, and (ii) Akka could not be held liable for its employees' conduct, nor for the conduct of its subsidiaries.

On May 26, 2020, the Paris Court of Appeals rejected Akka's appeal.

## The legal test applicable to obstruction

Akka first argued that the obstruction prohibition set out in Article L. 464-2(5), 2° of the French Commercial Code does not cover the breaking of seals, the refusal to cooperate during a raid or negligence because it does not expressly cite these practices. The Court rejected this argument. It held that the article only provides *examples* of practices qualifying as obstruction, and grants the FCA the power to sanction any acts of obstruction "*without limitation*."

Akka argued that the FCA extensively interpreted the term "obstruction" under Article L. 464-2(5), 2° of the French Commercial Code, in violation of the principle of legality of offences. The Court rejected this argument as well, holding that the definition of obstruction is sufficiently precise for companies to foresee what types of practices will fall under this qualification. It added that the legal concept of "obstruction" is common in business law and has been applied since the enactment of Article 23(1) of Regulation 1/2003.[2]

Akka also claimed that establishing obstruction requires a demonstration of both *intent* and *finality*. It argued that none of these two elements had been established in this case, because (i) the affixed seal had been broken due to mere negligence[3] and (ii) none of the employees' acts had had an effect on the FCA's investigation. However, the Court considered that acts that "*tend to*" impede an investigation can constitute obstruction,[4] regardless of whether or not these acts were deliberate.[5]

## Company liability for obstructive conduct on the part of employees and parent company liability

Akka also claimed that it should not be held responsible for acts committed by its employees. Moreover, it contended that the parent liability principle – applicable to antitrust infringements – should not apply in the present case. To support these claims, Akka argued that the infringements at issue have been committed by *employees* acting independently, whereas Article L.464-2 refers to *undertakings*. It further argued that obstruction cases, which are allegedly "*purely procedural*," should not necessarily abide by the same principles as antitrust infringement cases. The Court rejected these claims, holding that the rules holding a company liable for its employees' anticompetitive practices and parent company liability rules also apply to procedural obstruction cases. Thus, a company may be held liable for its employees' acts of obstruction even if the company's senior management was not aware of the acts or if the employee who committed the act did not hold a delegation authority.

## Takeaways

The Paris Court of Appeals confirmed the FCA's extensive interpretation of the notion of obstruction under Article L 464-2, V, 2° of the

[2] Article 23(1) of Regulation 1/2003 provides *inter alia* that the Commission may fine undertakings for refusing to submit to inspections and breaking seals, whether intentionally or negligently. *See* Council Regulation (EC) No 1/2003 of December 16, 2002 on the implementation of the competition rules laid down in Articles 81 and 82 of the Treaty.

[3] Akka claimed that the employee that broke the affixed seal was only looking for sweets. The Court questions the veracity of this claim.

[4] Judgment of the Paris Court of Appeals of May 27, 2020, para. 63.

[5] Judgment of the Paris Court of Appeals of May 27, 2020, para. 54.

French Commercial Code, consistent with the EU case law.[6] Indeed, it held that acts that can obstruct or delay proceedings can amount to obstruction, even if they were not performed intentionally. Unsurprisingly, it also confirmed that the principles on companies' liability for their employees' conduct and parental liability do apply to obstruction cases.

# The French Competition Authority ("FCA") accepts fix-it-first remedy and unprecedented behavioral commitments in a major overseas retail deal

On May 26, 2020, the FCA conditionally approved Bernard Hayot Group's €219 million acquisition of the Vindémia Group—one of the largest deals in French overseas territories ever reviewed by the FCA.[7] Further to an on-site investigation, the FCA cleared the transaction in Phase I, subject to a fix-it-first remedy and behavioral commitments.

Bernard Hayot Group (**BHG**) is a large, diversified group active, among other areas, in food and non-food distribution services. BHG sought to acquire sole control of the Vindémia group which belongs to the Casino group and is active in the food and non-food distribution sector in the French overseas territories of Réunion, Mayotte, Madagascar, and Mauritius. According to the FCA's press release,[8] the proposed acquisition was particularly significant in terms of turnover and number of stores involved (*i.e.*, over 80 hypermarkets, supermarkets, and other stores).

To assess the transaction, the FCA deployed significant investigative resources. In addition to market tests, an investigation team led by the head of the FCA Merger Unit carried out an on-site investigation in Réunion during the pre-notification phrase. The team interviewed the merging parties, a wide range of market participants (competing brands, suppliers, consumer associations), and public and institutional entities (such as the Observatory of Prices, Margins and Revenues ("**OPMR**"), the local administration, and members of local parliament).

Following its market investigation, the FCA found that the proposed transaction would trigger two main concerns. First, the FCA found that the transaction would leave consumers with no credible alternative to the combined entity in a dozen catchment areas in Réunion for the retail distribution of food products and books. Second, in the upstream market for the supply of supermarkets, the FCA found that the transaction was likely to increase the economic dependence of local suppliers on the parties. As a result, these local suppliers might have had to lower their margins and/or been unable to diversify their customer base.

To address the FCA's concerns in the retail distribution sector, BHG proposed a "fix-it-first" commitment, *i.e.*, the buyer for the divested assets and the transactional documents are approved in the decision clearing the main transaction. This type of remedy aims to give the competition authority the assurance that the divested business will be sold to a suitable purchaser. It is typically required when competition authorities find that only a small number of potential buyers exists.[9] In this case, BHG committed to sell five stores to Make Distribution and two stores to the Tak group.

[6] See, *e.g.,* ECJ judgment of November 22, 2012, *E.ON v Commission*, case C-89/11 P, in which the ECJ confirmed a Commission decision fining E.ON € 38 million for negligently breaking seals affixed during a dawn raid. Also see Commission decision of May 5, 2011, *Suez Environnement*, COMP/39.796, para. 70 (fine for negligently breaking seals) ; and Commission decision of March 28, 2012, *EPH and others*, case COMP/39.793 (fine for diversion of emails in the context of an inspection).

[7] Decision No. 20-DCC-72 of May 26, 2020.

[8] May 26, 2020, FCA press release on the clearance of GHB's acquisition of the Vindémia Group.

[9] According to the FCA's press release, the FCA has accepted fix-it-first remedies in four previous decisions since 2009. Decision No. 09-DCC-67 of November 23, 2009, *LDC Volailles/Arrivé*; Decision No. 15-DCC-53 of May 15, 2015, *UGI/Totalgaz*; and Decision No. 19-DCC-15 of January 29, 2019, *Dr.Oetker/Alsa*.

Moreover, to address the FCA's concerns regarding local suppliers, BHG offered a set of tailor-made behavioral commitments. It committed to (i) sourcing 25-35%[10] of its total purchases from local producers each year; (ii) establishing an internal mechanism to identify and assist suppliers in a state of economic dependence;[11] and (iii) allowing suppliers to conclude two-year contracts in place of annual contracts. According to the FCA's press release, it is the first time that the FCA has accepted such behavioral commitments to protect merging parties' suppliers.

# The French Competition Authority ("FCA") dismisses Molotov's complaint against TF1 and M6

On April 30, 2020, the FCA dismissed Molotov's complaint of alleged abuse of collective dominance, abuse of economic dependency and anticompetitive agreements against TF1 and M6.

## Background

Molotov is a television channel distribution platform that provides users with free, real-time television services, including TF1 and M6's TV programs. Molotov's revenues are generated from additional paid-for functionalities, such as recording or catch-up TV. Between 2017 and 2019, both M6 and TF1 imposed new financial conditions on Molotov. Molotov disagreed, finding that such financial conditions would make its "freemium" model impracticable, and no agreement was reached. M6 and TF1 terminated their distribution agreements with Molotov, in March 2018 and June 2019, respectively. Concurrently, TF1, M6 and France Télévisions agreed to create a joint video-on-demand platform, Salto, which aimed to distribute their respective television programs. The FCA cleared the creation of Salto in August 2019.[12]

## The FCA's decision

In July 2019, Molotov lodged a complaint with the FCA. Molotov alleged that M6 and TF1 had imposed unfavorable financial conditions and terminated their distribution agreements in order to exclude it from the market, because they intended to set up a competing joint platform. Molotov alleged that this conduct constituted both an abuse of collective dominance and an abuse of economic dependency and was thus contrary to Article 102 TFUE and Article L. 420-2 of the French Commercial Code.

The FCA dismissed Molotov's complaint on both grounds. First, it found that M6 and TF1 did not hold a dominant position collectively with France Télévisions. The FCA reaffirmed that, to prove a collective dominant position, one has to demonstrate that the allegedly dominant parties are – together –able to adopt a common policy on the market and act independently from their competitors, customers and consumers. Such a shared policy can result from structural links between the parties (*i.e.*, capitalistic or legal links, such as contracts) or from the market's structure (*i.e.*, if the market is oligopolistic and sufficiently transparent for the parties to be able to predict each other's behavior). In the case at hand, the FCA found that TF1, M6 and France Télévisions did not hold a collective dominant position because no sufficient structural links existed among them at the time of the alleged practices[13] (TF1 and M6 jointly hold a television channel, but this factor was deemed insufficient). In addition, the FCA found that the common policy criteria had not been fulfilled because France Télévisions had maintained its distribution agreement with Molotov and, as a publicly-owned entity, was in a distinct situation from the privately-owned TF1 and M6. Indeed, contrary to TF1 and M6,

[10] The FCA's press release does not provide the actual percentage.

[11] The FCA's press release does not provide further details on this internal mechanism.

[12] Decision 19-DCC-157 of August 12, 2019.

[13] The FCA did not take into account the creation of Salto as it was not cleared until after the alleged practices had ended.

France Télévisions is legally required to make its channels available to distributors. This finding of the FCA is consistent with its established case law setting high standards of proof to establish a situation of collective dominance. Its decisional practices shows that it has rarely found collective dominance.[14]

Second, the FCA dismissed the claim of abuse of economic dependency. It considered that a situation of economic dependency must be assessed individually for each contractual relationship. Therefore, Molotov could not allege that it was economically dependent from *both* TF1 and M6 (taken together).

Finally, the FCA rejected the claims relating to anticompetitive agreements for lack of evidence. Indeed, the FCA found that the clause contained in M6's general terms and conditions ("**T&C**"), criticized by Molotov, could not result from an anticompetitive collusion, because the T&C had been *unilaterally* imposed by M6 on Molotov.

### Conclusion

This decision is an important milestone in the judicial saga pitting the pure player Molotov against the leading TV channels before the French courts. In April 2018, Molotov successfully brought a claim before the Paris Commercial Court seeking to have M6's new financial conditions declared null and void. In April 2018 and July 2019, M6 and TF1 respectively filed a complaint before the Paris *Tribunal de Grande Instance* for counterfeiting and free riding practices. Both cases are still pending.

Molotov can appeal the FCA's decision until July 24.[15]

## COVID-19 Update: Time-limits for merger control and antitrust proceedings are gradually resuming

By Order No. 2020-560 of May 13, 2020, the Government decided not to further postpone the time limits that had been suspended or interrupted since March 12, 2020, despite the extension of the state of health emergency. Consistently, in a press release of May 18, 2020, the French Competition Authority ("**FCA**") announced that it would progressively re-instate the statutory time limits that had been interrupted or suspended in light of the state of health emergency. All of these time limits will resume on June 24, 2020 at the latest.[16]

**Antitrust proceedings.** Leniency proceedings and the two-month time limit for companies to respond to a statement of objections or a report of the General *Rapporteur*, which had been suspended since March 17, 2020, have resumed running as of May 12, 2020.[17]

**Merger control.** The merger control review statutory time limits, which had been suspended as of March 12, 2020, will resume running on June 24, 2020.[18] While the FCA had advised companies to defer merger notifications at the beginning of the pandemic,[19] it continued to receive notifications during this period and reviewed cases that had been notified prior to the state of health emergency. Between March 18 and May 18, the FCA cleared no less than 25 transactions, with an

[14] See for example Decision 12-D-06 for a group of undertakings belonging to a joint structure (an economic interest group) and jointly controlling a quarry; see also Decision 06-D-02 of February 20, 2006 for four undertakings operating jointly and holding the shares of the three manufactures of the area.

[15] Indeed, all appeal deadlines falling within the state of health emergency plus one month will restart from scratch on June 24, 2020 (cf. Ordinance No. 2020-560 of May 13, 2020 on the deadlines applicable to various procedures during the state of health emergency, Article 1er, I.). The FCA's decisions can be appealed within one month following the notification of the decision pursuant to Article L.464-8 of the French Commercial Code.

[16] FCA press release, "Gradual lifting of the state of health emergency in France: re-instating statutory time limits", May 18, 2020, available at: https://www.autoritedelaconcurrence.fr/en/press-release/gradual-lifting-state-health-emergency-france-re-instating-statutory-time-limits.

[17] *See* Order No. 2020-423 of April 14, 2020.

[18] *See* Order No. 2020-560 of May 13, 2020.

[19] See FCA press release "Adaptation of merger control procedures due to Coronavirus COVID-19", March 18, 2020: "*Companies are invited to postpone any plan for economic merger that is not urgent*."

average review period of 22 working days.[20] In its May 18, 2020 press release, the FCA indicated that it would continue to use its best efforts to issue decisions without waiting for the statutory time limits to expire.

**Commitments, injunctions and interim measures.** Time limits relating to commitments, injunctions, and interim measures, which had been suspended as of March 12, 2020,[21] will also resume running on June 24, 2020. In its May 18, 2020 press release, the FCA noted, however, that it may impose commitments, injunctions or interim measures before June 24, 2020, provided that such measures are "*justified in light of the interests for which* [the FCA] *is responsible*."[22] The FCA has already issued several decisions requiring implementation in tight time limits during the pandemic, including (i) interim measures imposed on Google in the matter of neighboring rights[23] and (ii) commitments undertook by La Poste[24] regarding its loyalty rebates practices. The FCA has also issued decisions prescribing time limits for implementing commitments in five merger cases.[25]

**Other acts, decisions, and appeals.** The time limits for other acts and decisions from the FCA, which have been interrupted since March 12, 2020, will start over—from scratch—on June 24, 2020.[26] Time limits to appeal FCA infringement decisions will also start over on June 24, 2020.[27] Consequently, all appeals against FCA infringement decisions for which the deadline would have expired between March 12 and June 23, 2020 (inclusive) will have to be filed with the Paris Court of Appeals by August 24, 2020 at the latest.

# French regulators announce that they will increasingly take into account climate issues in exercising their missions

In early May, eight administrative bodies in charge of regulating different sectors, including the French Competition Authority ("**FCA**") for competition, published a joint working paper highlighting the need to take into account the urgency of climate change in exercising their respective missions.

The paper notes that the regulators' mandates take into account climate objectives to varying degrees. The FCA's mandate entrusts it with the mission to protect competition and defend consumer interests, with no explicit reference to climate objectives. In practice, this may not always be consistent with climate objectives. The paper notes, for instance, that environment-friendly initiatives may violate competition law if they lead companies to set up an anticompetitive agreement (*e.g.*, rival companies agreeing to stop supplying a type of polluting product in a coordinated manner).

Conversely, the FCA explained that its decisional practice and its opinions can set up a competitive framework favoring environment-friendly practices For instance:

[20] For instance, the FCA cleared the acquisition of Sinoué by ORPEA and that of Bombardier assets by Spirit.Decision 20-DCC-63 of April 30, 2020, *Sinoué/Orpea*; Decision 20-DCC-62 of May 13, 2020, *Spirit Aerosystems Inc./Bombardier*.

[21] *See* Cleary Gottlieb, French Competition Newsletter, "The French Competition Authority suspends procedural time limits due to Covid-19", March 2020. On March 27, 2020, in application of Article 8 of Order No. 2020-306 of March 25, 2020, the FCA suspended the time limits for companies to implement commitments, injunctions, and interim measures.

[22] FCA press release, *op. cit*.

[23] Decision 20-MC-01 of April 9, 2020.

[24] Decision 20-D-06 of April 2, 2020.

[25] Decision 19-DCC-141 of July 24, 2019, *Reworld Media/Mondadori France*; Decision 19-DCC-147 of July 24, 2019, *Triskalia/D'Aucy*; Decision 19-DCC-221 of November 27, 2019, *Frans Bonhomme/DMTP*; Decision 19-DCC-244 of December 11, 2019, *William Demant/Audilab*; and Decision 20-DCC-28 of February 28, 2020, *Elsan/Hexagone Santé Méditerranée/SCI Bonnefon-Carnot*.

[26] *See* Order No. 2020-560 of May 13, 2020.

[27] *See* Order No. 2020-560 of May 13, 2020. Despite the extension of the state of public health emergency, Order No. 2020-560 of May 13, 2020 modified Article 1 of the Order of March 26, 2020 so that the interruption of time limits for appeal would not themselves be postponed.

— The FCA can sanction anti-competitive agreements that lead companies to limit competition on products' environmental performance. For example, in 2017, the FCA fined three leading manufacturers of PVC and linoleum floor covering for agreeing not to advertise the environmental performance of their respective products.[28]

— Merger control aims to maintain consumer welfare and, according to the FCA, this notion is broad enough to include environmental aspects. However, the working paper does not provide any details as to how the FCA may take into account environmental aspects in merger control decisions. In particular, it is unclear if the FCA would balance potential anticompetitive effects, *e.g.* on prices, with positive environmental efficiency gains triggered by a transaction.

The FCA's contribution to this working paper reaffirms one of its enforcement priorities. Indeed, the FCA has explicitly made sustainable development one of its priorities for action in 2020.[29] The FCA plans to give more thoughts to how it can take into account environmental issues when carrying out its mission. It also plans to promote discussion within its international network and at the EU level, including in the context of the upcoming review of key EU regulations (*i.e.*, the EU exemption regulations on vertical restraints, certain categories of research and development agreements, and certain categories of specialization agreements).[30]

[28] See FCA decision No. 17-D-20 of October 18, 2017 regarding practices implemented in the hardwearing floor coverings sector.

[29] See the FCA press release of January 9, 2020, "*The Autorité de la concurrence announces its priorities for 2020*".

[30] Commission Regulations (EU) No 330/2010 of April 20, 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices; Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements; and Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialization agreements.

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