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# French Competition Law Newsletter

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- The French *Cour de cassation* confirms that a company may be considered to participate in a cartel as long as the other colluding firms believe in its involvement
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## The French Competition Authority reports on its 2020 activity and announces its enforcement priorities for 2021

On December 23, 2020, the French Competition Authority ("**FCA**") presented a summary report of its 2020 activity and set out its priorities for 2021.[1]

### 2020 Activity

In 2020, the FCA issued around 200 merger control decisions, 23 anticompetitive practice decisions and 12 opinions, despite lockdown and other sanitary restriction measures in place.[2] This is only slightly less than in 2019, during which the FCA issued around 270 merger control decisions, 27 anticompetitive practice decisions and 16 opinions.

[1] FCA press release of December 23, 2020, available at: https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/apres-une-activite-tres-soutenue-en-2020-lautorite-de-la-concurrence-annonce.

[2] For more details regarding FCA extensions of time-limits during the state of public health emergency, see the March 2020 edition of our French Competition Law Newsletter, available at: https://www.clearygottlieb.com/-/media/files/french-competition reports/frenchcompetitionnewslettermarch2020pd-pdf.pdf.

The sanctions imposed amounted to nearly €1.8 billion, which is more than the double of 2019 sanctions (*i.e.* €632 million).

## 2020 key decisions

The summary report emphasized several important decisions, in particular:

— Regarding anticompetitive practices, the FCA issued the *Apple* and *Google* decisions. In March, it imposed a record fine (€1.1bn) on Apple for *inter alia* restricting its wholesalers' freedom to set their own prices and abusing its resellers' economic dependency through restricted supply, discriminatory treatment and unstable remuneration practices.[3] In April, further to press publishers' request for interim measures, the FCA ordered Google to negotiate in good faith with news publishers that request remuneration for the use of their protected content;[4]

— Regarding merger control, the FCA has for the first time used its power to initiate *ex officio* proceedings in view of assessing the need for interim measures, in a case of joint purchasing agreement.[5] Further to its investigation, the FCA accepted the commitments proposed by the four retailers involved: Casino, Auchan, Metro and Schiever. The retailers committed to reduce the scope of their joint purchasing agreement to their own-branded products in order to alleviate the risks for upstream and downstream competition.[6]

## The COVID-19 crisis

The FCA set up a team dedicated to guiding companies in their efforts to avoid engaging in anticompetitive behaviour during the COVID-19 crisis. This dedicated team advised a trade association on how to deal with the terms of its members' commercial rent during the health crisis.[7] It also provided guidance to Fisher & Paykel Healthcare, a designer and manufacturer of products used in respiratory care, on how to remedy exclusivity practices which risked impeding hospitals' access to respirators in overseas territories. As a consequence, Fisher & Paykel Healthcare revised its distribution rules in order to avoid any risk of supply disruption in these territories.[8]

## Focus on the digital sector and sustainable development in 2021

The summary report sets two main enforcement priorities for 2021: the digital sector and sustainable development.

— Regarding the digital sector, the FCA created a specialized "Digital Economy Unit" in 2020 to provide dedicated support for cases related to the digital sector.[9] The new unit has been fully operational since January 2020. In 2021, this unit is expected to publish its study on *fintechs* and the emergence of digital giants in payment services. The unit will also be responsible for developing new digital investigation tools, based in particular on algorithmic technology, big data and artificial intelligence. It will further contribute to the analysis of mergers in the

[3] FCA Decision No. 20-D-04 of March 16, 2020, regarding practices implemented in the Apple products distribution sector. Apple and its wholesalers' appeals of this decision are now pending. For more details, see the March 2020 edition of our French Competition Law Newsletter, available at: https://www.clearygottlieb.com/-/media/files/french-competition reports/frenchcompetitionnewslettermarch2020pd-pdf.pdf.

[4] FCA Decision No. 20-MC-01 of April 9, 2020, on requests for interim measures by the Syndicat des éditeurs de la presse magazine, the Alliance de la presse d'information générale and others and Agence France-Presse. For more details on this decision, see the April 2020 edition of our French Competition Law Newsletter, available at: https://www.clearygottlieb.com/-/media/files/french-competition-reports/french-competition-newsletter-april-2020.pdf. The FCA decision was upheld on appeal. See Decision of the Paris Court of Appeal of October 8, 2020, No. RG 20/08071.

[5] For more details on this, see the November 2020 edition of our French Competition Law Newsletter, available at: https://www.clearygottlieb.com/-/media/files/french-competition-reports/french-competition-newsletter november-2020.pdf.

[6] FCA Decision No. 20-D-13 of October 22, 2020, regarding practices implemented in the major food retailer sector by the Auchan, Casino, Metro and Schiever groups.

[7] See FCA press release of April 22, 2020 available at: https://www.autoritedelaconcurrence.fr/en/press-release/autorite-clarifies-options-professional-association-dealing-its-members-rent-during.

[8] See the press release on the closing of the FCA investigation regarding exclusive imports of respiratory assistance in French Guyana and the French West Indies, available at: https://www.autoritedelaconcurrence.fr/en/press-release/respiratory-assistance-equipment-french-guiana-and-french-west-indies-investigation.

[9] See, in particular, the press release on the creation of the digital economy unit, available at: https://www.autoritedelaconcurrence.fr/en/press-release/autorite-creates-digital-economy-unit. For more details, see also the January 2020 edition of our French Competition Law Newsletter available at: https://www.clearygottlieb.com/-/media/files/french-competition-reports/french-competition-newsletter-january-2020-pdf.pdf.

digital sector and antitrust procedures, including infringements committed by digital means (*e.g.*, collusion through the use of algorithms). The FCA will also actively participate in discussions on the EU digital platform regulation within the European Competition Network to develop standardised methods of analysis and intervention.[10]

— Regarding sustainable development, the FCA will focus on the most harmful anticompetitive practices in this area and provide support to companies looking for guidance on antitrust issues that may arise from environmentally friendly behaviours, for instance when carrying out concerted environmentally friendly actions. The FCA will also participate in discussions within the framework of the Green Deal at the European level.[11]

### The FCA's 2021 merger policy

The FCA announced that it will keep a close eye on transactions that fail to meet the national merger control thresholds due to exceptionally low turnovers in 2020, in the context of the pandemic, but it is not clear how this will be achieved (*e.g.*, if, and under which circumstances, the FCA may take into account the Parties' 2019 turnovers for jurisdictional purposes).

Starting from 2021, the FCA, and other national competition authorities (NCAs), will more pro-actively refer transactions that do not meet the national merger control thresholds but threaten to significantly affect competition within their territory to the European Commission. While NCAs could already refer such cases under Article 22(1) of the 2004 European Merger Regulation, the Commission has encouraged NCAs to do so more regularly with the aim of better controlling so-called "killer acquisitions" (*i.e.*, acquisitions whereby a large incumbent company acquires a smaller target before it becomes a significant competitor, preventing competition before it starts).[12] The FCA plans on actively implementing this new approach, and DG Comp is expected to release guidelines in mid-2021.

## The French Competition Authority accepts Lego's revised discount commitments

On January 27, 2020, the French Competition Authority ("**FCA**") accepted Lego's commitments, thereby closing a five-year long investigation into the discount policy applied to distributors by the building games manufacturer.[13] Lego committed to redefine the criteria of its discount scheme to allow online distributors to obtain the same level of discount as brick-and-mortar distributors.

### Price differentiation concerns

In 2013, Lego decided to increase the price of all its products by 15% and, simultaneously, to implement a "functional discount" policy under which distributors could obtain a discount of up to 13.044%. This discount scheme was based on a point system including three criteria.

— The first criterion, which allowed distributors to obtain up to ten points, was based on the shelf space allocated to Lego products in the distributor's store.

— The second criterion, awarding up to five points, related to the distributor's stock of Lego products, in particular the range of products which could

[10] For more details on The Digital Services Act package adopted by the European institutions, see : https://ec.europa.eu/digital-single-market/en/digital-services-act-package. See also the June 2020 edition of our European Competition Law Newsletter available at: https://www.clearygottlieb.com/-/media/files/eu-competition-newsletters/european-competition-newsletter-june-2020.pdf.

[11] For more details on the European Green Deal, see: https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.

[12] See the press release regarding "The future of EU merger control" during the International Bar Association's 24th Annual Competition Conference of September 11, 2020, available at: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en.

[13] See FCA Decision No. 21-D-02 of January 27, 2020, regarding practices implemented in the building games sector, available at: https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2021-01/21d02complete.pdf.

be bought directly in-store (with no need to order the product).

— The third criterion awarded up to five points for Lego's brand representation, which was appreciated notably on the basis of the availability of a printed catalogue.

In 2015, Cdiscount and EMC Distribution, which both belong to the Casino group, complained to the FCA that Lego's discount policy discriminated against online sellers, particularly pure players. They alleged that under Lego's new discount policy, Casino would receive a different discount depending on whether a product was sold through Cdiscount's e-commerce website or Casino's brick-and-mortar stores. The FCA opened an investigation.

Concurrently, the German Federal Cartel Office led an investigation on Lego's discount policy.[14] In 2017, as part of this investigation, Lego took the initiative to revise its discount policy to make it easier for online distributors to obtain a discount. The revised policy (i) allowed distributors to qualify for the first criterion if they could prove that a certain number of children from 2 to 11 years old had spent at least two hours on a non-commercial/entertainment site dedicated to Lego products over the last year; (ii) included delivery delays under the second criterion, so that online distributors could get points under this criteria; and (iii) included internet-specific examples, such as an online catalogue, to qualify under the third criterion. Lego introduced a fourth criterion regarding brand representation, which included two sub-criteria referring to a premium sales experience in stores. It also introduced a fifth criterion allowing distributors to obtain points if they offered a "*homogeneous omni-channel experience across all contact points*" (free translation).

In June 2020, as part of its preliminary assessment, the FCA considered that the award criteria for the discount policy —in both the initial and revised versions—resulted in a differential treatment between online pure players and other distributors, to the detriment of the former. The FCA found that the revised discount scheme made it still more difficult for online distributors to obtain a discount. In particular, it found that the first two criteria were unlikely to be fulfilled by any online distributor (because an online distributor does not shelf space in a shop nor a printed catalogue). It also noted that, because of the way the fourth criterion was subdivided, only brick-and-mortar stores could be eligible to obtain all the points attributed under the fourth criterion, and that the fifth criterion excluded pure players.

The FCA observed a difference ranging between 7% and 9%, depending on the period, in the discounts granted to pure players compared to other distributors. It also observed a lack of communication and transparency with regard to the applicable discount rates and the discount award timing. Accordingly, the FCA considered that the practices implemented by Lego were likely to result in an anticompetitive agreement, without specifying with which parties/distributors.

## Lego's commitments

In July 2020, Lego submitted a first commitment proposal to the FCA offering to (i) amend two of the five criteria and (ii) make the discount policy and related communications with distributors more transparent. Further to the FCA's market test and an oral hearing held in December 2020, Lego submitted a revised proposal in January 2021. It offered—for a period of five years, instead of the two years initially proposed—to:

— redefine the discount criteria with a view to ensuring that online distributors would be able to fulfil them, including existing players seeking to expand their online activity (for example, Lego reduced the time to be spent by children to qualify for the first criterion; regarding the second criterion, it allowed for same-day delivery to a pick-up location, a locker or a click & collect point, in addition to a same-day delivery to the customer's address);

[14] See Bundeskartellamt press release of July 18, 2016, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/18_07_2016_Lego.html;jsessionid=089D4465AEEC791EB9DF257B11A0DFB9.1_cid381?nn=3591568.

— increase the transparency of the discount scheme by informing distributors of the new discount policy and improving the internal management of the discount policy (with, for example, Q&As and a firm-wide scoring directory for all distributors).

Lego also committed to submitting an annual report to the FCA on the implementation of the commitments. The FCA considered that the substantially modified commitments addressed its competition concerns and closed the investigation.[15]

### Take-aways

This decision confirms the FCA's keen interest in restraints of online sales, making it clear that companies must take particular care not to penalize online distributors—be it through their discount policies or distribution agreements. In this case, the FCA analysed the practice under Article 101(1) TFEU, but price discrimination may also constitute an infringement of Article 102(c) TFEU if the undertaking in question holds a dominant position on the relevant market.

## The French Competition Authority publishes a study on professional associations

In connection with the forthcoming transposition of Directive No. 2019/1 (the "**ECN+ Directive**"), which exposes professional associations to higher fines for anti-competitive practices, the French Competition Authority ("**FCA**") has published a study on how competition law applies to professional associations and made a number of practical recommendations.[16]

### Competition law infringement by professional associations

Professional associations are organizations founded and funded by businesses that operate in a specific industry. The purpose of a professional association is to defend the interests of a profession or sector. In its study, the FCA recalls that the functioning of professional associations may facilitate anti-competitive behaviors and lead to competition law infringements, such as participation in a cartel (price fixing agreements, market sharing agreements, customer allocation, reciprocal limitations on outputs), sharing of commercially sensitive strategic information, sharing of price instructions, calls for boycott, discriminatory conditions to enter the professional association, adoption of restrictive technical standards, and denigration of competitors.[17]

### The FCA's recommendations

The FCA's study provides practical recommendations for professional associations to mitigate the risk of competition law infringement. These recommendations take the form of "DO's & DON'Ts" practical sheets that cover professional requirements, pricing, exchange of information, membership conditions, standardization/certification, and legal advice/relationship with public authorities.[18]

### Maximum fines for professional associations will increase significantly

The FCA's study was published in relation to the upcoming transposition of the ECN+ Directive, which significantly increases the maximum fine that the FCA may impose on professional

[15] See FCA press release of January 29, 2021, available at: https://www.autoritedelaconcurrence.fr/en/press-release/lego-makes-commitments-autorite-de-la-concurrence-amend-its-price-discount-system#:~:text=Following%20an%20open%20procedure%20before,products%20in%2Dstore%20or%20online.

[16] See French Competition Authority, Study on Professional Associations, January 2021, available (in French) at https://www.autoritedelaconcurrence.fr/sites/default/files/EtudeThematique-OrganismesProfessionnels_final.pdf.

[17] See, for instance: French Competition Authority, Decision 08-D-32 of December 16, 2008 on practices implemented in the steel products trading sector; Decision 15-D-19 of December 15, 2015 relating to practices implemented in the standard and express delivery industry; and Decision 19-D-12 of June 24, 2019 on practices implemented by notaries in the real estate negotiation sector.

[18] See French Competition Authority's website : media.autoritedelaconcurrence.fr/organismes-professionnels/#page=1.

associations. Under French law, professional associations are currently exposed to a maximum lump-sum fine of €3 million, regardless of their size. The ECN+ Directive raises the maximum fine to 10% of the combined worldwide turnover of each of the professional association's members.

The ECN+ Directive also changes the rules regarding the recovery of fines imposed on professional associations. In cases of insolvency, the FCA will be entitled to order the professional association to call for its members' financial contributions and – if no payment is made – require any member whose representatives were part of the decision-making bodies of the professional association to pay the fine. The FCA may also require any member of the professional association that was active in the market in which the infringement took place to pay the fine.[19]

The transposition of the ECN+ Directive into French law is expected to take place by June 2021.

## The French *Cour de cassation* holds that legal privilege applies to all attorney-client communications relating to the exercise of the rights of defence—even those unrelated to the antitrust case in relation to which the dawn raids are carried out

On January 20, 2021, the Criminal Chamber of the *Cour de cassation* ruled that none of the attorney-client communications relating to the exercise of the client's rights of defence could be seized during dawn raids, even those that were not related to the antitrust case in relation to which the dawn raids were carried out.

In November 2016, the French Competition Authority ("**FCA**") carried out dawn raids on the premises of three companies of the EDF group operating in the energy sector – Électricité de France (EDF), Dalkia France and EDF Optimal Solutions[20] – in relation to an alleged abuse of dominant position practice.

The FCA placed provisional closed seals on the documents, as is typically done to avoid complex and time-consuming on-site inventory. During the re-opening and purge of the seals, EDF argued that 125 documents could not be seized due to legal privilege. The liberty and custody judge (*juge de la liberté et de la retention*) of the Nanterre Tribunal thus ordered that those documents be kept under provisional seals and transmitted to the First President of the Versailles Court of Appeal, who would rule on whether the documents could be seized. In the meantime, EDF challenged the conduct of the dawn raids before the First President of the Versailles Court of Appeal.

In January 10, 2019, the First President of the Versailles Court of Appeal rejected the applications for annulment of the dawn raids and restitution of the documents seized. It held that only the attorney-client communications relating to the exercise of the rights of defence in connection with the antitrust case in relation to which the dawn raids had been carried out could not be seized. EDF appealed.

In January 20, 2021, the Criminal Chamber of the *Cour de cassation* overturned the order, ruling that none of the privileged correspondence relating to the exercise of the rights of defence could be seized—even those unrelated to the antitrust case at stake. However, the *Cour de cassation* held, in this case, that the First President of the Versailles

[19] If the FCA does so, the relevant undertaking will not be able escape the fine unless it demonstrates that (i) it did not take part in the competition law infringement, (ii) it was unaware of the anti-competitive practice, and/or (iii) that it actively distanced itself from such practice before the investigation was opened.

[20] EDF Optimal Solutions has since changed its name to Dalkia France holding.

Court of Appeal had rightfully considered that the 125 disputed documents could be seized, because EDF had failed to designate which of the 125 documents it considered to qualify as privileged correspondence relating to the exercise of the rights of defence before the First President of the Versailles Court of Appeal.

In addition, the *Cour de cassation* ruled that the liberty and custody judge can lawfully authorize police officers not to be physically present during the opening of the provisional seals and disposal of the protected documents, provided that the officers can be contacted and make themselves available at any time. In the *Cour de cassation*'s view, the temporary absence of the police officers during the re-opening of the seals in the EDF case did not harm EDF's interests because EDF could still seek, through the officer, a review of the process by the liberty and custody judge.

This judgment complements established case-law of the *Cour de cassation* concerning dawn-raids. It follows and confirms a November 25, 2020 judgment[21] in which the *Cour de cassation* ruled that privileged correspondence cannot be seized if it relates to "*the exercise of the rights of defence*." With this new judgment, the *Cour de cassation* clarifies that "*the exercice of the rights of defence everywhere*" does not have to be related to the antitrust matter concerned by the dawn raids. It remains to be seen how the judges will appreciate in practice whether an attorney-client communication relates to "*the exercice of the rights of defence everywhere*".

# The French Competition Authority unconditionally clears Engie's acquisition of a stake in hydrogen producer and distributor DMSE, factoring in growing "green" demand

On January 29, 2021, the French Competition Authority ("**FCA**") unconditionally cleared Engie's acquisition, through its subsidiary Storengy, of a controlling stake in Dijon Métropole Smart EnergHy ("**DMSE**"), a joint venture between Dijon Métropole and the Rougeot group specialized in the production and distribution of hydrogen.[22] The FCA cleared the concentration even though the combined entity will become the first and sole operator producing and distributing hydrogen in the Dijon area.

Storengy's and DMSE's activities overlap in the hydrogen and electricity sectors in France.

— With respect to hydrogen, the FCA found that the sector comprises three activities: the production, retail distribution, and conception and construction of hydrogen production facilities. The FCA examined a potential segmentation according to carbon footprint. Hydrogen can be produced through (i) steam methane reforming, which produces large amounts of carbon dioxide ("non-green" hydrogen), and (ii) water electrolysis, which does not release carbon dioxide ("green" hydrogen). The FCA found that the production volume of green hydrogen was currently minimal and therefore did not distinguish green from non-green hydrogen.

— With respect to electricity, the FCA focused on the market for the retail distribution of electricity. The FCA found a growing demand for green energy and limited substitutability between "green" electricity and "non-green" electricity. While it left open the exact market

[21] See Criminal Chamber of the *Cour de cassation*, 25 November 2020, No. 19-84.304. See French Competition Law Newsletter of December 2020.

[22] The FCA's press release is available here, https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/lautorite-autorise-lentree-de-storengy-filiale-dengie-au-capital-de-dmse.

definition, the FCA nevertheless conducted its competitive analysis on both (i) a narrow green electricity segment and (ii) a broader market encompassing green and non-green electricity.

With regard to the geographic scope of the hydrogen distribution market, the FCA found that, unlike gas, which is distributed through a dense, grid-like network, hydrogen is mainly distributed in stations along large highways, as well as at bus and truck depots, thus suggesting a broader geographic scope for hydrogen distribution.

Substantively, in line with well-established decisional practice at the national and European level, the FCA indicated that high market shares are not necessarily reflective of market power in emerging and fast-growing markets such as the hydrogen markets. Accordingly, the FCA focused on verifying that actual and potential competitors can enter and expand in the market, and concluded that competitors can expand locally given the absence of entry barriers.

*Storengy/DMSE* is the first case in which the FCA examined the hydrogen production and distribution markets. It shows that the FCA is attentive to the emergence of markets for "green" products and that, despite high market shares, a merger may be cleared on growing markets where the incumbent's market share is contestable due to low barriers to entry.

# The French *Cour de cassation* confirms that a company may be considered to participate in a cartel as long as the other colluding firms believe in its involvement

On February 10, 2021, the French *Cour de cassation* (the "**Cour de cassation**")[23] appeared to put an end to the "Packaged Flour" legal saga, as it dismissed yet another appeal seeking to reform the French Competition Authority's 2012 prohibition decision.[24] The judgment constitutes a strong incentive for companies to expressly and publicly distance themselves from cartels, as it confirms that a company's inertia after attending a single meeting may be taken into account to determine the duration of its participation in the infringement even if that company refrains from participating in subsequent anticompetitive meetings.

## Background

On March 13, 2012, following a four-year investigation, the FCA fined 17 millers for participating in two anticompetitive agreements, one of which was a Franco-German cartel which lasted from 2002 to 2008 (the "**Infringement Period**"). On appeal, the Paris Court of Appeals held that the FCA had incorrectly assessed the duration of two millers' participation in the cartel, namely GoodMills Deutschland GmbH ("**GoodMills**", formerly VK-Mühlen) and *Grands Moulins de Paris*. Specifically, the Court noted that both GoodMills and *Grand Moulins de Paris* had only attended the sixth meeting out of the twelve meetings that took place during the Infringement Period, and that the other cartel members stopped inviting them to subsequent meetings after a certain point, thereby showing their understanding that GoodMills and *Grand Moulins de Paris* had ceased to participate in the infringement before the end of the Infringement Period. As a result, the Court ruled that participation in the cartel had only lasted 10 months for GoodMills and five weeks for *Grands*

[23] French *Cour de cassation*, Commercial Chamber February 10, 2021, Judgment n°204 FS-D.

[24] FCA Decision no. 12-D-09 of March 13, 2012, regarding practices implemented in the packaged flour sector.

*Moulins de Paris*, and accordingly reduced the fines imposed by the FCA.[25]

### The *Cour de cassation*'s ruling

Despite obtaining a significant fine reduction on appeal, GoodMills took the view that the duration of its participation was even shorter than what the Paris Court of Appeals had decided. Indeed, the Court held that GoodMills had participated in the infringement until the eleventh meeting, *i.e.*, the first meeting for which it did not receive any invitation, even though GoodMills had previously not been invited to the eighth and ninth meetings. GoodMills thus appealed the Paris Court of Appeals' decision on two grounds.

**First**, GoodMills claimed that the absence of public distancing could not by itself, in the context of a cartel continuing over time through successive collusive meetings, constitute a sufficient proof of its ongoing participation in the infringement, given that (i) GoodMills only attended a single meeting, (ii) it was not up to GoodMills to decide whether or not invitations to anticompetitive meetings should be sent, and (iii) the Court of Appeals had not referred to additional factual evidence showing that GoodMills was otherwise implementing the anticompetitive agreement.

**Second**, GoodMills considered that the Paris Court of Appeals had failed to take into account the irregular frequency in the invitations. According to GoodMills, even assuming that the reception of invitations to anticompetitive meetings combined with an absence of explicit distancing may be sufficient to characterize a company's participation in an infringement, such participation cannot be considered as uninterrupted unless it can be based on facts sufficiently close in time.

The *Cour de cassation* dismissed both pleas. The Court ruled that the Court of Appeals' reasoning did not merely rely on GoodMills' absence of public distancing and was sufficiently justified by factual elements showing the company's continuous participation in the infringement. In other words, while the lack of explicit distancing may not amount to participation in itself, the failure of other cartelists to understand that the company has implicitly distanced itself from the infringement may suffice to characterize an infringement.

### Implications

The *Cour de cassation*'s ruling makes it clear that once companies start participating in collusive practices, explicit and public distancing is highly recommended. Failing this, companies run the risk of being fined as though they still were fully implementing the anticompetitive agreement even if they stop attending anti-competitive meetings.

## The French *Cour de cassation* confirms the validity of FCA dawn raids authorized on the basis of another competition authority's request for investigative measures

In a ruling dated February 17, 2021, the *Cour de cassation* dismissed an appeal formed against an order dated June 2019, in which the Paris Court of Appeals confirmed that the FCA could validly initiate an investigation and carry out dawn raids on the basis of a request for inspection issued by the competition authority of another EU Member State.

### Background

In November 2017, following a complaint filed by an online pharmacy, the Belgian Competition Authority (the "**BCA**") opened an investigation concerning alleged anticompetitive agreements between Caudalie, a French cosmetics company,

[25] From €17.1 million to €5.7 million for GoodMills and from €11.8 million to €334,537 for *Grands Moulins de Paris*.

and the members of its selective distribution network. Specifically, the BCA suspected that Caudalie was engaging in resale price maintenance practices and preventing its authorized resellers (in particular those resorting to online sales) from granting discounts of more than 10% off the recommended retail price.

In January 2018, the BCA asked the FCA to carry out dawn raids at Caudalie's Parisian headquarters pursuant to article 22 of Regulation 1/2003,[26] which provides that the competition authority of a Member State may carry out fact-finding measures in its own territory on behalf of another Member State's competition authority in order to establish the existence of competition law infringements. However, the FCA did not merely carry out dawn raids as requested by the BCA, but instead opened an investigation of its own into potential violations by Caudalie of both European and French antitrust laws. In this context, the FCA was granted a search warrant by the liberty and custody judge of the Paris Court of First Instance, and proceeded to carry out dawn raids on Caudalie's French premises on February 27, 2018.

Caudalie subsequently challenged the validity of the search warrant before the Paris Court of Appeals, arguing that the liberty and custody judge had breached Regulation 1/2003 by allowing the FCA to investigate beyond the scope of the BCA's request. That claim was however dismissed, leading to the *Cour de cassation*'s ruling of February 17, 2021.

## The *Cour de cassation*'s decision

**In its first plea**, Caudalie submitted that the search warrant issued by the Paris Court of First Instance was invalid insofar as it allowed the FCA to collect evidence of alleged resale price maintenance practices implemented within the cosmetics company's distribution network, without limiting the scope of the investigative measures to practices concerning Belgian distributors. According to Caudalie, given that the FCA was acting pursuant to the BCA's request, which was expressly circumscribed to practices affecting Belgium only, the FCA was not entitled to open an investigation on its own account.

In its June 2019 order, the Paris Court of Appeals had ruled that the evidence shared by the BCA suggested that the practices under investigation concerned Caudalie's entire distribution network and consequently spanned across a number of Member States. Indeed, the restrictions imposed on online retailers were liable to have repercussions on inter-state trade, as e-commerce facilitates cross-border transactions. Limiting the scope of investigation to a single Member State would therefore be inappropriate in this context.

The *Cour de cassation* approved the Paris Court of Appeals' reasoning. Further, the *Cour de cassation* clarified that even when the FCA is acting pursuant to a request issued by the competition authority of another Member State, the FCA is allowed to use its own powers of inspection under article L.450-1 of the French Commercial Code. In other words, the FCA is not bound by the scope of requests it receives under Article 22 of Regulation 1/2003, provided that there is sufficient evidence that the practices under investigation may have affected French markets.

**In its second plea**, Caudalie claimed that, in light of the evidence shared by the BCA with the FCA, the scope of the search warrant should have been limited to practices concerning distributors established or active in Belgium only. According to Caudalie, there was no evidence in the case file that the alleged resale price maintenance practices under investigation ever targeted distributors established or active in France.

In response, the *Cour de cassation* ruled that assessing whether there was sufficient evidence to allow the FCA to investigate Caudalie's practices in France was within the Paris Court of Appeals' discretion. As such, the Paris Court of Appeals was entitled to hold that such evidence "*made it possible to presume that the alleged prohibited practices could have been implemented from* [Caudalie's] *headquarters* [in France]".

[26] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

## Conclusion

The *Cour de cassation*'s ruling confirming the validity of Caudalie's French dawn raid follows the BCA's November 2020 announcement that it has submitted a proposal for a decision sanctioning the company's alleged resale price maintenance practices and restrictions of cross-border online sales – although this does not prejudge either the Belgian Competition College's decision or the outcome of the French investigation.

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