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# French Competition Law Newsletter

## Highlights

— The French Competition Authority fines EDF 300 million euros for abuse of dominant position

— The French *Cour de cassation* expands the scope of the French legal privilege to certain in-house communications

— Selective distribution: Lack of mutual trust as a valid reason for refusing to reappoint a distributor

## The French Competition Authority fines EDF €300 million for abuse of dominant position

On February 22, 2022, the French Competition Authority ("**FCA**") fined EDF €300 million for abusively using customer data acquired through EDF's historical regulated activities to both maintain EDF's market position in the electricity supply sector and expand its position in the related gas supply and energy services markets from 2004 to 2021.[1] The decision was adopted under the settlement procedure. EDF committed to (i) providing competitors with access to information on customers relying on regulated tariffs and (ii) clearly distinguishing its commercial processes for the regulated and unregulated sides of its business.

**Background**

In France, the liberalization process initiated by Directive 96/92/EC led to the gradual replacement of regulated electricity tariffs (so-called "**TRVs**")—an EDF statutory monopoly—with market prices offered by EDF and rival suppliers. In 2016, EDF stopped offering regulated tariffs to certain companies (*i.e.*, those previously eligible to *TRV Vert* and *TRV Jaune* offers).[2] In contrast, private individuals are still eligible to regulated tariffs, but since 2007 they can also subscribe to market offers from EDF and alternative suppliers.

The FCA opened an investigation into EDF's practices in 2015 and conducted dawn raids at EDF's premises in 2016. A year later, Engie, the historical gas provider which entered the electricity market in February 2000, filed a formal complaint to the FCA. Subsequently, in May 2021, the FCA notified formal objections to EDF.

[1] Decision 22-D-06 of February 22, 2022 regarding practices implemented by EDF in the electricity sector.

[2] Those with very high consumption (who were previously eligible to the *TRV Vert* offer) and those with subscribed power ranging from 36 kVA to 250 kVA (who were previously eligible to the *TRV Jaune* offer).

## The abusive conduct

In its February 22, 2022 decision, the FCA found that, from 2004 to 2021, as TRV offers for professional customers were being gradually terminated, EDF enacted a strategy to use resources from its historic regulated activities to push its professional customers to EDF's market offers. Although EDF provided rivals with some information on its professional customers relying on regulated tariffs as of late 2014, it deliberately withheld information that could enhance rivals' commercial offering. The FCA considered that the use of such resources gave EDF a decisive advantage over competitors, which could not be replicated by equally efficient competitors at a reasonable cost and within a reasonable time.

EDF's abusive use of customer information was threefold.

First, EDF exploited the customer databases acquired through its regulated activities to tailor offers for non-regulated electricity. It instructed commercial teams to obtain precise and up-to-date information on its customers relying on regulated tariffs (*e.g.*, SIREN/SIRET number, NAF code, delivery address, relevant contact person) and to identify the needs of those customers with the view to offering them tailored non-regulated electricity contracts. EDF's commercial teams used that data notably to target customers which recently switched to alternative providers. EDF also used the data to identify customers' needs for *related* services, in particular gas and energy services, in order to propose them tailored offers for such services.

Second, EDF did not create separate teams or entities for the sale of regulated and non-regulated offers. Thus, the commercial teams could—and did—use the resources relating to the regulated business to promote EDF's non-regulated business.

Third, EDF took advantage of the flow of incoming calls from customers with regulated tariff contracts to promote additional—non-regulated—services. In particular, EDF ordered commercial teams to make offers for non-regulated electricity and related services during those incoming calls, including when the customer was calling only to renew or change its address for its regulated tariff electricity contract.

Finally, the FCA uncovered several internal documents showing that EDF was aware, at least since 2009, that its behavior could violate competition law—but that it was willing to risk being caught. The FCA considered that these documents showed EDF's anticompetitive intent, which the FCA accounted for when assessing the existence of a strategy to exclude competitors and the gravity of EDF's conduct in its fining calculation.

## The settlement procedure

In September 2021, four months after receiving the FCA's statement of objections, EDF requested the benefit of the settlement procedure (*procédure négociée*). Under this procedure, EDF undertook not to challenge the facts alleged by the FCA and to negotiate a fining range—kept confidential—with the FCA's *Rapporteur Général*. EDF also committed to (i) making information regarding customers relying on regulated tariffs available to alternative electricity providers and (ii) keeping subscription processes for regulated contracts clearly separate from those for non-regulated contracts. In its decision, only five months after EDF's request to enter settlement, the FCA imposed a fine of €300 million on EDF and its subsidiaries, and made the proposed commitments binding for a period of three years, renewable.

## Takeaways

This is not the FCA's first foray into abusive conduct by former statutory monopolies in liberalized markets. In 2013, the FCA fined EDF €13.5 million for having favoured its subsidiary EDF ENR in the then-emerging market for photovoltaic solar power.[3] In 2017, it fined Engie—in a similar fact pattern—€100 million for using its historical database to convert its customers using regulated gas tariffs to market-based offers for gas and

[3] Decision 13-D-20 of December 17, 2013 concerning the practices implemented by EDF in the photovoltaic solar power sector.

electricity.[4] And in February 2021, the FCA announced that it will continue investigating into EDF's pricing practices in the market for retail electricity supply to small non-private customers.[5]

This trend is mirrored in national and EU case law on the abusive nature of such conduct by a former state monopoly in liberalized markets.

In December 2021, Advocate General Rantos clarified that while former legal monopolies are allowed to put in place practices aimed at retaining customers, they "*must not resort to practices which, by exploiting the advantages conferred by the statutory monopoly, are capable of producing exclusionary effects on new competitors that are regarded as equally efficient*".[6]

# The French *Cour de cassation* expands the scope of the French legal privilege to certain in-house communications

On January 26, 2022, the Criminal Chamber of the French *Cour de cassation* (the French Supreme Court) has ruled for the first time that companies' internal documents summarizing or forwarding outside counsel's legal advice in connection with anticipated litigation are protected by the French legal privilege (*secret professionnel*). The French case law is therefore gradually moving closer to the EU one.

## Background

In May 2014, the French Competition Authority ("**FCA**") carried out dawn raids on the premises of a private company in relation to alleged vertical and horizontal anticompetitive practices. The dawn raids followed a preliminary round of unannounced inspections carried out on the premises of the company's competitors in 2013. During the 2014 raids, the FCA seized a number of files, including internal documents reflecting a defense strategy laid down by the company's outside counsel in connection with the FCA investigation.

The company successfully challenged the validity of the dawn raids. In a decision dated November 8, 2017, the First President of the Paris Court of Appeals annulled the seizure of (i) several internal documents "*referring to*" or "*restating*"[7] the strategy developed by the company's outside counsel in the context of the ongoing investigation and (ii) a number of internal documents used by said outside counsel for the purpose of assessing a possible leniency application. The First President considered that although the documents had not been sent by or to an outside counsel, they explicitly referred to a defense strategy prepared by an outside counsel and, therefore, their seizure infringed the company's rights of defense. The FCA appealed the Court of Appeals' ruling before the *Cour de cassation*.

## The *Cour de cassation*'s decision

The FCA argued before the *Cour de cassation* that, under the current state of the law, French courts must apply an organic criterion when determining whether a document is covered by legal privilege, *i.e.*, whether the document was sent by or to an outside counsel.

The *Cour de cassation* rejected the FCA's argument. It held that the Court of Appeals rightly considered that the seized documents' "*main object*" was confidential information covered by the legal

[4] Decision 17-D-06 of March 21, 2017 regarding practices implemented in the sector of gas, electricity and energy services.

[5] Decision 21-D-03 of February, 18, 2021 regarding a request for interim measures submitted by Plüm Energie in the electricity supply sector in France.

[6] Press release of the Court of Justice of the European Union on Advocate General Rantos' Opinion in Case C-377/20 *Servizio Elettrico Nazionale and Others*, December 9, 2021.

[7] The *Cour de cassation* used the term "*reprend*" in French.

privilege, even though these particular documents had not been sent to or by an outside counsel.

The decision therefore acknowledges that the FCA and French courts should use an *in concreto* approach when assessing whether a document is covered by the legal privilege (*i.e.*, focusing on the content of the document and, in particular, checking whether the document refers to or repeats legal advice from an outside counsel), as opposed to an *in personam* approach, which focuses on the author of the document. As a consequence, in-house lawyers' comments or summaries of a defense strategy laid down by an outside counsel in internal documents/emails fall under the French legal privilege protection.

### Takeaway

With this ruling, the French case law is gradually aligning with the well-established EU case law on EU legal privilege should apply. Indeed, EU case law has been stating for a long time that legal privilege extends not only to companies' internal documents confined to reflecting lawyers' advice,[8] but also to internal documents drawn up exclusively for the purpose of seeking legal advice from an outside counsel.[9]

## Selective distribution: Lack of mutual trust as a valid reason for refusing to reappoint a distributor

On February 16, 2022, the *Cour de cassation* confirmed that lack of mutual trust is a valid reason for a supplier to refuse to reappoint a former member of its selective distribution network, upholding an important decision of the Paris Court of Appeals in the automotive industry.[10]

### Background

Under EU and French law, a supplier can put in place a selective distribution network if three criteria are met. First, a selective network is required to preserve the quality and ensure the proper use of the products being distributed. Second, the supplier must define selection criteria for distributors that are objective and qualitative in nature, and that they are applied in a non-discriminatory manner. Third, the selection criteria must not go beyond that which is necessary for the distribution of the product.[11]

In the case at hand, in 2003, Mercedes-Benz terminated a selective distribution agreement it had entered into with a French car repairer, Garage de Bretagne in 1970. Mercedes-Benz thereafter refused to let Garage de Bretagne rejoin its network. Garage de Bretagne complained before French courts but lost.

In 2014, Mercedes-Benz decided to terminate a separate car repair selective distribution agreement it had concluded with Garage de Bretagne in 2002, effective as of 2016. In 2017, Garage de Bretagne applied to rejoin this network. Mercedes-Benz refused, pointing to the lack of trust between the parties, resulting from the 2003 legal dispute relating to the first distribution agreement between the parties.

Garage de Bretagne challenged Mercedes-Benz' refusal before the Paris Commercial Court, arguing that it met the selection criteria of the carmaker. The Commercial Court and,

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[8] According to the landmark *Hilti* case, legal privilege applies to "*internal notes which are confined to reporting the text or the content of communications received from independent lawyers*" (CFI, Case T-30/89, April 4, 1990, *Hilti*).

[9] CFI, joined cases T-125/03 and T-253/03, September 17, 2007, *Akzo Nobel Chemicals Ltd, Akcros Chemicals Ltd v. Commission*. In previous 1982 *AM&S* ruling, the European Court had already found that EU legal privilege also applies to "*written communications that emanate from an outside counsel for the purposes and in the interests of the client's right of defence*" (ECJ, Case 155/79, May 18, 1982, *AM&S Europe Limited v. Commission*).

[10] *Cour de cassation*, Commercial division, February 16, 2022, No.20-11.754.

[11] *See* in particular ECJ Case 26/76 *Metro I*, October 25, 1977; ECJ Case C-439/09 *Pierre Fabre Dermo-Cosmetics*, October 13, 2011; and ECJ Case C-230/16 *Coty Germany*, December 6, 2017.

subsequently, the Paris Court of Appeals rejected those claims.[12] Both courts found that the lack of mutual trust resulting from the 2003 legal dispute between Garage de Bretagne and Mercedes-Benz was sufficient to justify the carmaker's termination of the contract and refusal to examine the car dealer's renewed membership application.

## The *Cour de cassation* ruling

Garage de Bretagne appealed. It argued that (i) Mercedes-Benz abused its right not to contract under French tort law by refusing to consider Garage de Bretagne's renewed membership application and (ii) under competition law, the head of a selective distribution network cannot refuse candidates who meet the network's selection criteria. The *Cour de cassation* dismissed both claims.

First, the *Cour de cassation* confirmed that Mercedes-Benz had not abused the right not to contract with the car dealer. Mercedes-Benz had acted in good faith, without intention to harm the car dealer and, importantly, Mercedes-Benz could validly refuse to consider the car dealer's application in light of the previous dispute between the parties and the lack of trust that ensued.

Second, the *Cour de cassation* found that EU and French competition law do not prohibit a supplier from refusing to appoint a dealer that meets the selective distribution network's criteria. It is only when (i) the supplier enforces the criteria in a discriminatory manner with the object or effect to distort competition or (ii) the supplier's refusal to enter into an agreement has such object or effect that the conduct is deemed anticompetitive under Article 101 TFEU.

## Takeaway

The *Cour de cassation*'s judgment clarifies that suppliers can terminate a distribution contract with a distributor and subsequently refuse to consider the distributor's application to rejoin the network if such termination and refusal are nondiscriminatory in nature, but based on an objective reason. The lack of mutual trust induced by a previous legal dispute qualifies as such an objective reason.

[12] French Commercial Court, ruling of February 21, 2018 and Paris Court of Appeals, ruling of November 27, 2019, No.18/06901.

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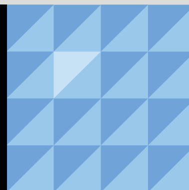


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