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French Competition Law Newsletter

Highlights

- The French *Conseil d'État* refers a case to the *Tribunal des Conflits* to determine which court has jurisdiction to hear a claim relative to the protection of business secrets
- The French Competition Authority fines Sony for abusing its dominant position in the market for the supply of PS4 video game controllers
- Paris Court of Appeal clarifies the conditions under which the presumption of decisive influence applies to the parent company's liability within the undertaking
- The French Competition Authority fines 15 industry players €20 million for having coordinated their strategy regarding the presence or absence of Bisphenol A in food containers

The French *Conseil d'État* refers a case to the *Tribunal des Conflits* to determine which court has jurisdiction to hear a claim relative to the protection of business secrets

On December 20, 2023, the French *Cour de cassation* ruled that the French Competition Authority's ("FCA") *Rapporteur Général* is required to duly justify its decision to disclose business secrets.¹ Two days later, the *Conseil d'État* (the French administrative supreme court) requested a preliminary ruling from the *Tribunal des Conflits* in the same case to clarify whether an action seeking to enforce the right to the protection of business secrets should be heard by a civil or administrative court.²

Background

During an investigation into alleged anticompetitive practices in the out-of-home advertising sector, JC Decaux submitted various documents to the FCA, which it claimed contained business secrets. The FCA initially acknowledged the claim and agreed to treat the information as confidential. However, later in the investigation the FCA's *Rapporteur Général* revoked its decision to keep these business secrets confidential stating that the disclosure of such information in its confidential version was

¹ See French *Cour de cassation*, Commercial, Financial and Economic Chamber, judgement of December 20, 2023, n° 22-17.296.

² See *Conseil d'État*, ruling of December 22, 2023, n° 475815.

necessary for the exercise of the rights of defence and/or for the purposes of the adversarial debate before the FCA, on the basis of Article R. 463-15 of the French Commercial Code.³ Shortly thereafter, the FCA sent a statement of objections disclosing some of the confidential information to all parties to the investigation, including the plaintiff, Clear Channel France, also JC Decaux's main competitor.

JC Decaux appealed the *Rapporteur Général's* decision to disclose the confidential information and on May 25, 2022, the Paris Court of Appeals partially annulled the *Rapporteur Général's* decision to disclose the confidential information for failure to provide adequate justification. JC Decaux subsequently lodged an application for interim relief (*référé*) with the Judicial Court of Paris to order Clear Channel France to destroy or hand over all documents containing sensitive information. JC Decaux also requested that the court order the FCA to refrain from further disseminating JC Decaux's business secrets.

Referral to the *Tribunal des Conflits*

On December 27, 2022, the Judicial Court of Paris declined jurisdiction in favor of the *Conseil d'État*. On June 15, 2023, the Paris Court of Appeals confirmed the first instance ruling, considering that, pursuant to Article L. 464-8-1 of the French Commercial Code,⁴ civil judicial review is limited to the *Rapporteur Général's* decision to revoke the decision to protect business secrets, whereas JC Decaux's application for interim relief related more broadly to the investigation and the statement of objections, the judicial review of which falls upon the administrative courts.⁵

JC Decaux therefore brought the case to the *Conseil d'État*, which departed from the reasoning of the civil courts, ruling that the injunction was

inseparably linked to the *Rapporteur Général's* decision to disclose the business secrets and hence should be judicially reviewed by the judicial courts, in the present case, the Paris Court of Appeals, in compliance with Article L. 464-8-1 of the French Commercial Code.

In view of this jurisdictional divergence, the *Conseil d'État* decided to stay the proceedings and refer the question to the *Tribunal des Conflits*, which is in charge of adjudicating possible jurisdictional conflicts between administrative and civil courts.

Duty to justify the publication of business secrets

The referral to the *Tribunal des Conflits* came shortly after the French *Cour de cassation* confirmed on December 20, 2023 the Paris Court of Appeals' ruling that partially annulled the *Rapporteur Général's* decision to disclose JC Decaux's business secrets due to insufficient justification.

The French *Cour de cassation* dismissed both arguments put forward by the *Rapporteur Général* on appeal. First, the *Rapporteur Général* submitted that the duty to provide adequate justification as interpreted by the Paris Court of Appeals was excessive. In response, the French *Cour de cassation* ruled that the mere reiteration of the terms of Article R. 463-15 of the French Commercial Code was insufficient. Specifically, the *Rapporteur Général* must explicitly justify why the confidential version is necessary for the rights of the defence or for the purposes of the debate.⁶ Second, the *Rapporteur Général* argued that, beyond assessing whether the reasons stated were sufficient, the Paris Court of Appeals failed to substantively assess whether it was necessary to revoke the decision to keep business secrets confidential. The French *Cour de cassation* responded that the insufficient reasoning provided

³ Article R. 463-15 of the French Commercial Code states: "Where the *Rapporteur* considers that one or more documents in their confidential version are necessary for the exercise of the rights of defence of one or more parties or that they need to be acquainted with them for the purposes of the adversarial debate before the Authority, he or she shall inform [...] the person who has made the request for protection of the business secrets contained in these documents and set a time limit for submitting his or her observations before the *Rapporteur Général* issues a decision. [...]" (Free translation).

⁴ Article L. 464-8-1 of the French Commercial Code provides that: "Decisions taken by the *Rapporteur Général* of the French Competition Authority pursuant to Article L. 463-4 to refuse the protection of business secrets or to revoke the protection granted may be subject to an action for reformation or annulment before the First President of the Paris Court of Appeal or his delegate." (Free translation).

⁵ See Paris Court of Appeals, ruling of June 15, 2023, n° 23/00733.

⁶ French *Cour de cassation*, Commercial, Financial and Economic Chamber, judgement of December 20, 2023, n° 22-17.296, para. 10.

by the *Rapporteur Général* precluded the Paris Court of Appeals from exercising effective judicial review.

Takeaways

This is not the first time that the *Tribunal des Conflits* has weighed in on the potential violation of a company's right to the protection of its business secrets. On October 5, 2020, the *Tribunal des Conflits* confirmed that the Paris Court of Appeals had jurisdiction to rule on an appeal against an FCA decision ordering interim measures, in which the claimant alleged that the FCA's decision, as published, had breached its right to the protection of its business secrets.⁷ The *Tribunal des Conflits* found that the decision regarding the redaction of business secrets in FCA decisions was inseparable from the substantive decision itself. The same reasoning was adopted by the *Conseil d'État* in the present case.

This is also not the first time that the French *Cour de cassation* has scrutinized the *Rapporteur*

Général for not providing sufficiently detailed reasons in deciding to disclose business secrets. On January 29, 2020, the French *Cour de cassation* issued two rulings dealing with the same issue.⁸ In the first one, the French *Cour de cassation* held that the *Rapporteur Général* must provide concrete reasons justifying the disclosure of confidential business secrets to other parties in the proceedings. However, in the second ruling, which related to proceedings that did not involve any other parties, the French *Cour de cassation* considered that the *Rapporteur Général's* decision would not risk exposing that party's business secrets to any third parties and upheld the *Rapporteur Général's* decision.

In any event, the duty to state adequate reasons serves the primary objective of effective judicial review, which requires a review of both matters of fact and law as required by the European Court of Human Rights.⁹ Mere references to the applicable law and generic explanations are unlikely to allow the judge to conduct a full review.

The French Competition Authority fines Sony for abusing its dominant position in the market for the supply of PS4 video game controllers

On December 20, 2023, the French Competition Authority fined Sony EUR 13.5 million for allegations of abuse of dominant position in the supply of video game controllers for its PlayStation 4 (“**PS4**”) console between November 2015 and April 2020.¹⁰

Background

On October 20, 2016, a French manufacturer of video game controllers, Subsonic, referred to the FCA certain practices allegedly implemented by

Sony. A year later, the FCA sent Sony a preliminary report outlining competition concerns with respect to: (i) technical measures put in place by Sony since November 2015 to fight against allegedly counterfeit controllers, and (ii) Sony's refusal to grant licences to certain controller manufacturers under its PS4 Official Licensed Product partnership programme (“**OLP programme**”).

Sony sent proposed commitments to the FCA on four occasions in November 2019, June, July and September 2020. All were rejected by

⁷ See *Tribunal des Conflits*, ruling of October 5, 2020, no 19/12686.

⁸ See French *Cour de cassation*, Commercial Chamber, judgment of January 29, 2020 no. 18-11.725 French *Cour de cassation*, Commercial Chamber, judgment of January 29, 2020 no. 18-11.726.

⁹ See for instance European Court of Human Rights, *Menarini Diagnostics v. Italy (Menarini)*, judgment of September 27, 2011, application no. 43509/08.

¹⁰ FCA Decision No. 23-D-14 of December 20, 2023, regarding practices implemented in the sectors for eighth-generation static video game consoles and the control accessories compatible with the PS4 console.

the FCA, which resumed the investigation¹¹ and subsequently sent Sony a statement of objections on July 15, 2021.

The FCA ultimately found that Sony had abused its dominant position on the French market for PS4 video game controllers by: (i) having put in place certain technical measures that disconnected controllers not manufactured or licensed by Sony from the PS4 console, and (ii) having an opaque licensing policy.

Sony's dominance on the French market for PS4 video game controllers

The PS4 was commercially launched in 2013 and is Sony's eighth-generation console. It comes with a PS4 controller called a DualShock 4, designed by Sony and also sold separately. It's Sony's best-selling console accessory: according to the FCA, PS4 controllers manufactured by Sony represent a market share of "well over 50% for the period 2015-2020."

Technical measures to fight against counterfeit controllers were disproportionate and discriminatory

PS4 controllers may be manufactured by Sony, by Sony licensees, or by unlicensed third parties. Controllers of the first two categories contain a chip with a unique identification number ("**ID number**") that Sony can, in principle, use to identify them.

The FCA found that Sony caused controllers without this unique ID number or controllers with a number duplicated on a large scale, to be disconnected during certain technical updates to the PS4 console. The latter were only able to correct these disconnections *a posteriori* and through patches which were difficult to install.

The FCA found that even though Sony was pursuing a legitimate objective to protect its IP rights, these measures were disproportionate. First, all controllers manufactured by third parties outside of the OLP programme were affected,

regardless of whether they were counterfeit or not. Second, the FCA noted that Sony went beyond what was strictly necessary to pursue its IP rights protection objective, since it should have, in the first instance, brought legal proceedings against the alleged counterfeits.

Sony's opaque licensing policy prevented rival companies from obtaining an official licence and unique ID numbers

The FCA noted that while Sony reserved the granting of licences and ID numbers to members of the OLP programme, the criteria for access to said programme were not communicated to all manufacturers who requested them, such as Subsonic, and were imprecise enough to lend themselves to discretionary application. Consequently, the FCA found that several manufacturers wishing to join the OLP programme were not able to do so, and that their brand image suffered as a result of the multiple disconnections resulting from the regular software updates.

Ultimately, the FCA found that users had been discouraged from buying controllers not covered by the OLP programme and would inevitably switch to controllers manufactured by Sony or Sony licensees.

Takeaways

With respect to substantive considerations, the FCA Decision provides a reminder that an objective to protect IP rights may not justify anticompetitive conduct.

With respect to procedural considerations, the case raised a number of procedural issues. The first was whether a decision by the FCA to refuse commitments could be subject to judicial review. The second was whether the French commitments procedure breaches a party's rights of the defence, given that FCA agents deciding whether to accept or reject commitments are also involved in assessing whether the practices under investigation constitute a competition

¹¹ FCA Decision No. 20-S-01 of October 23, 2020.

infringement. Both issues were heard by the French Constitutional Council, which found that a decision by the FCA to accept or reject commitments did not breach a party's rights of the defence and was indeed subject to judicial review.¹²

Based on the French Constitutional Council's decision, on January 31, 2024 the French *Cour de cassation* overturned the Paris Court of Appeals judgement¹³ which had ruled that an appeal of

the FCA's refusal to accept commitments was inadmissible, and ordered that the case be remitted for consideration.¹⁴ The Paris Court of Appeals will now examine whether Sony's proposed commitments were sufficient to remedy the competitive concerns identified by the FCA and, in the negative, set aside the FCA decision to reject the commitments and refer the case back to the FCA.

Paris Court of Appeal clarifies the conditions under which the presumption of decisive influence applies to the parent company's liability within the undertaking

On December 21, 2023, the Paris Court of Appeal (the "**Court**") upheld the French Competition Authority's decision to jointly and severally fine Mayotte Channel Gateway ("**MCG**") as the author of the infringement, and Société Nel Import Export ("**SNIE**") as its parent company, for obstructing the investigation by willfully and repeatedly failing to respond to an information request (the "**Decision**").¹⁵

Background

In 2018, the FCA launched an investigation against MCG in relation to practices carried out in the maritime transport sector in Mayotte.¹⁶ On December 14, 2020, the FCA issued an information request, providing MCG with a

six-week deadline to respond.¹⁷ The FCA sent three reminders,¹⁸ two penalty notices,¹⁹ and offered two deadline extensions,²⁰ but MCG did not reply.

The FCA subsequently issued an obstruction report on June 23, 2021, leading to decision n°21-D-28²¹ which imposed a joint and several fine of 100,000 euros on MCG and SNIE for having obstructed the investigation.²²

The FCA decision was upheld by the Court, which confirmed that (i) by deliberately refusing to respond to the information request, MCG had obstructed the investigation and (ii) a 90% equity stake was sufficient to establish a presumption of decisive influence.

¹² Constitutional Council Decision No. 2002-1035 QPC of February 10, 2023, *Société Sony interactive entertainment France et autre*. For further details, see our [February 2023 French Competition Law Newsletter](#). Sony had filed two parallel and distinct appeals against the FCA decision rejecting its proposed commitments: the first one before the French *Conseil d'Etat*, which found it did not have jurisdiction to hear the matter (*see Conseil d'Etat*, Decision No. 448061 of July 1st, 2022), and the second one before the Paris Court of Appeals, which ruled that the appeal was inadmissible as the lack of immediate relief against this FCA decision did not deprive Sony of its right to effective judicial review since the final FCA decision could be appealed (*see Paris Court of Appeals Judgment No. 20/169537 of April 21, 2022*). Sony subsequently filed an appeal against this judgement before the French *Cour de cassation*, asking that the case be deferred to the French Constitutional Council.

¹³ Paris Court of Appeals Judgement No. 20/169537 of April 21, 2022.

¹⁴ French *Cour de cassation*, Decision No. R-22-16-616 of January 31, 2024.

¹⁵ Paris Court of Appeals, judgment of December 21, 2023, No. 22/00474.

¹⁶ Decision, para. 1.

¹⁷ Decision, para. 5.

¹⁸ Decision, paras. 6, 9 and 12.

¹⁹ Decision, paras. 11 and 14.

²⁰ Decision, paras. 8 and 11.

²¹ FCA Decision No. 21-D-28 of December 9, 2021, regarding the implementation of Article L. 464-2 V of the French Commercial Code with respect to Mayotte Channel Gateway SAS' obstruction of the FCA's investigation.

²² Decision, paras. 66 and 74.

A deliberate refusal to respond to an FCA information request constitutes obstruction

The Court found that a deliberate refusal to respond to an FCA information request constituted obstruction by relying on Article L. 464-2, V of the French Commercial Code,²³ which provides that refusal to provide the information or documents requested within the prescribed timeframe, or failure to rectify an incorrect or incomplete response constitutes obstruction since it impedes the FCA's investigative powers.

The Court also found that the information request was not substantively excessive nor was the deadline to comply.²⁴ It concluded that the practices should be examined as a deliberate refusal to respond to information requests, thereby constituting an obstruction.²⁵

A 90% equity stake is sufficient to presume decisive influence

In line with standard practice, a parent company is presumed to exercise decisive influence over its subsidiary when it holds all, or nearly all, of its equity.²⁶ SNIE claimed that a 90% stake was not sufficient.

The Court clarified that neither domestic nor European case law has defined a specific equity threshold to establish the presumption of decisive influence.²⁷ The presumption, according to the Court, does not hinge on holding the entirety or almost all of the subsidiary's equity, but rather on the level of control exercised by the parent company,²⁸ i.e. its ability to impede the autonomy of the subsidiary on the market.²⁹

In the case at hand, the Court determined that SNIE's 90% stake in MCG implied a substantial degree of control, leading to the presumption that SNIE dictated the subsidiary's economic and commercial strategy,³⁰ such that it was up to SNIE to rebut the presumption.

The French Competition Authority fines 15 industry players €20 million for having coordinated their strategy regarding the presence or absence of Bisphenol A in food containers

In a 350-page decision dated December 29, 2023, the French Competition Authority sanctioned four professional associations and eleven undertakings, in their capacity as members of these associations, for having implemented a collective strategy to

prevent market players from competing on the presence or absence of Bisphenol A ("**BPA**") in food containers (the "**Decision**").³¹ The total fine amounts to €19,543,400.

²³ Under Article L. 464-2 of the French Commercial Code, "[w]here a company [''] has obstructed the investigation or inquiry, in particular by providing incomplete or inaccurate information, or by communicating incomplete or distorted documents, the [FCA] may, at the request of the Rapporteur General, and after hearing the company in question and the Government Commissioner, decide to impose a financial penalty".

²⁴ Decision, para. 75.

²⁵ Decision, para. 84.

²⁶ Court of Justice, Case C-595/18, para. 32.

²⁷ Decision, para. 110.

²⁸ Decision, para. 111.

²⁹ Decision, para. 112.

³⁰ Decision, para. 120.

³¹ FCA Decision No. 23-D-15 of December 29, 2023, relating to practices in the sector of the manufacture and sale of foodstuffs in contact with materials that may contain or may have contained Bisphenol A.

Background

BPA, a synthetic chemical employed in the production of resins, is commonly utilized in the interior lining of metal cans and metal lids used in the food and beverage industry. In reaction to the publication of certain scientific studies that pointed out the potential risks to human health, France passed a law on December 24, 2012 that banned the use of BPA in all food packaging as of January 1, 2015,³² thereby allowing for a transitional period of two years.

On October 5, 2021, the FCA notified a statement of objections to several trade associations and close to thirty undertakings across the entire food supply chain, including can manufacturers, canned-food suppliers and distributors.

The Decision

In its Decision dated 29 December 2023, the FCA fined four professional organizations, three can manufacturers and eight canned food suppliers a total of €19,543,400 for having coordinated their behavior between 2011 and 2015 to limit the competition risks associated with the “BPA-free” transition. This strategy included (i) an agreement not to communicate on the absence or presence of BPA in food-grade materials and (ii) an agreement to harmonize the launch date of BPA-free products on the market, which together constituted a single, complex and continuous infringement.

The practices. The practices primarily consisted in the adoption of a communication and monitoring strategy by the professional associations in the food industry, which was implemented by their members. The common strategy prevented members from communicating on the absence or presence of BPA in food-grade materials during the transitional period. The Decision refers to the associations’ communication initiatives advising members against competing on the BPA-related aspect, their attempts to rally retailers on the issue, and to letters sent to industry players who made use of “BPA-free” claims.

Separately, the practices also included a collective refusal to supply retailers with BPA-free cans before the cut-off date of January 1, 2015.

A by-object restriction. The FCA found that the practices constituted a restriction of competition by object. To reach such a conclusion, the Decision found that the absence or presence of BPA was in and of itself a competition parameter influencing consumer choices. The FCA then went on to highlight that the practices aimed to prevent economic players from gaining a competitive edge over each other by highlighting the absence of BPA in their products, thus restricting a competition parameter. The FCA Decision also brushed aside the argument that the objectives behind the practices were legitimate, noting that they aimed to ensure that no player would gain a competitive advantage by substituting products containing BPA with products without BPA.

The FCA also dismissed all arguments made with respect to the specific context of the practices, such as the uncertainties caused by the legal landscape at the time, particularly whether “BPA-free” claims were allowed in French consumer protection law, and the lack of scientific consensus on the risks of BPA for human health.

No infringement for a number of entities.

While the statement of objection was notified to almost thirty undertakings, only eleven were found to have infringed competition law. The FCA considered that there was insufficient evidence to conclude that some of them had adhered to the collusive agreement. Others were cleared from any wrongdoing without the FCA having to assess their potential participation in the collusive agreements, as they benefitted from the 10-year statute of limitations.³³

The fines. To set the amount of the financial penalties, the FCA deviated from its fining guidelines and imposed a lump-sum penalty, given that (i) the practices were established against various companies and associations of various economic weight and (ii) the professional

³² Law No. 2012-1442 of December 24, 2012 aimed at suspending the manufacture, import, export and marketing of any food packaging containing bisphenol A.

³³ Under Article L.462-7 of the French Commercial Code, the FCA is prohibited from imposing sanctions for anticompetitive practices that occurred more than ten years prior to the end of the practice.

associations did not generate a turnover that could be used as a basis for calculating a fine. While finding that the practices were particularly serious, the FCA also considered the substantial uncertainty created by the “BPA-free” transition.

Take-aways

This is the first decision in France that sanctions communication-related behaviors as a stand-alone by-object restriction of competition.

The Decision is also testimony to the FCA’s position that there is no pre-established list of competition parameters that may lead to by-object infringements of competition law. In the present case, the FCA held that the quality of food packaging (*i.e.*, the presence or absence of a particular chemical component in the packaging) inherently constitutes a “qualitative” competition parameter.

This finding aligns with a broader global trend observed in recent competition law enforcement which expands the scope of competition law to address broader societal goals such as sustainability, health, data protection, and workers’ rights.

Finally, the Decision also demonstrates the FCA’s heightened interest in enforcing competition law against professional associations, in line with its 2021 study on the application of competition law to professional bodies.³⁴

³⁴ See FCA press release, *The Autorité de la concurrence publishes a study on professional bodies*, January 27, 2021, available [here](#). See also FCA press releases regarding recent decisions: *The Autorité de la concurrence sanctions the French National Confederation of Tobacconists (Confédération nationale des buralistes de France) for organising boycott practices aimed at hindering the distribution of FDJ games by the Florajet florist network*, September 27, 2023, available [here](#) (See our [September 26, 2023 Antitrust Watch Blog](#)); *Several entities sanctioned in bakery equipment distribution sector*, April 25, 2023, available [here](#) (See our [April 2023 French Competition Law Newsletter](#)); *Fisheries and aquaculture sector: the Autorité de la concurrence fines the Association réunionnaise interprofessionnelle de la pêche et de l’aquaculture (Reunionese Interprofessional Fisheries and Aquaculture Association) for implementing an anticompetitive agreement on price and control of production and outlets*, November 16, 2022, available [here](#).

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