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Insights

PARIS LITIGATION GAZETTE ISSUE 1

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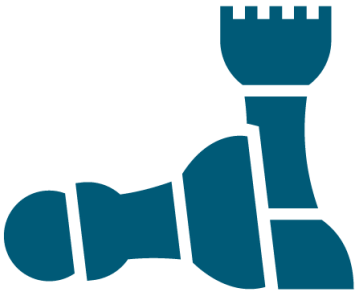
SUMMARY

Welcome to the first edition of 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.

In this edition, we cover:

- Competition Distribution
  - Differentiated general terms and conditions of sale
  - Opportunity to prosecute
- Labor Law
  - Scale of compensation still encountering resistance for dismissals without real and serious cause
- Commercial Litigation
  - Absence of statute of limitations on actions for the declaration of unfair terms
  - Amicable expertise in dispute resolution
- IP/IT/Data
  - CNIL fined DISCORD for failing to comply with the GDPR
  - CNIL fined CLEARVIEW AI in relation to facial recognition
  - Dereferencing of the Wish platform

If you wish to discuss any development, please do not hesitate to get in touch.



COMPETITION DISTRIBUTION

DIFFERENTIATED GENERAL TERMS AND CONDITIONS OF SALE: FRENCH SUPREME COURT SPECIFIES CONDITIONS OF SUPPLIER'S LIABILITY FOR FAILURE TO COMPLY WITH THEIR DUTY TO COMMUNICATE

The French Supreme Court ruled on in two cases dated 28 September 2022 on issues related to the differentiation of general terms and conditions of sale ("**GTCs**") by suppliers. While both cases involved a laboratory and the same purchasing grouping company ("**SRA**") within the pharmaceutical sector, there are key takeaways for all suppliers.

Background to the cases

One SRA, which acts as a buying agent on behalf of its member pharmacies, had asked two laboratories for their GTCs.

In the first case, the laboratory had communicated the GTCs that it had specifically established for SRA. In the second case, as it had not established differentiated GTCs for SRA, the laboratory had communicated the GTCs applicable to wholesalers.

In both cases, the SRA considered that it should benefit from the GTCs applicable to pharmacies, which had been previously established by the laboratories, and consequently invoked a breach of the duty to communicate.

Impact of the first decision (case no. 21-20357)

In the first decision, the main issue raised before the French Supreme Court concerned the supplier's justification for the differentiation between its different purchasers: did the supplier have good reasons to differentiate pharmacies from SRAs? If not, should it be considered that the communication of "unjustified" differentiated GTCs was likely to engage the supplier's liability for breach of its duty to communicate?

In this case, the French Supreme Court ruled out the supplier's liability, as the differentiation made was justified by the existence of an "objective difference" between pharmacies and SRAs.

Impact of the second decision (case no. 19-19768)

In the second decision, the question was whether the supplier had failed in its duty to communicate and was liable by transmitting GTCs applicable to another category of purchasers.

To answer this question in the affirmative, the French Supreme Court examined which category of purchasers identified by the laboratory the SRA "*most closely fits*", based on the "*relations of the parties as a whole*". The Court found that the situation of the SRA had decisive similarities with the situation of independent pharmacies.

The reasoning will be of interest to all suppliers who draw up GTCs. They will have to be particularly careful when (i) determining the different categories of GTCs they draw up, which must be based on objective criteria and when (ii) communicating category-based GTCs to a purchaser who does not clearly fall into one or other of these categories. The communication by a supplier of "artificially" differentiated GTCs, and the communication of GTCs to a purchaser who does not clearly fall into one or other of the defined categories would engage its liability.

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THE FRENCH COMPETITION AUTHORITY REJECTS FOR THE FIRST TIME A COMPLAINT FOR ABUSE OF A DOMINANT POSITION FOR "LACK OF PRIORITY".

On 20 October, the French Competition Authority ("**the Authority**") rejected, on the grounds of "lack of priority", the complaint lodged by the Union des commerçants des loisirs et de la presse ("**Culture Presse**") against the La Poste group concerning an alleged abuse of a dominant position in the sector of the resale of postage stamps for franking.

This is the first rejection decision issued by the Authority after assessing the appropriateness of the prosecution, since Ordinance 2021-649 of 26 May 2021 transposed the ECN+ Directive[1] into Article L.462-8 of the French Commercial Code. The latter now allows national competition authorities to reject certain complaints considered to be of low priority. Rejection decisions may, however, be challenged by companies wishing to contest them.

Background of the case

On 13 December 2019, Culture Presse submitted a complaint to the Authority regarding practices implemented by La Poste. According to the referral, La Poste, which has a monopoly on the upstream market for the issue of postage stamps, would have treated tobacco shop operators more

favourably, and without justification, to the detriment of press merchants, even though these operators are in a similar situation on the market for the distribution of postage stamps.

Grounds for rejecting the complaint

According to the second paragraph of Article L.462-8 of the French Commercial Code, the Authority rejected Culture Presse's complaint for "lack of priority" in the light of the following grounds:

- The alleged practice would have only a limited economic impact on the market - the stamp being a uniform product and its resale price to the consumer being fixed;
- This type of practice has already been the subject of numerous decisions and case law at both national and European level;
- The referral does not raise any new questions;
- Its handling, for which the complainant has other means of redress before the national courts, would require the mobilisation of considerable internal resources which could be better allocated to other cases.

Conclusion

This decision is useful for companies that want to have a better understanding of the Authority's approach to deciding on the appropriateness of prosecution, even if it is still difficult to have a clear view of its assessment of the "priority" nature of the cases that will be submitted to it on a case-by-case basis.

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LABOR LAW

THE SCALE OF COMPENSATION FOR DISMISSALS WITHOUT REAL AND SERIOUS CAUSE, FINALLY VALIDATED BY THE COURT OF CASSATION, IS STILL ENCOUNTERING RESISTANCE

One of the great novelties of President Macron's first five-year term was the introduction in the Labor Code in 2017 of a scale of compensation for dismissals deemed without real and serious cause

(Article L. 1235-3 of the Labor Code). This scale is commonly referred to as the "Macron scale".

The purpose of this provision is to allow employers to have visibility as to the financial risk to which they are exposed in the event of the dismissal of an employee if this dismissal is deemed to be without real and serious cause.

This scale provides for a minimum amount and a maximum amount of compensation. These amounts are a multiple of the gross salary, which varies according to whether the company has more or less than 11 employees and according to the seniority of the employee on the date of dismissal.

However, this scale is not applicable if the dismissal is deemed void. This is the case, for example, of the dismissal of a protected employee without prior authorization from the labor inspectorate or sanctioning the exercise of a fundamental freedom such as the right of expression or actually occurring because of the state of health of the employee, his political opinions, his sexual orientation, his religion, etc. or for having denounced acts of harassment.

Before the entry into force of this scale, the labor courts could condemn employers to amounts much higher than the maximum amounts provided for by this scale.

Also, many employees' lawyers have tried to have this scale invalidated, invoking Article 10 of Convention 158 of the International Labor Organization or Article 24 of the European Social Charter, which provide for the benefit of employees dismissed without valid reason a right to “adequate and appropriate compensation for the damage”, which according to them the “Macron scale” would not allow. It is on such grounds that several Labor Courts and Courts of Appeal have authorized themselves to exceed the maximum amounts of compensation provided for in this scale for the benefit of unfairly dismissed employees.

The “Bareme Macron ” considered by the french supreme court as being compliant with international law …

On May 11, with the intention of putting a definitive end to this legal uncertainty, the Court of Cassation ruled that the "Macron scale" is in accordance with international law, and in particular with article 10 of convention 158 of the International Labor Organization, in that it allows appropriate compensation for the damage suffered by the employee. The Court of Cassation also ruled that since the European Social Charter is not directly applicable, Article 24 could not lead to the application of the “Macron scale” being excluded.

Is still facing resistance …

However, on September 26, an opinion of March 23, 2022 from the European Committee of Social Rights (regulatory body of the European Social Charter) was published. According to this opinion,

the "Macron scale" does not comply with Article 24 of the European Social Charter since it does not guarantee the employee's right to adequate compensation or other appropriate compensation.

Although such an opinion does not have direct effect, the Court of Appeal of Douai seized it and in support of the other international texts invoked above, judged under the terms of a judgment of 21 October 2022 that the scale, in certain specific cases, could not ensure adequate compensation for the damage suffered and that it was then up to the judge to determine, by an assessment in concreto, the amount of adequate compensation. Thus in this case, where the unfairly dismissed employee was 55 years old when he was dismissed when he had 21 years of seniority, his average monthly salary was €1,497.53 gross, that he was physically impaired which did not allow him to hope to find a job quickly, that he had 8 children, 3 of whom were still dependent, and had to deal with the repayment of 2 mortgages, the Douai Court of Appeal found is authorized to exceed the Macron scale by granting the employee compensation of €30,000, whereas the maximum compensation under the Macron scale would have been €24,000. (CA Douai, October 21, 2022, No. 20/01124)

However, in 3 other cases judged on the same day, the Douai Court of Appeal, considering that the unjustly dismissed employee did not justify any particular circumstances, notwithstanding his age on the date of the dismissal (52 years) and his seniority, application of the "Macron scale" to determine the employee's compensation, even going so far as to reverse a judgment of the Labor Court insofar as it had granted compensation for an amount greater than the scale when no particular circumstances did not justify such an overrun. (CA Douai, October 21, 2022, No. 20/01025, CA Douai, October 21, 2022, No. 20/01018, CA Douai, October 21, 2022, No. 20/01139).

In the future, it may therefore be that in exceptional cases relating to the personal situation of the employee, certain Courts of Appeal will continue to resist the strict application of the "Macron scale" notwithstanding the firm position taken by the Court of Cassation.

Thus, to assess whether he is exposed to a risk of exceeding the scale in the event of unjustified dismissal of one of his employees, the employer must assess the real consequences of the dismissal, in particular in the light of the personal situation of the his employee. Such an exercise seriously conflicts with the right to respect for private life enjoyed by every employee in a company. Fortunately, HR functions are often the source of valuable information!

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COMMERCIAL LITIGATION

THE ABSENCE OF STATUTE OF LIMITATIONS ON ACTIONS FOR THE DECLARATION OF UNFAIR TERMS

The Court of Justice of the European Union (CJEU) has established itself as a key player in the construction of European Union law. It plays a decisive role in the interpretation of the rules resulting from the numerous directives relating to consumer law. This is particularly true with regard to Directive 93/13/EEC on unfair terms in consumer contracts as amended by Directive (EU) 2019/2161 of 17 November 2019 as regards the better enforcement and modernisation of EU consumer protection rules, the so-called "Omnibus" Directive, which had to be transposed into national law by 28 November 2021. Naturally, credit agreements do not escape the scrutiny of the CJEU from the perspective of unfair terms.

While it may have been considered that the *ex officio* statement did not exclude the application of the rules of prescription (See Court of appeal of Paris, Pôle 5, 6th chamber, 21 Sept. 2018, No. 17/22196. - Contra, Court of appeal of Aix-en-Provence, 8th chamber, section C, 9 Nov. 2017, No. 15/11494. – Court of Appeal of Metz, 1st chamber, 16 Oct. 2018, No. 17/01058), the CJEU has established the non-applicability of the statute of limitations to actions seeking a finding of unfairness of a term, even where the consumer is the claimant (CJEU, 10 June 2021, C-776/19 to C-782/191).

Following the CJEU judgment of 10 June 2021, the Court of Cassation confirmed that an action to declare that a contractual term is unfair is not subject to a statute of limitations (Court of cassation, 1st civil chamber, 2 February 2022, No. 20-10.036; 30 March 2022, No. 19-17.966).

However, the CJEU distinguishes between an action to declare unfair terms and any resulting action for restitution, which may remain subject to the limitation period. The CJEU refrained from specifying the date on which the limitation period for the restitutionary action should start to run, so that it is now up to the national courts alone to determine the starting point. However, the CJEU has clarified that the starting point cannot be the end of the performance of the credit agreement (CJEU, 9 July 2020, C-698/18), nor can it be the conclusion of the credit agreement (CJEU, 16 July 2020, C-224/19), nor can the starting point be fixed as from the payment of each instalment (CJEU, 22 April 2021, C-485/19). In so doing, the starting point of the restitutionary action tends to be closer to the

date on which the unfairness of a term is declared, which in reality makes the distinction made by the CJEU a pure fiction.

Without calling into question the principle of primacy of the European Union (see in particular ECJ, 15 July 1964, Costa v. Enel, C-6/64), nor the authority attached to the judgments of the ECJ (see for example ECJ, 5 March 1986, Wünsche Handelgesellschaft, C-69/85), one cannot help but notice that the non-applicability of the statute of limitations to the action for the declaration of unfair terms amounts in a way to eternally burdening contractual stipulations that are at first glance lawful, because they do not fall within the scope of terms prohibited by the regulatory power (Article R. 212-1 of the French Consumer Code), with the threat of a legal action to have them declared unwritten.

This decision of the CJEU enshrining the non-applicability of the statute of limitations to actions for the declaration of unfair terms is in line with European case law which, in the name of the effectiveness of European Union law, limits the procedural autonomy of its State members. For example, the CJEU has considered it necessary to limit or exclude, depending on the case, the application of domestic procedural rules relating to domestic remedies (CJEU, 15 Apr. 2010, C-542/08), to time barring (CJEU, 21 Nov. 2002, C-473/00), *res judicata* (CJEU, 6 Oct. 2009, C-40/08 ; CJEU, 18 Feb. 2016, C-49/1 ; CJEU, 26 Jan. 2017, C-421/14), or evidence (ECJ, 15 May 1986, C-222/84). The Court of Cassation applied the above in a judgment of 2 February 2022, holding that the national court's own-initiative assessment of the possible unfairness of a clause must take precedence over the inadmissibility resulting from the principle of temporal concentration of claims in the appeal proceedings. The judgment under review is part of a body of case law from which it follows that no limit seems to be placed on the judge's power to determine *ex officio* whether a clause is unfair (Court of cassation, 2nd Civil Chamber, 2 February 2022, No 19-20.640).

The judge's obligation to determine *ex officio* whether a clause is unfair, to which no limit seems to be applicable, is therefore not without consequence since it may, under certain conditions, lead to the retroactive annulment of the contract in its entirety. The primacy of the own-initiative report over the procedural rules of national law, in the name of respect for the principle of effectiveness of European Union law, therefore raises serious questions.

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THE PLACE OF THE AMICABLE EXPERTISE IN DISPUTE RESOLUTION

Amicable expertise allows the parties to a dispute to appoint the expert of their choice in order to be able to introduce evidence in judicial proceedings in support of their claims. Paragraph 2 of Article 1554 of the French Code of Civil Procedure, relating to the expertise in amicable dispute resolution, provides that "*the report [of the amicable expert] has the same value as the report of a judicial*

expert", which makes it an effective method for introducing evidence in judicial proceedings. The advantage of an amicable expertise is that it is generally quicker than a judicial one, as the expert does not have to comply with the legal time limits provided by the French Code of Civil Procedure, and it is less costly than a judicial expertise.

However, other evidence must always corroborate the findings of an amicable expert, this rule being logical when one considers that the opposing party does not participate in the expert's findings (Court of cassation, mixte chamber, 18 Sept. 2012, No. 11-18.710). Subsequently, the Court of Cassation completed its jurisprudence by holding that the judge "*cannot rely exclusively on a non-judicial expert opinion carried out at the request of one of the parties by an expert of their choice, regardless of whether the opposing party was regularly called to it*" (Court of cassation, 3rd civil chamber, 14 May 2020, No. 19-16.278). The Court of cassation reiterated this solution in the context of a dispute between an insurer and one of its employees concerning the period of payment of daily allowances following the employee's sick leave. In this case, the Court of Appeal of Besançon, in a decision dated 24 November 2020, had rejected the employee's request that the insurer pay him daily allowances, based on the findings of an expert appointed by the insurer. This expert had found that during his sick leave, the employee "*had retained […] the ability to carry out certain managerial and supervisory tasks, as well as to carry out work without handling heavy loads*". The Court of cassation stroke out this decision, recalling that "*except in cases where the law provides otherwise, the judge cannot rely exclusively on a non-judicial expert opinion carried out at the request of one of the parties, regardless of whether [such expertise] was carried out in their presence*". The Court of cassation considered that the Court of Appeal had violated the principle of adversarial proceedings ("*principe du contradictoire*") set out in Article 16 of the French Code of Civil Procedure, since it based its decision exclusively on a non-judicial expert opinion carried out at the request of one of the parties (Court of cassation, 2nd civil chamber, 25 May 2022, No. 21-12.081).

The case law on the amicable expertise attempts to respond to some legal practitioners' reluctance to have recourse to an amicable expert. In fact, some practitioners believe that there is no strict procedural framework to the amicable expertise and that there is a risk of subjectivity on the part of the amicable expert, as the party that appointed and paid the expert often invites such expert to take the party's side. In fact, contrary to a judicial expertise, in an amicable expertise, it is more likely that one party contest the findings of the amicable expert appointed by the other party. Therefore, corroborating the findings of the amicable expert by other means of evidence, even when the opposing party has been called to the expertise, enables the judge to guarantee the principle of adversarial proceedings in accordance with article 16 of the Code of Civil Procedure and to reduce the risks that one party contests the findings of the amicable expert. In any event, even if the findings of the amicable expert constitute an "*imperfect evidence*" and need to be completed by other evidence, such findings remain a substantial source of evidence for the parties and for the judge.

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IP/IT/DATA

THE CNIL FINED DISCORD INC 800,000 EUROS FOR FAILING TO COMPLY WITH THE GDPR

Presentation of the case

On November 10, the CNIL fined the American company DISCORD INC 800,000 euros for having failed to comply with several obligations of the GDPR.

DISCORD INC publishes the website "discord.com" and the mobile application on which it provides users with a free voice IP and instant messaging service allowing users to create servers and text, voice and video chat rooms.

The rationale of the case

The 5 breaches observed and sanctioned by the CNIL:

- Failure to define and respect a data retention period appropriate to the purpose (Article 5.1.e of the GDPR): DISCORD did not have a written data retention policy and retained about 2,5 million French user accounts that had not been used for several years.
- Failure to comply with the obligation to provide information (Article 13 of the GDPR): DISCORD displayed to users an insufficient and incomplete information policy without specifying the duration and criteria of data retention.
- Failure to ensure data protection by default (Article 25.2 of the GDPR): An user could still be heard by other members in the local room even if he had closed the application window and left the voice room.
- Failure to ensure the security of personal data (Article 32 of the GDPR): DISCORD's management policy was not robust and restrictive enough to ensure user security.
- Failure to carry out a data protection impact assessment (Article 35 of the GDPR): DISCORD did not carry out an impact analysis on data protection. This should have been done, given the volume of data processed by the company and the use of its services by minors.

Read the full deliberation >

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FACIAL RECOGNITION: THE CNIL FINED CLEARVIEW AI 20 MILLION EUROS FOR THE UNLAWFUL COLLECTION AND USE OF DATA ON INDIVIDUALS IN FRANCE

Presentation of the case

On October 22, the CNIL imposed a fine of 20 million euros and requested CLEARVIEW AI to stop collecting and using, without a legal basis, the data of individuals in France. CLEARVIEW AI has collected 20 million photographs worldwide from several websites for its facial recognition service.

The rationale of the case

The 3 breaches observed and sanctioned by the CNIL:

- Failure to comply with the obligation of the lawfulness of processing (Article 6 of the GDPR): CLEARVIEW AI has not collected the consent of the data subjects. Moreover, the processing of the data is not based on a legal basis or on a legitimate interest.
- Failure to comply with the data subject's right of access and right to erasure (Articles 12, 15 and 17 of the GDPR): CLEARVIEW AI does not facilitate the exercise of the data subject's right of access by imposing several limitations. It does not respond effectively to requests for access and deletion. It provides partial responses or does not respond at all to requests.
- Failure to comply with the obligation of cooperation with the supervisory authority (Article 31 of the GDPR): In November 2021, the CNIL issued a formal notice to CLEARVIEW AI. However, CLEARVIEW AI has not provided any response to the formal notice.

You can read the deliberation here >

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DEREFERENCING OF THE WISH PLATFORM RULED COMPLYING WITH THE FRENCH CONSTITUTION

Presentation of the case

The French *"Conseil Constitutionnel"* ruled on relating to the compliance of some provisions of the French "*Code de la Consommation"* with the constitutional principles of freedom of speech and

communication and the freedom of enterprise enshrined in the French Constitution.

The provisions referred to the *Conseil Constitutionnel* provide that the administrative authority in charge of competition and consumption ("*DGCCRF*") can take measures to stop certain fraudulent commercial practices committed online. Among these measures, the possibility of dereferencing URL addresses of online interfaces whose contents are illegal.

On November 24, 2021, the *DGCCRF* had ordered Google to remove the e-commerce website and application Wish from the web search engine results considering that many of the products marketed did not comply with safety regulations.

The rationale of the case

On October 21, the Constitutional Council ruled that the provisions allowing DGCCRF to take such dereferencing measures are in compliance with the French Constitution. The French *Conseil Constitutionnel* considered:

- The legislator intended to strengthen consumer protection and ensure the fairness of online commercial transactions. It is a purpose of general interest.
- The dereferencing measure applies only to online interface on which practices have been identified and are likely to seriously undermine fairness of transactions or consumer interests. Moreover, only the URL addresses of online interfaces whose content is blatantly illicit may be impacted.
- The provisions can only be implemented if the author of the fraudulent practice observed on this interface could not be identified or if he did not comply with an injunction to comply which can be challenged before the competent judge.
- The time limit set by the administrative authority for dereferencing may not be less than 48 hours. It allows interested parties to usefully contest this decision by way of an application for interim relief.
- Under the control of the judge who ensures its proportionality, the provisions allow that the dereferencing measure applies to all or part of the online interface.

Read the full judgement >

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[1] 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.

RELATED PRACTICE AREAS

- Business & Commercial Disputes
- Antitrust
- Regulation, Compliance & Advisory
- Litigation & Dispute Resolution
- Employment & Labor
- Intellectual Property and Technology
