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Insights

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SUMMARY

Welcome to the Litigation Gazette. Each quarter, BCLP's Paris team will keep you informed of the main litigation news in competition law, commercial litigation, labor law, IP/IT/Data and compliance.

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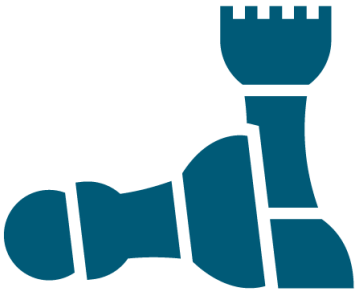

COMPETITION DISTRIBUTION

ACTION BY THE MINISTER OF THE ECONOMY ON THE BASIS OF SIGNIFICANT IMBALANCE: THE JURISDICTION OF THE FRENCH COURTS CONFIRMED BY THE COURT OF JUSTICE

In a noteworthy decision of December 22, 2022, the Court of Justice of the European Union ("CJEU") ruled, in response to a preliminary question referred by the Paris Court of Appeal, that an action brought by the Minister of the Economy (the "**Minister**") based on significant imbalance does not fall within the scope of the jurisdiction rules established by the "Brussels I bis" Regulation (No 1215/2012 of December 12, 2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

This decision definitively settles the question, debated for a long time, of the competent jurisdiction to hear this action: it must necessarily be the French courts.

A unique feature of French law on restrictive practices allows the Minister to bring a company before the courts when he considers that the company has submitted or attempted to submit another party "to obligations creating a significant imbalance in the rights and obligations of the parties" (Articles L.442-1 and L.442-4 of the French Commercial Code).

The actions carried out on this basis by the Minister have mainly concerned large-scale retailers and online platforms, which are often companies with an **international dimension**. Therefore, the question of the competent jurisdiction quickly arose as soon as the case in question had a **foreign element**.

UNTIL NOW, THE JURISDICTION OF THE FRENCH COURT WAS BASED ON THE APPLICATION OF EUROPEAN JURISDICTIONAL RULES

For a long time, **the debate revolved around the question of whether the Minister's action should considered as relating to a contract or to tort under European jurisdiction rules** (Brussels Convention, and subsequently, Brussels I and Brussels I bis Regulations). Thus, in numerous disputes, the companies being prosecuted have argued a contractual qualification, invoking the jurisdiction of the courts of the state in which they are domiciled or invoking the clauses of the disputed contract designating a foreign or arbitral jurisdiction against the Minister. On the other hand, the Minister, not being a party to the contract, argued that his action was necessarily in tort.

Case law has consistently sided with the Minister's position, **qualifying his action as "quasi-delictual" within the meaning of the aforementioned European provisions, and holding the jurisdiction of the French courts** as the court of the place where the damage occurred or the place where the damage was suffered (see, for example, Paris Court of Appeal, June 21, 2017, RG n°15/18784).

THE APPLICABILITY OF EUROPEAN JURISDICTION RULES QUESTIONED SINCE THE MOVIC RULING OF THE CJEU

In a judgment of July 16, 2020, the CJEU held that the action of the Belgian Minister of Economy to cease unfair commercial practices fell within the scope of the "Brussels I bis" regulation, which concerns "civil and commercial matters" (CJEU, July 16th, 2020, Case C-73/19, *Movic*).

To reach this conclusion, the CJEU took into account, among other things, the fact that it was not demonstrated that the Belgian Minister had **(i)** "brought actions in the exercise of public powers", as he was in a procedural situation comparable to that of private individuals (who can bring an action before the court for the same condemnation and cessation requests), and **(ii)** "made any use of evidence collected by exercising [his] public powers".

A contrario, this ruling could suggest that this solution may not necessarily be applicable to the action referred to in Article L.442-4 of the French Commercial Code. Unlike his Belgian counterpart, the French Minister has the possibility of requesting the imposition of a civil fine and of submitting to the court evidence obtained through investigations or visits and seizures.

THE CONFIRMATION BY THE *EURELEC TRADING* JUDGMENT THAT THE MINISTER'S ACTION DOES NOT FALL WITHIN THE SCOPE OF "CIVIL AND COMMERCIAL MATTERS"

The opportunity to question the CJEU on the qualification of the Minister's action under the Brussels I bis Regulation quickly arose in the context of a dispute between the Minister and a purchasing center domiciled in Belgium, brought before the Paris Court of Appeal.

In February 2022, the Court of Appeal referred a preliminary question to the CJEU, asking whether the Minister's action "against a Belgian company, (ii) aimed at finding and stopping restrictive competition practices and condemning the alleged author of these practices to a civil fine, (iii) based on evidence obtained through its specific investigation powers" falls within the scope of Regulation "Brussels I bis" (Paris Court of Appeal, February 2, 2022, No. 21/09001).

In a very clear manner, the CJEU answered negatively, stating that this action does not fall within the scope of the concept of "civil and commercial matters", since:

- "The action at issue in the main proceedings, which aims to defend French economic public policy, was introduced on the basis of evidence obtained through on-the-spot inspections and document seizures", that is, through means that are exceptional compared to ordinary law; and
- The action at issue, in particular, seeks the imposition of a civil fine, which "can only be requested by the Minister responsible for the economy and the public prosecutor" (CJEU, 22 December 2022, Case C-98/22, *Eurelec Trading*).

THIS SOLUTION DEFINITIVELY CONFIRMS THE JURISDICTION OF THE FRENCH COURTS

What are the consequences of this decision?

- **On a legal standpoint** : the determination of the court having jurisdiction to hear the Minister's action, when he exercises his prerogatives as a public authority, no longer requires the "detour" of qualification within the meaning of the European rules of jurisdiction.
- **From a practical perspective** : the impact of the ruling should be limited, since the French courts will remain competent in accordance with the principle established by the Court of Cassation in cases where the applicability of European jurisdiction rules had not been raised: the Minister's action is "an autonomous action **whose knowledge is reserved for state courts with regard to its nature and object**" (see, for example, Cass. Civ. 1ère, 6 July 2016, n°15-21811).

However, the decision rendered by the CJEU has the merit of closing nearly 15 years of judicial debates. The Minister's actions based on significant imbalance, now purged of jurisdictional issues, can only be more effective and rapid.

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THE PARIS COURT OF APPEAL OVERTURNS THE €444 MILLION FINE IMPOSED BY THE FRENCH COMPETITION AUTHORITY FOR DISPARAGING AND MISLEADING DISCOURSE IN THE PHARMACEUTICAL SECTOR

On February 16th, the Paris Court of Appeals (the "**Court**") fully annulled the decision of the French Competition Authority (the "**FCA**") dated September 9th, 2020, imposing Novartis, Roche, and Genentech (the "**Laboratories**") a fine of **€444 million** for a collective abuse of dominant position in the market for age-related macular degeneration (the "**AMD**").

This judgement clarifies a complex issue in the pharmaceutical sector, to wit to what extent laboratories may, in a context of scientific uncertainty, publicly express themselves about competing products.

This new setback for the FCA follows a previous ruling by the Court substantially reforming, on October 6th, another of its sanction decisions against Apple for a fine of €1.1 billion. The judgement under review may thus be interpreted as a trend by the Court to adopt a more critical and uncompromising reading of the FCA's decisions.

CONTEXT OF THE CASE

As a reminder, Genentech laboratory developed:

- the Avastin, a drug marketed by Roche in 2005 with a marketing authorization ("**MA**") for the treatment of colorectal cancer, but not for the treatment of AMD;
- the Lucentis, a drug marketed by Novartis in 2007 with a MA for the treatment of AMD.

Despite the availability of Lucentis, ophthalmologists decided to prescribe Avastin to treat AMD, even though this drug did not have a MA for this treatment. Doctors used it because of its effectiveness on visual acuity and above all because of its **significant lower cost** (Lucentis being up to 30 times more expensive than Avastin at the time of the practices).

After noting (i) that the Laboratories held a collective dominant position due to their economic and legal ties (Novartis is a non-controlling shareholder of Roche, which is the parent company of Genentech) and (ii) that Avastin and Lucentis were substitutable because both were prescribed, in practice, for the treatment of AMD, the FCA considered that the Laboratories had abused their collective dominant position since:

- Novartis had disseminated a **denigrating discourse** to public authorities, healthcare professionals, the general public, and patients, motivated solely by the desire to preserve Lucentis's position, by unjustifiably exaggerating the risks associated with the use of Avastin

"off-label" for the treatment of AMD compared to the safety and tolerance of Lucentis for the same use (allegation n°1);

- and, together with Roche and Genentech, disseminated an **alarming**, even **misleading discourse** before the public and health authorities regarding the risks related to the use of Avastin to treat AMD, in order to unduly block or slow down initiatives taken by the public authorities aimed at securing its use for the treatment of AMD (allegation n°2).

In its judgement, the Court reassesses the legal substitutability between the two drugs in the market definition and revisits the conditions under which a discourse may be considered as disparaging or misleading, which it applies to the facts at issue.

LEGAL SUBSTITUTABILITY OF MEDICINES DETERMINE THE IMPACT ON THE MARKET OF THE PRACTICES AT ISSUE

The Court overturns the market analysis of the FCA by admitting that Avastin and Lucentis were "legally substitutable" only during the period prior to the adoption of the "Bertrand" Law of December 29, 2011.

The Court considered that the "Bertrand" Law prohibits the prescription of drugs for a specific treatment when there is an alternative drug on the market with a MA for that treatment. Since Lucentis has a MA for the treatment of AMD, unlike Avastin, the "Bertrand" Law created a "legal impediment" to the prescription of the latter drug in ophthalmology. Thus, as of December 30, 2011, the two drugs ceased to be "legally substitutable" on the market for the treatment of AMD.

Therefore, the Court indicates that its examination only concerns practices that may have affected the French market for the treatment of AMD, meaning "during the period from March 2008 to December 30, 2011", and implicitly rejects the potential existence of an anti-competitive practice after that date.

THE DISCOURSES REGARDING AVASTIN WERE NEITHER DISPARAGING NOR MISLEADING

As a preliminary matter, the Court confirms the FCA's jurisdiction to assess the discourses of the Laboratories relating to scientific arguments, but only to the extent that it controls that these statements do not distort - and are faithful to - the studies on which they are based. The FCA's analysis cannot lead to scientific or medical assessments.

In its analysis of the communication disseminated by the Laboratories regarding Avastin, the Court adopts an interpretation contrary to the FCA's one, to wit that the Laboratories did not exceed the limits of freedom of expression:

Regarding the first allegation, the Court assesses whether Novartis' communication campaign on the risks associated with the prescription of Avastin "off-label" was denigrating, based on (i) the

fundamental right of companies to freedom of expression, in accordance with Article 10 of the European Convention on Human Rights, as well as (ii) the legal test applicable to the qualification of denigration, which requires determining whether the litigious discourse was part of a general interest debate, based on sufficient factual basis, and if the tone of the discourse was moderate.

The Court rules that the communication was neither excessive nor imprudent and did not exceed the limits of freedom of expression, given that it:

- was part of a public interest debate on the substitutability of Avastin for Lucentis in the treatment of AMD, while Avastin did not have a MA for this indication;
- was based on a significant volume of evidence, namely scientific studies available, so that allegations regarding the possibility, even the probability, of a link between the use of Avastin and the appearance of more significant systemic side effects were credible;
- was neutral and did not lack moderation or prudence, as it was limited to purely objective observations.

Regarding the second allegation concerning the alarmist or misleading nature of the Laboratories' discourse before the public authorities on the risks related to the use of Avastin, the Court reached the same conclusion.

Again, it relies on the principle of freedom of expression, but also on the legal test applicable to the qualification of misleading information resulting from the ECJ's “Hoffman-Laroche” ruling of 2018, which is satisfied when the discourse (i) misleads the authorities and (ii) exaggerates, in a context of scientific uncertainty, the perception of the risks associated with the use of a medicine.

The Court considers that the Laboratories' discourse to public authorities did not exceed the limits of freedom of expression, and was not of a nature to exaggerate the perception of risks associated with the use of Avastin, since it:

- was part of a public interest debate and only aimed to draw the attention of the public authorities on the risks associated with the use of a drug that did not have a MA for this purpose;
- was based on published and known scientific studies, which could not deceive public authorities who were able to read them critically;
- was measured and contained no factual errors.

The Court further clarifies that it is irrelevant (i) whether the discourses were disseminated for commercial reasons or (ii) that Roche and Genentech did not intend to apply for a MA for Avastin to be indicated for the treatment of AMD, as a dominant undertaking can respectively act to defend its commercial positions and freely assess the opportunity to file a MA application.

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IP/IT/DATA

THE DESTRUCTION OF A DATA SERVER DOES NOT EXEMPT A HOSTING SERVICES PROVIDER FROM ITS ESSENTIAL OBLIGATION

Lille Commercial Court, January 26, 2023[1]:

Following the fire of one of its data centres in March 2021, France's leading hosting service provider had to cut off the electricity in the affected premises, thus making its client's websites inaccessible. The backups of its client's data were further completely and irretrievably destroyed. Both parties were at the time bound by virtual server rental as well as automatic backup service contract, the latter providing for the preservation and recovery of data of the dedicated server.

On 26 January 2023, the Lille Commercial Court ordered the hosting service provider to compensate one of its client for breach of its contractual obligations.

To condemn the hosting service provider, the judges noted that:

- The parties are bound by a contract of adhesion which is to be interpreted in favour of the client. It follows from the interpretation of the contractual provisions that the hosting service provider had to store the backup data in different location from the main server. By failing to do so (although it had the means to), the hosting service provider failed to fulfil its contractual obligations, including its obligation to do what is necessary to fulfil its obligations (pursuant to an *"obligation de moyens"* in French).

- The automatic backup service contract contained a force majeure clause, which stipulated that neither party can be held responsible for any failure linked to a case of force majeure, e.g. a fire. As per the judges' findings, this clause is deemed unwritten, since it has the effect of releasing the hosting service provider from its commitments in the event of any disaster, including a fire. The primary interest of the backup contract is however to ensure that the hosting service provider makes backup copies, particularly in the event of fire. Hence, this obligation constitutes an **essential obligation** which the hosting service provider cannot contractually override.

- The general T&C's – to which the client agreed – provided for a limitation of liability to the amount of the sums paid by the client in return for the services affected during the six months preceding the compensation claim or to the direct loss suffered by the client if lower. The clause is deemed invalid on the grounds that it grants the hosting service provider an unjustified advantage, thus bringing about a significant imbalance between each party's obligations in the absence of any consideration for the client. As a reminder, Article 1171 of the Civil Code provides that "In a contract of adhesion, any non-negotiable clause, determined in advance by one of the parties, which creates a significant imbalance between the rights and obligations of the parties to the contract shall be deemed unwritten".

This decision could pave the way for new claims for compensation against the hosting service provider.

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CAN AN E-COMMERCE PLATFORM BE FOUND GUILTY OF COUNTERFEITING BECAUSE OF THE PRODUCTS PUT ONLINE BY THIRD-PARTY SELLERS?

CJUE, December 22, 2022 (Joined Cases C-148/21 and C-184/21)[2]

In a dispute between famous luxury shoe brand and major online marketplace operator, the Court of Justice of the European Union had to rule on the notion of use within the meaning of Article 9 of Regulation (EU) 2017/1001[3], paving the way for potential liability of online marketplaces.

The French designer known for his red-soled shoes has filed a claim against the said operator for infringement of its trademark rights by posting sales advertisements on its online marketplace relating to red-soled shoes without the trademark holder's consent.

By way of preliminary reference, the CJEU is asked to determine whether the operator of an online marketplace, which acts as intermediary offering professionals to use an online platform, in addition to its own offers for sale, is itself using a sign identical to the registered trade mark, where the contested product bearing that sign is offered for sale by third party sellers on that same marketplace.

THE ONLINE MARKETPLACE OPERATOR IS A "HYBRID" MARKETPLACE

The Court held that the operator of an online marketplace is likely to be regarded as itself using a sign identical to a registered trade mark, in respect of sales advertisements by third party sellers, if a reasonably well-informed and reasonably observant user can establish a link between the services offered by the platform and the mark.

This finding is based on the below:

- **On the notion of use**: the Court recalls that the notion of use implies active conduct on the part of the person concerned, in particular offering infringing goods, placing them on the market or holding them for these purposes (Article 9(3)(b) of Regulation (EU) 2017/1001). In the case of a marketplace, this active conduct is understood as the use of the sign in the context of its **own commercial communication**. In a previous decision involving the web giant, the Court held that the fact of creating the technical conditions necessary for the use of a sign and being paid for that service does not mean that the party offering the service itself uses the sign. We consider that this rationale is still valid. In the aforesaid decision, the operator's action was limited to stocking the infringing products (CJEU, 2 April 2020, *Coty Germany*, C-567/18[4], §43).

- **On the user's perception**: in order to determine whether the use of the contested sign occurs in the context of the operator's own commercial communication, one should assess whether a reasonably well-informed and reasonably observant user establishes a link between the services of the operator and the sign in question, thus leading the user to believe that the said operator markets the product bearing the sign in question **in his name and on his own account**. In this sense, it is important to consider the *manner* in which the advertisements are presented and the *nature and extent* of the services provided. This is where the facts diverge, with the e-commerce platform being a **hybrid marketplace**, compared to previous cases that may have addressed the liability of online marketplaces for posting counterfeit goods (e.g. CJUE, 12 juillet 2011, *L'Oreal SA and other v eBay International AG and Others, C-324/09*[5]). The said platform offers a uniform presentation of the offers published on its site, attaching its own logo, including on the advertisements of products offered by third parties. It further deals with issues relating to the shipping, storage and returns of products sold on its site, including those sold by third parties.

It is still up to the national courts (Belgium and Luxembourg) to decide the cases in accordance with the Court's decision.

TOWARDS A BROADER LIABILITY OF MARKETPLACES?

These conclusions only apply to cases in which the marketplace operator offers products sold in its own name and on its own account in addition to products offered by third parties, and therefore have limited impact. However, this decision should allow trademark holders to act against marketplaces directly, rather than having to identify each infringing practice, and its perpetrators, on the said platforms.

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THE END OF THE HOSTING SERVICES PROVIDER SAFE HARBOUR?

Paris Court of Appeal, March 3, 2023[6]

A French hosting service provider offers content storage services, which its clients may use from its website 1fichier.com. In order to make its services payable, the service provider has signed a contract covering payment services with one of the main French banks in January 2013.

It later appeared that some of the content hosted by the technical provider may infringe on a third party's intellectual property rights. The bank therefore terminated the contract, in accordance with the relevant contractual provisions on termination.

The hosting service provider filed a claim against the bank before the Commercial Court of Paris to declare the termination unfair, but its claim has been dismissed.

The Paris Court of Appeal handed over its decision on the validity of the termination in March 2023.

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RATIONALE OF THE CASE

In order to rule in favour of the respondent and declare the termination of the contract justified, the Court of Appeal noted that:

- The appellant claimed that it only acted as a hosting service provider, and as such could benefit from the safe harbour set forth in Article 6.I.2. of the "loi du 21 juin 2004 pour la confiance dans l'économie numérique (LCEN)"[7] – excluding its civil liability to a certain extent if it were to host unlawful content. The dispute does however not concern the search for tortious liability as established in the said law, but the **execution of contractual clauses** ;
- The contract contains a specific clause prohibiting the appellant to host unlawful content, e.g. infringement of works protected by an intellectual property right, under the penalty of termination by the cocontractor;
- In view of these contractual obligations, the court has to **determine whether the content stored by the appellant was unlawful**, as soon as the hosting and storage of such content amounts to a communication to the public. In light of the CJUE judgment of 22 June 2021 (C-682/18)[8],

the Court recognises that the appellant has played an indispensable role in making the illegal content available – the free sharing of this content being impossible otherwise. The appellant should further have acted deliberately. Relevant factors include e.g. "the circumstance that [the appellant], despite the fact that it knows or ought to know, in a general sense, that users of its platform are making protected content available to the public illegally via its platform, refrains from putting in place the appropriate technological measures that can be expected from a reasonably diligent operator in its situation in order to counter credibly and effectively copyright infringements on that platform" (§84 of the aforementioned judgment).

In the present case, the respondent notified the appellant twice of the illegal situation in which it found itself, and gave formal notice to cease this disturbance, failing which it would terminate the contract. As the appellant did not provide any proof of the implementation of technical measures as mentioned above, the termination is held valid.

PACTA SUNT SERVANDA

The main takeaway of this judgement is that hosting service providers cannot hide behind their hosting services provider's status, where the contract explicitly prohibits them to store and host unlawful content. It is important to keep in mind that the common contractual clauses requiring the contractor to guarantee the legality of information it stores (found in most of the IT services contract) can have a significant effect over the execution of the contract even if the legality of the content is not relevant for the IT services provider.

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COMMERCIAL LITIGATION

NOT OPENING A PRE-INSOLVENCY PROCEEDINGS IS NOT MISMANAGEMENT FAULT IN ITSELF

On 6 September, 2022, the Commercial Court of Aix-en-Provence reaffirmed the principle according which not requesting the opening of a pre-insolvency proceedings does not constitute a mismanagement fault (T. com. Aix-en-Provence, 6 Sept. 2022, no. 2020003532).

Following the opening of a judicial liquidation procedure, the liquidator summoned the company's manager under the ground of management having contributed to a shortfall of assets, based on the

fact that he had not requested the opening of a pre-insolvency proceedings of conciliation or ad hoc mandate prior to the opening of the insolvency procedure.

Under Article L. 651-2 of the French Commercial Code, the manager who contributed to the shortfall may be held liable for shortfall of assets. However, the Commercial Court rightly considered that the fact that the manager did not open pre-insolvency proceedings of conciliation or ad hoc mandate did not commit a mismanagement fault since these procedures are optional.

Indeed, the Commercial Court motivated its decision by stating that "as these procedures are optional, their lack of implementation cannot, in itself, be considered as a mismanagement".

The solution of the Aix-en-Provence Commercial Court is not new and has already been adopted from a higher court (*CA Lyon, 24 juillet 2014, n°13/07951*).

Some other decisions have ruled that the manager did mismanage in a situation where he did not open a pre-insolvency proceedings (*CA Douai, 29 Nov., 2012, no. 12/00803* ; *CA Douai, 4 Dec., 2013, no. 12/05585*). However, this solution may be explained because this fact was corroborated by other grounds for liability, namely the fact that the manager did not file the declaration that the company was in shortfall of assets ("*état de cessation des paiements*") or because he was actually pursuing a loss-making activity of his company.

As stated by a scholar, not opening a pre-insolvency mechanisms should not in itself qualify as a mismanagement fault but must indeed be cumulated and corroborated by other faults in order to be characterized as such (*C. DELATTRE, Revue des procédures collectives no. 6, comm. 148, Nov., 2014*). This is the meaning of the Commercial Court of Aix-en-Provence's decision, by stating that not opening pre-insolvency proceedings which are optional could not, *"on its own"*, be considered as a mismanagement fault

The solution of the Commercial Court of Aix-en-Provence may be welcomed as it confirms this position, but also because it may reassure managers who may sometimes open pre-insolvency procedures in situations where they are not always appropriate, and wrongly thinking that those procedures necessarily protect from any sanctions. In this respect, it has been ruled that the use of such measures cannot justify the absence of personal sanctions (*CA Versailles, 29 October, 2009, no. 09/030028*). Similarly, the opening of a preventive procedure facing an aggravated situation cannot exonerate the manager from its liability (*CA Douai, 27 April, 2017, no. 16/02512*

Finally, it should be reminded that opening pre-insolvency proceedings outside the legal criteria, and in particular when the company is shortfall of assets ("*état de cessation des paiements*"), fall within the meaning of Article L.651-2 of the French Commercial Code (*T. com. Valenciennes, 12 June, 2017, no. 2013004412*).

In conclusion, although not requesting the opening of pre-insolvency proceedings cannot be considered as a mismanagement fault *per se*, it may be asserted from this decision, that it could

nevertheless be qualified as such if it is corroborated with other wrongful facts (e.g. not filing a declaration by which the company is in shortfall of assets ("*état de cessation des paiements*"), pursuing a loss-making activity…).

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FRENCH LAW ON CORPORATE DUTY OF CARE: THE IMPACT OF THE FIRST TWO DECISIONS ON THE SUBJECT

THE FRENCH LAW ON CORPORATE DUTY OF CARE

The French law of March 27, 2017 on the corporate duty of care of parent and instructing companies requires large companies with headquarters in France to establish, publish and implement a due diligence plan containing reasonable measures to identify risks and prevent serious harm to the health and safety of individuals and the environment, resulting from the company's activities and those of the companies it controls, as well as from the activities of subcontractors or suppliers with whom it has an established business relationship, when these activities are related to that relationship.

In case of alleged failure to comply with these obligations, the subject company may be given formal notice. If the company does not take the appropriate measures to remedy these breaches within three months, any person with an interest in the matter may bring an action before the Paris Judicial Court to order the company to comply with its obligations, if necessary under penalty. The company may also be held civilly liable in order to repair the damage that the compliance with its due diligence obligations would have prevented.

At this stage, several formal notices and legal actions have been initiated on the basis of the French law on corporate duty of care. All industry sectors are targeted: energy, water, banking, distribution, services, transport and cosmetics. To date, no court has had the opportunity to rule on the quality of a vigilance plan and it is not yet possible to establish a due diligence's "standard".

On February 28, 2023, the Paris Judicial Court ruled for the first time on the application of the French law on corporate duty of care in the context of an emblematic case opposing several NGOs an oil major

The Court had been seized in 2019 as regards the construction of two major projects. The NGOs claimed that there was a serious risk of environmental, climate and human rights violations, in violation of the French law on corporate duty of care. Following a formal notice sent to the company, the NGOs asked the Court to order the company to comply with the terms of the law "with regard to the inadequacies of its plan, its effective implementation and its publication" and to suspend the construction of the disputed projects.

The Court ruled that the NGOs' claims were inadmissible because of the lack of a prior formal notice. Nevertheless, these decisions provide insight on the judicial interpretation of the corporate duty of care's concept and the juge's authority in enforcing the law.

These decisions emphasize that the content of the obligations relating to the due diligence plan provided for by the law is "broad", in the absence of an implementing decree and clarification of the text on the applicable standards and the typology of the rights concerned. The control of the respect of these obligations falls to the judge who must assess the "reasonable character" of the measures provided for by the due diligence plan, a notion that the judge considered "imprecise, vague and flexible".

After noting that "the legislator did not intend to give a precise outline to the general measures that are imposed on certain companies within the framework of the duty of care", the judge specified that the legislator expressed his intention that this due diligence plan be drawn up within the framework of a co-construction and a dialogue between stakeholders and companies. This is the reason why the law has instituted an obligation of formal notice prior to referral to the judge, which must be "sufficiently firm and precise to allow the identification of the breaches attributed to the plan" and to "institute a compulsory phase of dialogue and amicable exchange during which the company may respond to the criticisms made against its vigilance plan and make the necessary changes".

In this case, the judge noted that the formal notices dated June 24, 2019 sent by the NGOs to the oil major were related to the year 2018 due diligence plan, whereas the company has since published new due diligence plans for the years 2019, 2020 and 2021 thus amending to 2018 due diligence plan. Consequently, the judge considered that the claims made by the NGOs' relating to the 2021 due diligence plan had not been the subject of a prior formal notice in violation of the law's provisions e, and therefore declared the NGOs' claims inadmissible.

In addition, the judge underlined the limits of its authority in the context of an action brought on the basis of the French law on corporate duty of care. While the judge ruling in summary proceedings may order the company to draw up, publish or effectively implement a due diligence plan, he may not assess the reasonableness of the measures adopted by the plan, "when such an assessment requires an in-depth examination of the elements of the case, which is within the sole power of the judge on the merits".

As these decisions do not rule on the merits of the dispute, only the upcoming decisions of the Paris Court of First Instance, which will be rendered on the merits of the case, will shed light on the manner in which the judges will assess the compliance of companies with their obligations under this law.

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THE FRENCH-STYLE CLASS ACTION COULD SOON EVOLVE THROUGH A RECENT BILL REFLECTING THE EUROPEAN DIRECTIVE OF NOVEMBER 25, 2020

THE FRENCH CLASS ACTION HAS BEEN THE SUBJECT OF AN ACCUMULATION OF TEXTS SINCE ITS CREATION

Class action was introduced in France in 2014 with a very strict framework as regards the associations with standing to act and the nature of the damages that can be compensated. In 2016, it was extended to health, environmental, personal data protection and workplace discrimination disputes and then, in 2018, to housing tenancy disputes. Whatever the class action considered, two stages follow one another: a judgment on the liability of the professional and the determination of the class concerned, then the implementation of this judgment via membership of the group (the "opt-in" system) and individual compensation for damages. However, there are still differences between the various sectoral class actions in terms of the definition of standing, the nature of the damages that can be compensated, whether or not there is a compulsory prior formal notice procedure, and the procedural methods for compensating damages.

A MITIGATED EVALUATION OF THE FRENCH CLASS ACTION REGIME SO FAR

The introduction of the French class action regime has been closely monitored with the setting up of a mission of information on the outcome and prospects of class actions. Its conclusions were presented in June 2020 and the report described the results of this new procedure as disappointing.

On the one hand, the report highlighted the low number of class actions implemented: 21 class actions filed since 2014, including 14 in the consumer field and 3 in health. By the end of 2022, there were be 32 class actions, 20 of which in the consumer fiel. On the other hand, the report noted that no professional had yet been held liable in a class action. Since then, in a non-final judgment of January 5, 2022, the Paris Court has held liable a company operating in the health sector.

Associations and professionals have multiplied the number of procedural incidents regarding the statute of limitations, the conditions required, the presentation of individual cases and the factual and legal arguments, and requests for a provision or the communication of documents. These issues alone illustrate an uncertain scope of application and an excessive complexity of the French class action mechanism.

The use of group mediation has led to the signing of approved settlement agreements in several cases.

Practitioners have tended to favour collective actions grouping together a large number of individual complaints without the need for consumers to turn to an association.

The European directive was adopted on November 25, 2020 (Directive (EU) 2020/1828 of the European Parliament and of the Council of November 25, 2020 on representative actions to protect the collective interests of consumers and repealing Directive 2009/22/EC). This text is similar to the French class action regime in several respects. In particular, it reserves standing to qualified entities and follows the two-phase scheme of the French model. The directive extends its scope to sectors not covered by the French class action regime, such as financial services. On January 27, 2023, France was censured by the European Commission for not having transposed the directive within the required timeframe.

AS REGARDS THE RECENT PROPOSED BILL ON THE LEGAL REGIME FOR CLASS ACTIONS

This recent French bill was submitted on December 15, 2022. It was adopted by the Commission for Constitutional Law, Legislation and the General Administration of the Republic on February 17, 2023 and the Council of State issued its advisory opinion on February 9, 2023. The substantially amended bill was adapted by the French National Assembly in open session on March 8, 2023 and sent to the Senate for discussion.

As it stands, the provisional text provides for the inclusion of the procedural regime for class actions in an ad hoc uncodified law; the extension of the standing to all approved associations, representative trade unions, associations declared for the last two years "whose statutory purpose includes the defense of interests that have been harmed" and victims' associations grouping together at least 50 natural persons, 10 companies or 5 territorial authorities; full compensation for damages and the elimination of the procedural step of a mandatory formal notice in environmental, discrimination and data protection matters.

The text encourages the implementation of a reinforced publicity of the actions undertaken and proposes the maintenance by the Ministry of Justice of a public register of the class actions in progress before all the jurisdictions. The proposal provides that the public prosecutor may initiate or intervene in a class action.

The text also provides for the creation of a civil penalty that can only be requested by the public prosecutor's office, relating to a "breach [of the professional's] legal or contractual obligations resulting from the exercise of a professional activity" and assigned to the public treasury. For a legal entity, the amount of the fine may be up to 3% of the turnover before tax.

The proposal also provides that the judge may decide to charge the costs of the proceedings to the State.

The proposal specifies the jurisdiction "in all matters" of the specialized judicial courts and requires the submission of a report on the evaluation of the reform of class actions' legal regime four years after its entry into force.

Finally, the proposal ensures full transposition of the directive. Based on a principle of reciprocity, it opens up standing for class actions to entities entitled to bring representative actions in other Member States. Criteria are provided for the authorization of French associations to bring representative actions in other Member States. Finally, two changes have been made to the procedural regime of the French class action in order to meet the requirements of the EU directive: the absence of an obligation to present individual cases when the class action seeks to put an end to the breach and a mechanism to ensure that there are no conflicts of interest between the third party funders of the class action and the defendant.

It remains to be seen whether this latest bill transposing the directive will be enough to renew class action in France.

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LABOR LAW

ABANDONMENT OF POSITION AND PRESUMPTION OF RESIGNATION - AN IMPLEMENTATION THAT RAISES MANY QUESTIONS

Law No. 2022-1598 of 21 December 2022 on emergency measures relating to the functioning of the labour market with a view to full employment created a new method of terminating an indefinite-term employment contract: the presumed resignation of an employee who voluntarily abandons his or her job/position.

The new Article L.1237-1-1 of the Labour Code, integrated into the section devoted to the termination of the indefinite-term employment contract at the initiative of the employee and more particularly into the sub-section relating to resignation, thus states that "the employee who has voluntarily abandoned his or her position and does not return to work after having been given formal notice to justify his or her absence and to return to his or her position, by registered letter or by letter delivered personally against a receipt, within a period set by the employer, is presumed to have resigned on the expiry of this period[9] ".

The voluntary abandonment of a position by the employee is therefore now presumed to be a resignation.

The legislator's stated objective is to combat the "practice" of certain employees who, instead of resigning, abandon their positions in order to force their employer to dismiss them and thus benefit from unemployment compensation. The new provisions of the Labour Code are therefore intended to deprive employees who have voluntarily abandoned their positions and are therefore presumed to have resigned of the benefit of unemployment insurance.

According to a study published by the DARES (Ministry of Labour), in the first half of 2022, 71% of dismissals for serious or gross misconduct in the private sector were motivated by abandonment of position, which concerns approximately 123,000 people, 55% of whom registered with the national unemployment agency (« Pôle emploi ») in the three months following the termination of their employment contract.

While the objective of the new article L.1237-1-1 of the Labour Code is clear and assumed, its implementation - which can only take place once the decree has been published, which is announced for the end of March - raises questions.

What is abandonment of post? How is the voluntary nature of abandonment of position assessed? The concept of abandonment of position is generally invoked when an employee leaves work without explanation and justification, but legally it is not defined.

The Constitutional Council, which validated the conformity of Article L.1237-1-1 in a decision of 15 December 2022, emphasises that "abandonment of position cannot be voluntary if [...] it is justified by a legitimate reason, such as medical reasons [for example, hospitalisation rendering the employee unable to inform his employer], the exercise of the right to strike, the exercise of the right of withdrawal, the employee's refusal to carry out an instruction contrary to the regulations or his refusal of a unilateral modification of an essential element of the employment contract". While in some cases the employer may be aware of a possible legitimate reason for the employee to abandon his position, it is also possible that a legitimate reason exists of which the employer was not aware (discrimination, harassment, etc.).

What about the notice period of the employee presumed to have resigned? Unlike dismissal for serious misconduct, in the event of resignation, the employee is legally obliged to serve the notice period, unless the employer exempts him/her from doing so. Thus, in the case of a presumed resignation following an abandonment of position, the employee would be obliged to serve the notice period. In addition to being deprived of unemployment insurance, the employee presumed to have resigned, who is likely to fail to serve the notice period, is liable to be ordered to pay damages that may be claimed by the employer.

These are all questions that the courts will have to decide if employers take up this new method of termination.

As resignation is only presumed, the employee can try to overturn this presumption before the industrial court.

According to paragraph 2 of the new Article L.1237-1-1 of the Labour Code, the industrial court will have to rule "on the merits within one month from the date of referral to it", which is an ambitious timeframe given the level of congestion in some industrial courts.

As the employee is presumed to have resigned under Article L.1237-1-1, it is therefore up to him to fight this presumption by trying to rely on a legitimate reason justifying his abandonment of his position, thus discarding the voluntary nature of the abandonment of position necessary for the presumption of resignation. To do this, he could argue that he was unable to respond to his employer and return to work for reasons beyond his control, such as health reasons. He could also argue that the abandonment of his position was not voluntary but forced on the grounds that he was in a situation of harassment or that his overtime was not paid.

On the other hand, it is up to the employer to support this presumption by demonstrating factual elements that highlight the unequivocal and voluntary nature of this abandonment. The fact that the employee was previously refused a contractual termination, the absence of conflict or the employee's new professional situation, which quickly led to a new job, are elements that could be considered by the judges as elements characterising the employee's desire to abandon his position.

The industrial court will then have to rule on "the nature of the termination and its consequences". Article L.1237-1-1 does not determine the consequences of reversing the presumption. If the employee succeeds in overturning this presumption of resignation, the termination of the employment contract would probably be requalified as a dismissal without real and serious cause, entitling the employee to the various related indemnities (legal or conventional dismissal indemnity, indemnity in lieu of notice-period and related paid leave and damages in application of the Macron scale). If the employee also manages to show that the justification for abandoning his or her position is based on a breach of a discriminatory nature or on facts constituting harassment, the resignation could be reclassified as a null and void dismissal.

The implementation of this article by the employer therefore requires him to anticipate the risks of challenging the voluntary nature of this abandonment of position by the employee presumed to have resigned. All these precautions must also be taken when dismissing for serious misconduct an employee who abandons his position.

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COMPLIANCE

THE AFA PUBLISHES A PRACTICAL GUIDE TO INTERNAL ANTI-CORRUPTION INVESTIGATIONS

On 14 March 2023, the French Anti-Corruption Agency (AFA) published a guide to internal anti-corruption investigations, drafted in collaboration with the Parquet national financier (French financial prosecutor).

This guide, which is not binding, aims to "enlighten companies, whether or not they are subject to Article 17 of the Sapin II Act (...) on the design and implementation of an internal anti-corruption investigation system while respecting individual rights and freedoms".

It should be remembered that Article 17 of the Sapin II Act requires companies employing at least five hundred employees, or belonging to a group of companies whose parent company has its registered office in France and whose workforce includes at least five hundred employees, and whose turnover exceeds 100 million euros, to implement a whistleblowing system, and that the recent Waserman Act of 21 March 2022 amending Article 8 of the Sapin II Act also provides for a whistleblowing system, in particular for companies with at least fifty employees.

In practice, the internal whistleblowing system allows a company, regardless of its size, to pre-empt possible violations of company procedures, corruption or influence peddling and thus eliminate or minimise the risk of legal proceedings and damage to reputation.

This new guide describes the events that give rise to an internal anti-corruption investigation, before highlighting the key points to bear in mind when conducting an investigation and addressing the question of the follow-up to be given to the investigation.

The AFA begins by pointing out that the events that give rise to the problem may be internal or external to the company, as managers may be informed by the receipt of a warning resulting from an audit, or even by the opening of a procedure by a prosecuting authority.

Prior to conducting the internal investigation, the AFA recommends defining and formalising in a document the internal procedure to be followed. In a group of companies, a "good practice" according to the AFA may consist of adopting an internal investigation procedure at the central level, which will then be adapted at the local level, taking into account the specificities. The AFA also highlights as a "good practice" the implementation of an "internal investigation charter" for employees so that they can be aware of their rights and the behaviour to adopt during investigations.

Once they are aware of the facts that give rise to the allegations, it is up to the governing bodies to decide whether to open an investigation. To do so, a "special or ad hoc committee" may be appointed with the participation of the heads of legal, internal audit, compliance, human resources or finance. The investigation can then be carried out internally by the company, but also with the assistance of a third party, in particular lawyers or a mixed team. In the latter two cases, the AFA

considers it appropriate to designate a "referent" who will be in charge of conducting the investigation and its follow-up.

During the course of the investigation, the AFA insists on the respect of certain guidelines and guarantees. Under no circumstances may evidence be gathered by illegal or unfair means or in a way that disproportionately infringes on the rights of individuals and individual and collective freedoms. The AFA strongly recommends that, at the very least, the investigation method followed, all the investigative acts carried out, as well as all the facts established and the elements collected be recorded in a report.

If the investigation report confirms the commission of criminal offences or breaches of company procedures and policies, it should lead to disciplinary action and/or legal proceedings.

Companies have no choice but to be particularly vigilant in this respect as late or partial transmission of information from the investigation may be considered as an aggravating factor in criminal proceedings. Following this investigation and the sanction, AFA recommends to the governing bodies to communicate anonymously on the results of the investigation in order to remind their employees of their "zero tolerance" policy.

In addition to the consequences of the internal investigation itself, the AFA emphasizes that these internal anti-corruption investigations are also an opportunity for companies to improve their anti-corruption programme in order to remedy the shortcomings highlighted by the investigation.

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This article was co-written with Trainees Clelia Lenti, Rebecca Loko, and Kevan Laurent.

Read January's issue.

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[1] Accessible at: https://www.legalis.net/jurisprudences/tribunal-de-commerce-de-lille-metropole-jugement-du-26-janvier-2023/

[2] Accessible at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62021CJ0148

[3] Accessible at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R1001

[4] Accessible at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62018CJ0567

[5] Accessible at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62009CJ0324

[6] Accessible at: https://www.doctrine.fr/d/CA/Paris/2023/CAPA1E87D241ED15DD7BDF3

[7]Accessible at: https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000801164 (restricted access)

[8] Accessible at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62018CJ0682

[9] As the draft decree stands, this minimum period should be 15 calendar days, which will begin to run from the first presentation of the formal notice sent by registered letter or letter delivered by hand against a receipt - delivery by hand to the employee, which seems materially difficult to envisage for an absent employee

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