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French Competition Law Newsletter

Highlights

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- The French Competition Authority fines Pari Mutuel Urbain for failing to comply with its 2014 commitment to separate online from offline betting pools
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The FCA ordered interim measures on Google to negotiate with publishers and news agencies for displaying their contents in search results

On April 9, 2020, the French Competition Authority (the “**FCA**”) imposed interim measures on Google following three complaints lodged in mid-November 2019 by publishers unions *Syndicat des éditeurs de la presse magazine* and *Alliance de la presse d'information générale* and news agency *Agence France Presse* (the “**Decision**”). The FCA found that interim measures were necessary to prevent a potential abuse of dominance in the French market for general online search services.¹

The alleged practices

French Law N°2019-775 of July 24, 2019 (the “**Law**”), transposing Directive N°2019/790 of April 17, 2019, created new copyright-related rights (“*droits voisins*”) on content published by news agencies and publishers online.² Under the Law, publishers can authorize or prohibit the reproduction by platforms, aggregators, and search engines of protected content such as text extracts, images, and videos.

¹ FCA Decision of April 9, 2020, N°20-MC-01.

² The Law transposes Article 15 of Directive N°2019/790 of April 17, 2019, which provides for the creation of copyright-related rights to the benefit of publishers, by giving them the right to authorize or prohibit the reproduction of their publications by platforms, aggregators, and search engines. Directive (EU) 2019/790 of the European Parliament and of the Council on copyright and related rights in the Digital Single Market, OJ 2019 L 130/92. The Directive resulted in the creation of Articles L. 218-1 and *seq.* of the French Code of Intellectual Property (“**CIP**”). In particular, Article L. 218-2 of the CIP provides that publishers and news agencies should give their prior consent for the use and reproduction of their content by an online public communication service.

A month before the entry into force of the Law, Google announced that it modified its news display policy and decided to no longer display protected content in its search engines unless publishers gave it authorization to do so free of charge. The complainants claimed that Google circumvented the purpose and spirit of the Law and imposed unfair trading conditions on news publishers and agencies.

The FCA found that the overwhelming majority of publishers and news agencies allowed Google to display protected content without financial compensation, while publishers which did not give Google such permission faced significant traffic decline.³

A potential abuse of dominance in the French market for general online search services

At this stage of its investigation, while not ruling on the merits, the FCA found that Google may have relied on its dominant position in the French market for general online search services to (i) impose unfair trading conditions, (ii) impose discriminatory conditions and (iii) circumvent the Law, which justified ordering interim measures.

First, the FCA found that Google may have imposed unfair trading conditions under Article L.420-2 of the French Commercial Code and Article 102(a) TFEU by unilaterally changing its news content display policy a month before the entry into force of the Law. According to the FCA, Google has not entered into any negotiations with publishers and news agencies to define the terms and conditions to display and pay for the reproduction of their content under the Law. In other words, Google's conduct forced publishers and news agencies to waive the expected benefits of the Law, since they had to choose between refusing to grant a free licence to Google at the risk of losing traffic and revenues, or agreeing to Google's new policy.

In addition, the FCA found that, at this stage of its investigation, Google's decision to impose a zero compensation policy to reproduce protected content of publishers and news agencies did not constitute a reasonable measure. The FCA explained that, while Google derived economic benefits from the reproduction of protected content, the Law was designed to transfer part of these benefits to publishers and news agencies. The FCA thus concluded that Google's conduct may amount to the imposition of unfair trading conditions on publishers and news agencies.

Second, the FCA found that Google may have engaged in a discriminatory practice under Articles 102(c) TFEU and L.420-2 of the French Commercial Code by imposing its zero compensation policy on all publishers, without taking into account their individual situation and the particular content at stake. The FCA considered that the notion of discrimination could consist in treating in the same way situations which are objectively different. The FCA concluded that, at the interim measures stage, Google's undifferentiated treatment may not be objectively justified and may therefore be abusive.

Third, the FCA found that Google may further violate Articles 102 TFEU and L. 420-2 of the French Commercial Code by circumventing the objective of the Law. In particular, the FCA found that Google used the possibility left by the Law of granting free licenses to impose a general principle of zero remuneration for the display of protected content on its platform. According to the FCA, Google could thus obtain new, even more advantageous, trading conditions than before the Law was enacted.

Finally, the FCA found that Google's conduct may deteriorate the situation of publishers and news agencies, and may lead to anticompetitive effects on the market for general search services by placing Google's competitors, having decided to compensate publishers for the display of their content, in an asymmetrical position compared to Google.

³ Decision, para. 102.

The interim measures ordered by the FCA

The FCA found that Google's behaviour created a serious and immediate risk for the French press sector that justified interim measures.

Pending a decision on the merits, the FCA imposed seven injunctions on Google to allow publishers and news agencies to negotiate with Google the terms and conditions for displaying their protected content and the associated remuneration.⁴

In particular, Google must negotiate in good faith with any publishers and news agencies which request remuneration for the display of protected

content by Google on the basis of transparent, objective and non-discriminatory criteria. To ensure the effectiveness of this injunction, the FCA ordered Google to provide publishers and news agencies with the information necessary for a transparent assessment of adequate remuneration.

Google must also take measures to ensure that the existence and the outcome of these negotiations do not affect the indexing, ranking, or presentation of the protected content at stake on Google's services.

The FCA indicated that the injunctions will remain into force until the publication of the FCA's decision on the merits.

The French Competition Authority fines Pari Mutuel Urbain for failing to comply with its 2014 commitment to separate online from offline betting pools

On April 7, 2020, the FCA imposed a €900,000 fine on Pari Mutuel Urbain ("**PMU**"), the main French horse race betting group, for failing to separate the betting pools of its online and physical activities.⁵ PMU had taken this commitment in 2014 in order to end an FCA investigation for a potential abuse of dominance.⁶

PMU historically held a legal monopoly over the organization of horse races and all related bets. In 2010, French law No. 2010-476 opened the online gambling sector to competition, while maintaining PMU's monopoly on horse race betting through physical outlets.⁷

In its 2014 decision,⁸ following a complaint by Betclic Everest Group ("**Betclic**") race betting company, the FCA found that PMU combined the betting pools of its physical and online activities, allowing PMU to leverage its legal monopoly on physical bets to increase the attractiveness of its online offer to the detriment of its competitors. PMU could thus offer much higher winnings to bettors, guarantee more stable odds and widen its betting offering without jeopardizing the quality of existing bets.⁹

To alleviate the FCA's competitive concerns, PMU submitted several commitments to the FCA, including to segregate its online and offline betting pools. The FCA accepted these commitments and made them binding in February 2014.¹⁰

⁴ Decision, paras 292-316.

⁵ FCA Decision of April 7, 2020, n°20-D-07 (the "**Decision**").

⁶ FCA Decision of February 25, 2014, n°14-D-04.

⁷ Law No. 2010-476 of May 12, 2010 relating to the opening to competition and regulation of the online gambling sector, JORF of May 13, 2010, n°0110, p. 8881.

⁸ FCA Decision of February 25, 2014, n°14-D-04, para. 34.

⁹ *Ibid.*, para. 101.

¹⁰ Decision, paras 28-29. PMU further committed to (i) modifying its website to better distinguish between the activities open to competition and those subject to its monopoly; (ii) separating the customer base and commercial teams of its online and offline businesses; and (iii) accounting separately for its online and offline businesses.

KPMG, in its capacity of monitoring trustee, produced eight quarterly reports—all of which concluded that PMU complied with its commitments. However, in 2017, rivals Betclic and Zeturf France LTD complained that PMU combined its online and offline betting pools for foreign horse races, in breach of the commitments.

PMU argued that betting pool arrangements with foreign betting companies were not included in the scope of the commitments since the FCA's Decision did not contain any reference to foreign races.¹¹ PMU further argued that the monitoring trustee had approved the exclusion of foreign races from the scope of the commitments.¹²

However, the FCA stressed that the language of the commitments was general and did not establish any distinction between domestic and foreign races—while PMU had never approached the FCA regarding the scope of the commitments.¹³ In addition, the FCA noted that the commitments' objective was to ensure that PMU would not take advantage of its legal monopoly in offline horse

race betting to obtain an unfair advantage in the online horse race betting sector.¹⁴ The FCA also considered that PMU could not ignore the scope of the commitments since it had contributed to their drafting.

Finally, the FCA recalled that the monitoring trustee's interpretation of commitments could not override the FCA's. The FCA noted that KPMG's reports never mentioned foreign races and that its missions consisted in overseeing PMU's IT projects and thus were merely technical. More generally, the FCA found that trustees have neither the power nor the legal abilities to interpret commitments.

When calculating the fine, the FCA emphasized that non-compliance with antitrust commitments was particularly serious, especially when the commitments are unambiguous, taken voluntarily, at the core of the procompetitive mechanism designed by the FCA, and their breach had started since the very date on which the commitments had become effective.¹⁵

The European Commission authorizes the French Government's measures to face COVID-19

Since the beginning of the COVID-19 outbreak, the French Government has notified a series of measures to the European Commission on the basis of the Temporary Framework adopted by the European Commission in order to enable Member States to support their economy in this specific context.¹⁶ Such measures were authorized by the

Commission under Article 107(3)(b) TFEU, as listed below.¹⁷ The Commission also authorized a tax deferral scheme directed at French airlines under Article 107(2)(b) TFEU "*to make good the damage caused by natural disasters or exceptional circumstances*".

¹¹ Decision, paras. 93 and 100.

¹² Decision, para. 93.

¹³ Decision, paras. 101-103 and 111.

¹⁴ Decision, para. 171.

¹⁵ Decision, paras. 89, 160, and 166.

¹⁶ See our two alert memoranda on this topic: "State Aid Temporary Framework to Support the Economy in the Context of the COVID-19 Outbreak", March 20, 2020, available at: <https://www.clearlygottlieb.com/news-and-insights/publication-listing/state-aid-temporary-framework-to-support-the-economy-in-the-context-of-the-covid-19-outbreak>; and "Amendment to the State Aid Temporary Framework to Support the Economy in the Context of the COVID-19 Outbreak", April 6, 2020, available at: <https://www.clearlygottlieb.com/news-and-insights/publication-listing/amendment-to-the-state-aid-temporary-framework>. The Temporary Framework will be in place until the end of December 2020, and allows Member States to implement aid (subject to prior notification and clearance by the Commission) in five different forms: (i) direct grants, selective tax advantages, and advance payments of up to €800,000 to help a company address its liquidity needs; (ii) state guarantees for loans taken by companies from banks to help businesses cover immediate working capital and investment needs; (iii) subsidized public loans to companies to help businesses cover immediate working capital and investment needs; (iv) safeguards for banks that are used by the State to support businesses, in particular small and medium-sized companies, by expanding their lending capacities; and (v) short-term export credit insurances.

¹⁷ At the time of writing. See the European Commission's updated list of all its related decisions here: https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html.

Case Number	Clearance Date	Duration	Measure
SA.56709	March 21, 2020	March 23 - December 31, 2020	<p>Three separate schemes enabling the French public investment bank Bpifrance Financement S.A. to provide:</p> <ul style="list-style-type: none"> i. Guarantees on investment loans and working capital for companies with up to 5,000 employees; ii. Guarantees on confirmed credit lines for companies with up to 5,000 employees; and iii. State guarantees to banks on portfolios of new loans for all companies. <p>The measure has an estimated budget of €700 million for the first two measures, and €300 billion for the third measure.</p>
SA.56823	March 30, 2020	Until June 30, 2020	<p>Direct grants up to €3,500 available to small and micro-companies (10 employees and €1 million yearly turnover maximum) closed as a result of the COVID-19 outbreak or if their March 2020 turnover dropped by 70%. The measure has an estimated budget of €1.2 billion.</p>
SA.56765	March 31, 2020	Until December 31, 2020	<p>Deferral payment scheme allowing airlines with an operating license in France to defer the payment of certain aeronautical taxes due between March and December 2020 to after January 1, 2021 and over a period of up to 24 months.</p>
SA. 56887 (Amendment to SA. 56823)	April 2, 2020	Until June 30, 2020	<p>Grants authorized in case SA.56823 are extended to small and micro-enterprises if their March 2020 turnover dropped by 50%. The estimated budget for the measure is revised to €1.7 billion.</p>
SA.57010 (Amendment to SA.56823)	April 15, 2020	Until June 30, 2020	<p>Grants authorized in case SA.56823 are extended so that the maximum granted amount is €8,000. The estimated budget for the measure is revised to €1.7 billion for March 2020, and €2.9 billion for April 2020.</p>
SA.56903	April 12, 2020	Until December 31, 2020	<p>€10 billion guarantee scheme in support of the domestic credit insurance.</p>
SA.56985	April 20, 2020	Until December 31, 2020	<p>Umbrella scheme to support all companies (regardless of their sector, location, or size), except for credit and/or financial institutions, with:</p> <ul style="list-style-type: none"> i. Direct grants, equity injections, repayable advances, and subsidized loans; ii. State guarantees on loans; iii. Public loans at favorable terms; and iv. Guarantees or loans provided via credit or financial institutions. <p>The estimated budget for the measure is €7 billion.</p>
SA.56868	April 24, 2020	Until December 31, 2020	<p>Scheme extending the French public investment bank Bpifrance Financement S.A.'s ability to provide state guarantees on loans to French exporting companies with an annual turnover below €1.5 billion. The estimated budget for the measure is €4 million.</p>

Case Number	Clearance Date	Duration	Measure
SA.57134	April 29, 2020	Until December 31, 2020	€5 billion loan guarantee to the Renault group
SA.57082	May 4, 2020	Unknown to date ¹⁸	€7 billion state guarantee on loans and shareholder loan to Air France
SA.57219	May 11, 2020	Until December 31, 2020	Guarantee scheme for exporting French small and midsize companies (annual turnover below €1.5 billion) affected by the COVID-19 outbreak. The estimated budget for the measure is €200 million.

Further state measures to support companies affected by the COVID-19 outbreak are to be expected in the coming weeks.

The French Competition Authority closes its investigation on La Poste following commitments received on loyalty discount practices

On April 2, 2020, the FCA accepted commitments from La Poste, the incumbent operator in postal services in France, and closed its investigation regarding La Poste's discount practices for delivery services.

In 2010, the FCA launched an investigation into La Poste's discount practices for both home and out-of-home delivery services.¹⁹ La Poste offered discounts calculated on the basis of either home delivery flows – a segment in which La Poste holds a 80% market share – or both home and out-of-home delivery flows. The FCA was concerned that, through these rebates, La Poste could leverage its dominant position in the home delivery segment to encourage customers to also use its out-of-home delivery services, to the detriment of its competitors.

In order to alleviate the FCA's competitive concerns, La Poste offered a series of commitments to the FCA.²⁰ In particular, La Poste offered to (i) calculate its discounts for home and outside-of-home delivery separately; (ii) build price scales with incremental prices and discounts²¹, which are uniformly applied to customers based on volume of orders; (iii) ensure compliance with its first two commitments through regular competition law training, use of an IT tool to archive all contracts, and internal oversight; and (iv) implement these commitments according to a set calendar and for a period of five years.

The FCA accepted La Poste's commitments since they allowed competitors to compete with La Poste both for home and out-of-home delivery services. The FCA made these commitments mandatory for a period of five years and thus closed its investigation.²²

¹⁸ The public version of this decision is not yet available.

¹⁹ See FCA Decision n° 20-D-06 of April 2, 2020.

²⁰ See Commitment Proposal from La Poste S.A., of December 12, 2019, available at: https://www.autoritedelaconurrence.fr/sites/default/files/commitments/2020-04/engagements20_d_06_vnc.pdf.

²¹ Tiered price scales, whereby prices and discounts are determined by specific volume thresholds, see FCA Decision n° 20-D-06 of April 2, 2020, paras 97-112.

²² See FCA Decision n° 20-D-06 of April 2, 2020.

The Minister of Economy to veto the acquisition of Photonis by Teledyne

On March 31, 2020, French Economy Minister Bruno Le Maire verbally notified US defense manufacturer Teledyne that it would block U.S. conglomerate Teledyne's proposed acquisition of French night vision startup Photonis.²³ This will be the first use by the Economy Ministry of its veto powers over transactions in strategic industries under the French foreign investment control regime.

Since 2014,²⁴ the French Minister of Economy has the power to veto mergers in strategic industries, such as energy, water, transport, telecommunications, and public health. Under the current foreign investment control regime, the takeover by a non-EU foreign investor of any sensitive French company is subject to prior authorization by the Economy Ministry when the foreign investor crosses the threshold of 25% of voting rights within the company. In 2019,²⁵ the Pacte Law n°2019-486 strengthened the Economy Ministry's prerogatives and extended them to additional sectors, including artificial intelligence, data storage and connected devices, and the space industry. In the context of the COVID-19 outbreak, the Economy Minister further added the biotechnology sector to the list of "critical technologies" subject to prior approval under the foreign investment control regime.²⁶

Teledyne had announced earlier this year that it was in advanced discussions to acquire Photonis, currently predominately owned by the French investment fund Ardian, for c. €500 million. The transaction was however subject to foreign investment approval in France. The Ministry's main concern is that the proposed transaction would harm French technological sovereignty,²⁷ as Photonis designs and manufactures state-of-the-art image intensifier tubes for military, space, and commercial applications. More generally, the French Minister of Economy warned against the increased risk of foreign investments in French industrial and technological assets during the COVID-19 crisis.²⁸ The Economy Ministry has yet to issue its formal, written decision, which may be delayed due to the COVID-19 outbreak.

The Economy Minister also announced that it would lower the shareholding threshold to 10% for investments by non-EU investors into publicly-listed companies. The revised threshold would be in place until the end of 2020.²⁹

²³ See Teledyne's Report, Form 8-K filing to the U.S. Securities and Exchange Commission of March 31, 2020, Item 8.01 "Other Events", available at: <https://www.sec.gov/ix?doc=/Archives/edgar/data/1094285/000109428520000054/tdy-20200331.htm>.

²⁴ See Decree n°2014-479 of May 14, 2014, which expanded the list of sectors in which foreign investors must seek prior authorization from the French Minister of Economy.

²⁵ Introduced by Law n°2019-486 of May 22, 2019, on Business Growth and Transformation, so-called "Pacte Law".

²⁶ See Order of April 27, 2020 on foreign investment in France.

²⁷ See Mlex's Report, "Teledyne-Photonis defense merger to be blocked under French strategic veto powers" (April 6, 2020), available at: <https://www.mlex.com/GlobalAdvisory/DetailView.aspx?cid=1177023&siteid=442&rdir=1>

²⁸ See Mlex's Report, "France to boost merger-veto powers to block hostile takeovers during Covid-19, Le Maire says" (April 29, 2020), available at: <https://www.mlex.com/GlobalAdvisory/DetailView.aspx?cid=1182807&siteid=225&rdir=1>

²⁹ See press release from the General Directorate of the Treasury available at: <https://www.tresor.economie.gouv.fr/Articles/2020/04/30/covid-19-update-of-the-foreign-direct-investment-screening-procedure-in-france>.

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