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— The French Tribunal des Conflits confirms the jurisdiction of the Paris Court of Appeals to rule on confidentiality waivers in public versions of French Competition Authority decisions

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— The French Competition Authority consults on commitments offered by Carrefour/Tesco in joint purchasing agreement investigation

The General Court partially annuls European Commission decisions ordering French supermarkets dawn raids

On October 5, 2020, the General Court partially annulled three European Commission decisions ordering French supermarket groups Casino and Intermarché to submit to unannounced inspections.[1] The General Court found that the Commission did not have sufficiently strong evidence to suspect one of the alleged infringements and had therefore breached the dawn raided companies' right to the inviolability of the home.

Factual background

In February 2017, after receiving information concerning potential exchanges of information between companies active in the retail distribution sector, the European Commission (the "**Commission**") issued several decisions authorizing its officials to carry out dawn raids on the premises of French supermarket groups Casino and Intermarché, as well as at their joint purchasing subsidiary Intermarché Casino Achats ("**INCA**"). The Commission suspected the dawn raided companies of exchanging information on (i) rebates obtained on the supply markets for certain everyday consumer goods (such as food, home care and personal care products) and the prices on the market for the sale of services to manufacturers of branded products; and (ii) their

[1] *Casino, Guichard-Perrachon and AMC v Commission* (Cases T-249/17,) EU:T:2020:458; *Intermarché Casino Achats v Commission* (T-254/17), EU:T:2020:459; and *Les Mousquetaires and ITM Entreprises v Commission (French retailers purchasing alliance)* (T- 255/17), EU:T:2020:460.

future commercial strategies on the supply markets for everyday consumer goods and on the market for the sale of everyday consumer goods.

The dawn raids were carried out on February 20, 2017. In April 2017, Casino, Intermarché and INCA (the "**Applicants**") lodged an appeal against the Commission's decisions authorizing the dawn raids.

The Applicants' arguments regarding the illegality of the dawn raids

The Applicants appealed the Commission's decisions on three grounds: (i) the illegality of the provisions of Regulation 1/2003 empowering the Commission to conduct inspections; (ii) the violation of the Commission's duty to state reasons; and (iii) the violation of the right to the inviolability of the home.

The first two pleas were rejected by the General Court.

According to the Applicants, Article 20 of Regulation 1/2003, which notably provides that, "*in order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings*", breached dawn raided companies' right to an effective remedy. But the General Court rejected this claim – despite the fact that dawn raided companies may only challenge the conduct of a dawn raid itself in the context of an appeal against the final decision on the substance issued by the Commission (should it issue one) or through an action for damages against the Commission. In addition, the Court rejected the claim that Article 20 breaches the companies' rights of defense and the principle of equality of arms, as it held – in accordance with settled case law – that the Commission cannot be required to provide the underlying evidence justifying the conduct of dawn raids at the preliminary investigation stage without compromising the effectiveness of said investigation.

The General Court also summarily dismissed the Applicants' plea regarding the Commission's failure to state reasons.

However, the General Court carefully assessed whether the Commission did, in fact, have sufficient evidence to justify its decision to authorize dawn raids with respect to both sets of suspected anticompetitive practices, and therefore to justify its interference with the Applicants' right to the inviolability of the home.

The General Court's assessment

The General Court concluded that the Commission had sufficient evidence to suspect a concerted practice relating to the exchange of information on (i) discounts obtained on the supply markets for certain everyday consumer products and (ii) prices for the sale of services to manufacturers of branded products. By contrast, the Court found that the Commission had insufficient evidence to justify inspections on alleged exchanges of information concerning the future commercial strategies of the dawn raided companies. In this respect, the Commission's suspicions mainly stemmed from the fact that in 2016, a director of the Casino group had attended a meeting organized by Intermarché during which the latter presented its commercial priorities. However, as the General Court noted, the Casino director had attended the meeting in question as part of his functions within INCA, and not as a representative of Casino, meaning that it could not be established that Casino had "accepted" the disclosure of confidential information by Intermarché. Moreover, the information discussed during the meeting was general in nature and was "*genuinely public*" within the meaning of the Commission's guidelines on horizontal cooperation agreements, as the attendees included over 400 suppliers, as well as journalists, and received coverage in specialized newspapers. The General Court thus concluded that the Commission could not validly form a suspicion of anticompetitive information exchange based on such information.

The General Court therefore upheld the claim on the violation of the right to the inviolability of the home as regards the second suspected infringement and annulled the inspection decisions relating to this part. This could, in turn, impact the pending

appeals filed by Casino and Intermarché against another Commission investigation regarding alleged information exchanges, which was initiated following the challenged 2017 dawn raids.

Interestingly, these partial annulment decisions arise in the context of increased scrutiny from French Courts on the legality of decisions authorizing competition authorities to carry out dawn raids. In two judgements issued on July 8, 2020 and October 7, 2020, respectively, the Paris Court of Appeals (i) annulled a 2014 search warrant authorizing the conduct of dawn raid on Whirlpool France's premises, both due to a breach of the company's right to an effective remedy and because the search warrant was largely based on illegally collected evidence,[2] and (ii) annulled a 2019 search warrant issued against Swarovski, ruling in particular that the evidence presented by the French Competition Authority ("**FCA**") was weak and could not support sufficient presumptions of anticompetitive practices.[3]

The French *Tribunal des Conflits* confirms the jurisdiction of the Paris Court of Appeals to rule on confidentiality waivers in public versions of French Competition Authority decisions

On October 5, 2020, the French *Tribunal des Conflits* confirmed that the Paris Court of Appeals had jurisdiction to rule on the appeal lodged by Google against an FCA interim measures decision, in which Google alleged that the FCA had breached its right to the protection of business secrets by publishing information that had previously been granted confidential treatment by the investigation services.[4]

In France, the *Tribunal des Conflits* is in charge of adjudicating possible conflicts of jurisdictions between administrative and civil courts. The *Tribunal*'s ruling relates to Decision no. 19-MC-01 issued by the FCA on January 31, 2019, in which the FCA found that certain practices implemented by Google with respect to Amadeus (a company offering directory enquiry services), potentially amounted to an abuse of dominant position. The FCA therefore ordered Google to implement four sets of interim measures aimed at clarifying the rules of its advertising service *Google Ads* and the suspension of advertisers' *Google Ads* accounts.[5]

On appeal before the Paris Court of Appeals, Google claimed that the interim measures imposed by the FCA were disproportionate and should consequently be annulled. In addition, Google asked the Court of Appeals to order the FCA to publish a new version of the interim measure decision, as the version published on January 31, 2019 disclosed several Google business secrets that had been granted confidential treatment by the FCA investigation services. According to Google, by failing to protect its business secrets in the public version of the decision, the FCA's *Collège* had frustrated the purpose of the protection granted during the investigation phase.

In a ruling dated April 4, 2019, the Paris Court of Appeals mostly upheld the interim measures, but held that it did not have jurisdiction to decide whether the FCA's *Collège* had indeed deprived the applicable rules on the protection of business secrets of their effectiveness nor did it have jurisdiction to order the publication of a new

[2] Paris Court of Appeals, ruling of July 8, 2020, no. 19/16854.

[3] Paris Court of Appeals, ruling of October 7, 2020, no. 19/12686.

[4] *Tribunal des Conflits*, ruling of October 5, 2020, no. 4193.

[5] FCA Decision no. 19-MC-01 of January 31, 2019, regarding a request for interim measures filed by Amadeus, available at: https://www.autoritedelaconcurrence.fr/sites/default/files/commitments//19mc01.pdf.

version of the FCA's decision.[6] As a result, Google filed a claim before the *Conseil d'Etat* (the highest administrative court in France), which also declined jurisdiction and referred the case to the *Tribunal des Conflits*. According to the *Conseil d'Etat*, the publication of an FCA decision cannot be considered separately from the decision itself; therefore, the jurisdiction of the Paris Court of Appeals' should extend to such matters.[7]

In its October 5, 2020 decision, the *Tribunal des Conflits* essentially upheld the *Conseil d'Etat*'s reasoning, and held that challenges relating to the publication of an FCA decision should be heard by the Paris Court of Appeals. In the meantime, the FCA has not taken any steps to remove Google's business secrets from the public version of the decision. Interestingly, however, the FCA has now modified its practice in some cases and tends to ask the Parties to identify their business secrets prior to the publication of antitrust decisions.

The Paris Court of Appeals confirms the French Competition Authority decision imposing interim measures on Google to protect copyright-related rights of online news publishers

On October 8, 2020,[8] the Paris Court of Appeals dismissed the appeal brought by Google against an interim measures decision issued by the FCA on April 9, 2020 in favor of publishers unions *Syndicats des éditeurs de la presse magazine and Alliance de la presse d'information générale*, and news agency *Agence France Presse*.[9] It thereby approved the FCA's third interim order against the tech giant in a decade. Pending the FCA's decision on the merits, the Court of Appeals' order addresses Google's refusal to engage in negotiations with news publishers and agencies to determine an adequate remuneration for the exploitation of their copyright-related rights.

Background

In April 2019, in order to address the structural crisis faced by the press industry, particularly as a result of digitization, the European Union adopted the Copyright Directive,[10] which created a *sui generis* exclusive right for news publishers to authorize (or prohibit) the reproduction, communication and public availability of their content.[11] As a result, extracts of protected content can no longer be displayed by information society services without prior authorization from news publishers, including an agreement on their remuneration or lack thereof.[12] These rules were transposed into French law by Law no. 2019-775 of July 24, 2019, which came into force on October 24, 2019 (the "**French Law**").[13]

A month before the entry into force of the French Law, Google announced that it would only continue to display the protected content of publishers who had agreed to grant it a free license for said display. This prompted complaints to the FCA by news

[6] Paris Court of Appeals, ruling of April 4, 2019, no. 19/03274.

[7] *Conseil d'Etat*, ruling of March 30, 2020, no. 429279.

[8] Paris Court of Appeals, ruling of October 8, 2020, no. 20/08071.

[9] FCA Decision no. 20-MC-01 of April 9, 2020, regarding requests for interim measures filed by the *Syndicat des éditeurs de la presse magazine*, the *Alliance de la presse d'information générale* and others and *Agence France-Presse*.

[10] Directive (EU) 2019/790 of the European Parliament and of the Council of April 17, 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (the "**Copyright Directive**").

[11] Article 15 of the Copyright Directive.

[12] The display of hyperlinks and isolated words or very short extracts is however excluded from that protection.

[13] The law resulted in the creation of articles L.218-1 to L.218-5 of the French Intellectual Property Code.

organizations, quickly followed by the interim measures decision of April 9, 2020. These interim measures, which are applicable until the FCA issues a decision on the merits, require Google to negotiate in good faith with any news publishers and agencies that request remuneration for the use of their protected content. In addition, during negotiations, Google must refrain from altering the referencing of the protected content on its search engine. Google also cannot undermine the effects of negotiations by requiring publishers to use some of its services or otherwise affect its other economic relations with publishers.

On appeal, the Court considered that the conditions required to impose interim measures had been met and therefore largely upheld the measures.

The Court of Appeals' assessment

First, the Court considered, in line with the challenged decision, that Google's unilateral decision to change its display policy shortly before the entry into force of the French Law did amount to the imposition of unfair trading conditions under Articles L. 420-2 of the French Commercial Code and 102(a) of the TFEU. In this respect, the Court rejected Google's argument that it had merely made use of short extracts, which are excluded from the protection granted by the Copyright Directive. The Court held that Google could not rely on this exception as a general rule to avoid negotiations with news publishers.

Second, the Court found that Google's conduct was likely to negatively impact both (i) news publishers and agencies, observing, in particular, that the removal or demotion of content had caused a sharp decrease in traffic for publishers who had refused to license their protected content for free, and (ii) those of Google's competitors who had agreed to remunerate news publishers for the use of their content.

Third, the Court confirmed the existence of a risk of serious and immediate damage to the press sector. Google's conduct indeed forced news publishers to choose between losing financial resources by granting Google free licenses or forgoing a large share of their online revenues as a result of demotion, frustrating the very purpose of the French Law.

As a result, the Court considered that the interim measures were necessary to guarantee equitable transaction conditions until the adoption of a decision on the merits.

In its defense, Google notably claimed that the interim measures were disproportionate. In particular, it contended that the measures wrongly granted publishers a guaranteed right to remuneration and were structural in nature, altering its gratuity-based business model and infringing its fundamental freedoms. However, the Court rejected these arguments and found that the FCA did not impose any obligations of payment. While the interim measures require Google to make an offer for adequate, objective and transparent remuneration, said remuneration can be equal to zero should the content not generate revenues or require any particular investments. The Court here appears to establish a subtle, albeit arguably artificial, distinction between the obligation to pay content providers, and the obligation to extend a binding offer for the remuneration of content.

The Court therefore confirmed the analysis of the FCA, modifying only slightly the fifth interim measure[14] to clarify that the injunctions are without prejudice to Google's right to roll out enhancements, as long as it does not directly or indirectly harm copyright-related rights holders.

Interim measures as a solution to the difficulties of regulating digital markets?

Over the past few years, regulators across Europe have engaged in an in-depth discussion about how to effectively regulate digital markets. Competition authorities often struggle to intervene before market conditions become too distorted and before dominant companies tip markets. One of the solutions often put forward is

[14] The fifth measure ordered Google to leave the publishers' referencing, ranking, and displays unaltered during the three-month negotiation period.

to make greater use of properly designed interim measures. This was recommended, for instance, by the UK[15] and German Expert Panels.[16] The European Commission has certainly heard these calls, as evidenced by the fact that, last year, it imposed interim measures for the first time in nearly two decades.[17] Executive Vice-President Vestager also indicated that the Commission would not hesitate to impose interim measures or remedies that go beyond cease-and-desist orders.[18]

For its part, the FCA has already been strongly relying on interim measures. Since 2007, it adopted 16 interim measures orders, three of which were ordered against Google.[19] Occasionally, these decisions go further than mere cease and desist orders, and the latest FCA order is particularly far-reaching. Indeed, it requires Google to engage in negotiations, which must result in a fair offer for remuneration, and during which Google is not permitted to demote protected content.

Following the decision, Google announced that its priority remained to reach an agreement with French news publishers. Failure to comply with the interim measures would expose Google to fines of up to 10 percent of its global turnover, and daily fines of up to 5 percent of its daily global turnover until it complies with the injunction.

On November 19, 2020, although negotiations are still ongoing with a number of publishers, Google announced that it had come to an agreement with several major French news organisations.[20]

The French Competition Authority consults on commitments offered by Carrefour/Tesco in joint purchasing agreement investigation

Following various investigations in the retail sector,[21] the FCA opened another investigation to assess the joint purchasing agreement concluded in August 2018 between Carrefour and Tesco.[22] In this context, in October 2020, the FCA received commitment proposals from the two distributors, redefining the scope of their cooperation on private labels.

The FCA's competition concerns

The Carrefour/Tesco agreement focuses on two areas: (i) the joint provision of international services for the benefit of suppliers, and (ii) the joint purchase of private label products, which is the core subject of the FCA's investigation.

According to the FCA, the upstream market for the supply of private label products is characterized by contractual conditions that are typically unfavorable to suppliers (as contracts with distributors usually have a short duration and contain no exclusivity or volume commitment) and limit their market power. Moreover, a significant proportion of suppliers are small and medium companies, and sometimes very small businesses ("*très petites entreprises*" or "*TPE*"), which are particularly exposed to the changes in trading conditions that

[15] Report of the Digital Competition Expert Panel chaired by Professor Jason Furman, *Unlocking digital competition*, March 13, 2019, pp. 20 and 110.

[16] Report by the Germany Competition Law 4.0 Expert Panel, *A new competition framework for the digital economy*, September 9, 2019.

[17] Commission Decision of October 16, 2019 in case AT.40608, *Broadcom*.

[18] Answer given by Executive Vice-President Vestager on behalf of the Commission on April 6, 2020, to Parliamentary question number E-000591/2020.

[19] In addition to the case at hand, *see* FCA Decision no. 19-MC-01 of January 3, 2019, regarding a request for interim measures filed by Amadeus and FCA Decision no. 10-MC-01 of June 30, 2010, regarding a request for interim measures filed by NavX.

[20] Le Monde, *Droits voisins : accord entre Google et plusieurs médias français pour rémunérer les extraits d'articles dans le moteur de recherche*, November 19, 2020.

[21] In May 2018, following the communication of several (contemplated) joint purchasing agreements, the FCA opened an investigation into the agreements involving *Auchan/Casino/Metro/Schiever and Carrefour/Système U.*

[22] Law no. 2018-938 of October 30, 2018 (dubbed the "*Loi EGalim*") created Article L. 462-10 of the French Commercial Code, which grants the FCA the power to initiate *ex officio* proceedings in view of assessing the need for interim measures, with respect to joint purchasing agreements.

could result from the consolidation of Carrefour and Tesco's purchases, such as price decreases or drops in volume. As a result, the FCA considered that the Carrefour/Tesco agreement was likely to further weaken suppliers of private label products and reduce their capacity and incentive to invest and innovate, ultimately harming end consumers.

The proposed commitments

To remedy the FCA's concerns, Carrefour and Tesco offered several commitments aimed at redefining the scope of their cooperation on private label products. More specifically, Carrefour and Tesco offered, for a period of five years, to:

— exclude from the scope of the agreement (i) several groups of fruit and vegetables that are directly purchased from French and European producers and whose production network has become more fragile as a result of the COVID- 19 crisis, (ii) house plants and flowers from France and the European Union, and (iii) French and European lamb.[23] In addition, the Parties committed not to reduce the current proportion of annual purchases made within the EU in these product families by more than 20%;

— limit joint purchases in certain product groups (*e.g.*, bread, cotton, several types of cheese, and tomato preserves) to 15% of the French private label products market;[24]

— no longer exclude certain categories of companies from calls for tender to produce Carrefour and Tesco's private label products, *i.e.*, small and medium businesses for Carrefour and companies with an annual turnover of less than 3 million dollars for Tesco.[25]

Third parties (*i.e.*, suppliers, competing retailers, trade associations, and consumer protection associations) may submit their comments on the proposed commitments until November 9, 2020 at the latest. Should the FCA consider that these commitments (potentially supplemented and amended) are likely to remedy its competition concerns, it may make the commitments mandatory and close the case.

[23] Article 3.2 of the proposed commitments.

[24] Article 4.1 of the proposed commitments.

[25] Article 5 of the proposed commitments.

CONTACTS

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

François-Charles Laprévote
+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

Sophie Troussard-Fauré
+33 1 40 74 68 00
stroussard@cgsh.com

Maud Lesaffre
+32 2 287 2025
mlesaffre@cgsh.com

Maeva Lagoute
+33 1 40 74 68 00
mlagoute@cgsh.com

Sarah Aït Benali
+33 1 40 74 68 00
saitbenali@cgsh.com

Jeanne Lévy-Bruhl
+32 2 287 2226
jlevybruhl@cgsh.com

Clarisse Ouakrat
+33 1 40 74 69 93
couakrat@cgsh.com

Ségolène Allègre
+32 2 287 2171
sallegre@cgsh.com

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