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French Competition Law Newsletter

Highlights

- The Paris Court of Appeal condemns the FCA for violating Google’s business secrets
- The *Conseil d’Etat* finds that decisions of the French Competition Authority to reject commitments cannot be appealed
- The French Competition Authority publishes its annual report for 2021: a record year in terms of number of merger control decisions

The Paris Court of Appeal condemns the FCA for violating Google’s business secrets

On June 16, 2022, the Paris Court of Appeals (the “**Court**”) ruled that “*decisions to protect the confidentiality of business secrets taken during the course of the investigation, which have not been challenged pursuant to Article R. 463-15 of the French Commercial Code, continue to bind the College when adopting and drafting the decision on the merits, otherwise such decisions would be deprived of any effectiveness*” (the “**Ruling**”).¹

Background

In the context of an investigation carried out by the French Competition Authority (the “**FCA**”), Google obtained from the head of the FCA’s investigatory services, the Rapporteur Général, that its business secrets be kept confidential.² Later in the investigation, the FCA issued a

decision imposing interim measure on Google and published a non-confidential version of the decision.³

However, the non-confidential decision disclosed certain information that had been classified as confidential. Google requested from the Paris Court of Appeals the annulment of the FCA’s decision of publication.

Google claimed that the FCA could not disclose information which had been classified as confidential during the course of the investigation, and should at least have offered Google the opportunity to express its views on the declassification request pursuant to the procedure provided for in the French Commercial Code.

¹ Paragraph 35 of the Ruling (free translation).

² Decisions no. 18-DSA-442 of December 6, 2018 and no. 19-DSA-023 of January 14, 2019.

³ Decision no. 19-MC-01 imposing interim measures.

From the FCA's point of view, the procedure allowing parties to have their business secrets protected only applied during the investigation, but not at the publication stage. The FCA did not consider itself bound by the Rapporteur Général's decision to keep certain information confidential when adopting its decision on the merits, and considered that the objective of informing the general public prevailed on the parties' right to have their business secrets kept confidential.

Court jurisdiction to rule on decision to publish business secrets

Incidentally, the Court, which normally has jurisdiction over matters relating to the substance of decisions taken by the FCA, initially declined jurisdiction to rule on the matter. Google then seized the *Conseil d'Etat*, which referred the case to the *Tribunal des Conflits* to rule on jurisdiction. On October 5, 2020, the *Tribunal* ruled that "the decision taken by the French Competition Authority, on the basis of the aforementioned provisions of Article D.464-8-1⁴ of the French Commercial Code, to limit or not to limit the publicity of a decision taken on the basis of Article L.464-1⁵ of the French Commercial Code is not severable from this decision itself. Consequently, any appeal in that respect is also a matter for the Paris Court of Appeal".⁶

The mechanism for the protection of business secrets applies to the publicity of the decision

The Court first laid down the procedure provided for in the French commercial Code which enables a party to have its business secrets kept confidential under certain conditions. The French commercial

Code sets out (i) the kind of information that can be claimed to constitute confidential business secrets,⁷ (ii) the cases where the confidentiality afforded to such business secrets may be lifted,⁸ (iii) the modalities for doing so⁹ and (iv) the possibility of an appeal.¹⁰

The Court also noted that the right for a party to have its business secrets kept confidential is enshrined in Directive (EU) 2016/943 of the European Parliament and of the Council of June 8, 2016, on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

In light of the fact that the right for a party to have its business secrets kept confidential is inherent to its rights of defence, the Court found that "a decision allowing business secrets to be kept confidential during the investigation, which has not been challenged and reversed by a decision deciding to lift confidentiality pursuant to Article R.463-15 of the French Commercial Code, continues to bind the *Collège* at the stage of adopting a decision, unless the confidentiality thus granted is largely deprived of its useful effect".¹¹

Furthermore, the Court clarified that even assuming that the FCA could decide that the public interest at stake justifies lifting confidentiality, the FCA was required consult the parties in advance and provide the reasons for its decision.¹²

As a result, the Court found that the FCA had violated Google's business secrets and ordered the FCA to pull and republish an appropriately redacted decision, which the FCA did two weeks after the ruling.

⁴ "The decisions of the Competition Authority referred to in Article L. 470-7-1 are published on the Authority's website. Their publication may be restricted to take into account the legitimate interest of the parties and the persons cited in not disclosing their business secrets".

⁵ "The Competition Authority may, at the request of the Minister in charge of the economy, of the persons mentioned in the last paragraph of Article L. 462-1 or of the companies, or on its own initiative and after having heard the parties in question and the Government Commissioner, take the precautionary measures which are requested or which appear necessary".

⁶ Paragraph 12 of the Ruling (free translation).

⁷ Article L.151-1 of the French commercial Code.

⁸ Article L.463-4 of the French commercial Code.

⁹ Articles R.463-14 and R.463-15 of the French commercial Code.

¹⁰ Article L.464-8-1 of the French commercial Code.

¹¹ Paragraph 35 of the Ruling (free translation).

¹² Paragraph 41 of the Ruling.

The *Conseil d'Etat* finds that decisions of the French Competition Authority to reject commitments cannot be appealed

On July 1, 2022, the *Conseil d'Etat* (the French administrative supreme court) ruled¹³ that it had no jurisdiction to annul a decision of the French Competition Authority (the “FCA”) rejecting commitments offered by the group Sony (“Sony”) to end competition proceedings and referring the case back for further investigation.¹⁴

Background

In October 2016, the FCA launched an investigation into Sony’s practices following a complaint from an accessory manufacturer alleging that Sony had abused its dominant position in the market for next-gen gaming consoles.

As part of its preliminary assessment, the FCA’s investigation services found that Sony had implemented two anti-competitive practices. First, Sony had updated the PlayStation 4 operating system which allegedly resulted in the alteration of the functioning of certain third-party controllers.¹⁵ Second, Sony had implemented an allegedly ambiguous and opaque licensing policy for companies seeking to market controllers compatible with the PlayStation 4.

In response to these competition concerns and in order to put an end to the proceedings, Sony offered a number of commitments. On October 23, 2020, the FCA rejected Sony’s latest set of commitments and sent the case back for further investigation. Sony brought the case before the *Conseil d'Etat* requesting the annulment of the FCA decision rejecting its commitments offer on the grounds of excess of power.

Decision of the *Conseil d'Etat*

On July 1, 2022, the *Conseil d'Etat* ruled that Sony’s appeal of the FCA decision rejecting its commitments could not be heard since the *Conseil d'Etat* had no jurisdiction to rule over such case. The *Conseil d'Etat* held that a decision of the FCA to reject commitments was not capable in itself of producing legal effects. Consequently, such decision could not be considered as unrelated and severable from the underlying FCA proceedings and could be appealed.

It should be noted that Sony had also filed an appeal before the Paris Court of Appeals on the same grounds. The Court had found that the appeal was inadmissible on the grounds that a decision to reject commitments could not be appealed separately from the final FCA decision on the merits.¹⁶

¹³ *Conseil d'Etat*, ruling July, 1, 2022, No. 448061.

¹⁴ FCA decision No-20-S-01 of October 23, 2020.

¹⁵ Three types of controllers are compatible with the PlayStation 4: (i) Sony controllers, (ii) third-party controllers manufactured under Sony licence and (iii) other third-party controllers which do not benefit from a Sony licence.

¹⁶ *Cour d'appel de Paris*, ruling April 21, 2022, No. 20/16953.

The French Competition Authority publishes its annual report for 2021: a record year in terms of number of merger control decisions

On July 6, the French Competition Authority (“FCA”) published its annual report for the year 2021.¹⁷ In particular, the report highlights (i) the key figures of the FCA activity in 2021, (ii) the reinforced investigative powers of the FCA and (iii) the roadmap for 2022-2023.

Key figures of the FCA’s activity in 2021

The FCA imposed a total of 873.7 million euros of fines for 2021, slightly below 2020 which was a record year with fines totaling 1.785 billion euros. In 2021, most of the total amount (845.8 million euros) resulted from three decisions: Google’s practices in relation to neighboring rights¹⁸ as well as in online advertising,¹⁹ and a cartel in the sunglasses and glasses frames sector²⁰. In total, the FCA issued a record number of 321 decisions and opinions in 2021: 272 merger control decisions, 30 decisions for anticompetitive practices and 19 opinions. In respect of merger control proceedings, the great majority of notified transactions were unconditionally cleared, with only 10 being cleared subject to commitments, and one prohibited. The FCA evaluates the total gain for the economy to be 18.5 billion euros between 2011 and 2021 (made up of fines imposed and avoided overcharge) thanks its regulatory activities.

Broadened investigative powers and FCA mission

The report highlights the most recent legislative changes that reinforced the investigative power of the FCA, such as the so-called “DDADUE”²¹ law and the national order transposing the ECN+ directive.²² The FCA notably benefits from an extended access to companies’ data and the principle of prosecutorial discretion *i.e.*, the discretion to investigate or not depending on the FCA’s priorities. The report also points out that the FCA published revised fining guidelines in July 2021²³, which include inter alia new criteria to assess the gravity of an infringement with regards to innovation and the environment. The report also insists that the impact on sustainable development and the environment is now part of the FCA’s assessment in anticompetitive practices proceedings (it refers to last year’s decisions in the floor coverings and road freight transport sectors²⁴), and in merger proceedings (of the FCA has defined new “green” markets and has acknowledged the potential offsetting gains of an environmental nature).

¹⁷ French Competition Authority, Annual Report 2021, available at https://www.autoritedelaconurrence.fr/sites/default/files/2022-07/ADLC_RA_2021_SD-2.pdf.

¹⁸ FCA Decision No. 21-D-13 of June 21, 2021 in relation to practices implemented by Google in the press sector.

¹⁹ FCA Decision No. 21-D-11 of June 7, 2021 in relation to practices implemented in the online advertising sector.

²⁰ FCA Decision No. 21-D-20 of July 22, 2021 in relation to practices implemented in the glasses and glasses frames sector.

²¹ Law n°2020-1508 of December 3, 2020 on various adaptations to European Union law, which implemented 18 European directives and harmonised national law with 14 European regulations.

²² Order n°2021-649 of May 26, 2021 in relation to the transposition of the directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

²³ See the July/August 2021 edition of our French Competition Law Newsletter available at: <https://www.clearygotlieb.com/-/media/files/french-competition-reports/french-competition-law-newsletter-julyaugust-2021-pdf.pdf>.

²⁴ FCA Decision No. 17-D-20 of October 18, 2017 in relation to practices implemented in the floor coverings sector (price-fixing and other practices between the three leading manufacturers of PVC and linoleum floor covering); FCA Decision No. 21-D-21 of September 9, 2021 in relation to practices implemented in the road freight transport sector (boycott of digital intermediation platforms).

Roadmap for 2022-2023

The FCA published, along with its annual report, its roadmap for the year to come with seven main objectives: (i) encouraging the proper competitive functioning of digital markets (an ongoing top priority), (ii) participating in efforts to fight climate change (moving from fifth to second priority compared to the 2021 roadmap), (iii) preserving consumers' purchasing power in times of crisis, (iv) tackling anticompetitive practices affecting public resources, (v) promoting a culture of competition, (vi) guaranteeing the FCA's efficiency and responsiveness, and (vii) ensuring the consistency and coherence of the FCA's action with other public policy objectives. The FCA also anticipates Article 22 referrals which enable the FCA to refer to the European Commission transactions which do not meet the jurisdictional thresholds but raise anticompetitive concerns.

CONTACTS



Antoine Winckler
+32 2 287 2018
awinckler@cgsh.com



François-Charles Laprèvote
+32 2 287 2184
fclaprevote@cgsh.com



Frédéric de Bure
+33 1 40 74 68 00
fdebure@cgsh.com



Séverine Schrameck
+33 1 40 74 68 00
sschrameck@cgsh.com



Stéphanie Patureau
+33 1 40 74 68 00
spatureau@cgsh.com



François Six
+33 1 40 74 69 43
fsix@cgsh.com



Victoria Blanc
+33 1 40 74 68 00
vblanc@cgsh.com



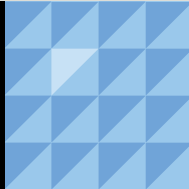
Pauline Heingle
+32 2 287 2077
pheingle@cgsh.com



Myrane Malanda
+32 2 287 2115
mmalanda@cgsh.com

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