Concurrences
Competition Laws Review

Concurrences
Antitrust Publications & Events

N° 4-2022

International jurisdiction : The Court of Justice of the European Union rules that the Minister's action for abusive practices with evidences obtained by means of his specific investigation powers does not fall within the scope of civil and commercial matters within the meaning of EU Regulation 1215/2012 (Brussels I bis), for the determination of the jurisdiction *(Eurelec Trading ; Scabel)*

DISTRIBUTION, FRANCE, DISTRIBUTION AGREEMENT, INVESTIGATIONS / INQUIRIES, ALL BUSINESS SECTORS, ABUSE OF ECONOMIC DEPENDENCE, COMPETENCE, PUBLIC ORDER, BUYER POWER, ACT OF STATE, CONCURRENT JURISDICTIONS, GROUP PURCHASING ORGANIZATION, SIGNIFICANT IMBALANCE

CJEU, Dec. 22nd, 2022, case C-98/22, Eurelec Trading SCRL, Scabel SA / Ministry of Economy and Finance
This article was first published in Lettre de la distribution published by the Centre du Droit de l'Entreprise of the University of Montpellier.

Jean-Michel Vertut | Jean-Michel Vertut - Avocat (Montpellier)

Concurrences N° 4-2022 | Alertes | Distribution

**This article is an automatic translation of the original article, provided here for your convenience. Read the original article [fr].*

Facts and procedure. It will be recalled that in a press release dated July 22, 2019 (Press release n° 1354) B. Le Maire and A. Pannier-Runacher announced a summons before the Commercial Court of Paris against four entities of the E. Leclerc movement (Eurelec Trading, Scabel, Galec and ACDLEC) for abusive commercial practices committed by the movement's central purchasing office located in Belgium (Eurelec Trading). According to this press release, the State asked the Court to put an end to the abusive practices of this central purchasing unit and to sanction these four entities with a fine of 117.3 million euros, proportionate to the amount of the sums unduly collected by the company from its suppliers. These practices were brought to light during controls conducted by the DGCCRF during the 2018 negotiations, followed by a search authorized by the JLD in the premises of the E. Leclerc's premises in Ivry-sur-Seine. It would appear that the E. Leclerc would have used its Eurelec Trading center located in Belgium to circumvent French law and impose very significant price cuts, without any compensation, to some of

its suppliers established in France. Still according to this press release, the E. Leclerc would have resorted to the application of strong retaliatory measures, to force its suppliers to accept the conditions set by Eurelec Trading. The DGCCRF had to consider that these practices were constitutive of a significant imbalance.

By judgment of April 15, 2021, the Paris Commercial Court dismissed the objection of lack of jurisdiction raised before it by Eurelec, Scabel, GALEC and ACDLEC (Paris, Feb. 2, 2022, Pôle 5, Ch. 4, no. 21/09001, judgment, point 11), to hear the action brought by the Minister of Economy against Eurelec and Scabel, companies established in Belgium, in accordance with the provisions of the "Brussels I bis" regulation on " *jurisdiction* " and the recognition and enforcement of judgments " *in civil and commercial matters* ". The judgment was appealed by the two Belgian companies, in order to discuss the jurisdiction, or not, of the French courts, on the basis of the aforementioned regulation, for an action such as that of the Minister. The Paris Court of Appeal (Feb. 2, 2022, Pôle 5, Ch. 4, No. 21/09001) decided to stay the proceedings and to refer to the CJEU the question for a preliminary ruling reproduced below , relating to the scope of application of the above-mentioned regulation.

Issue. Must the "civil and commercial" matter defined in Article 1, paragraph 1, of [Regulation No. 1215/2012] be interpreted as including within its scope the action - and the judicial decision rendered as a result of it - i) brought by the [Minister of the Economy and Finance] on the basis of Article [L 442-6, I, 2°, of the French Commercial Code] against a Belgian company, ii) aimed at having restrictive competition practices established and stopped and at having the alleged perpetrator of these practices ordered to pay a civil fine, iii) on the basis of evidence obtained through its specific investigative powers? (CJEU judgment, pt. 19).

More specifically, the Court questioned whether, as in the present case, when the Minister uses his specific investigative powers to establish the existence of practices constituting a significant imbalance and seeks the imposition of a civil fine, he is using a prerogative of public authority in the exercise of his action such as to exclude him from the scope of application of the Brussels I bis Regulation as not falling within the scope of civil and commercial matters (Paris, Feb. 2, 2022, supra, pt. 55)

Solution. The CJEU says Regulation 1215/2012 is not applicable to the Minister's action as reported: " *Article 1(1) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that : "the concept of 'civil and commercial matters', within the meaning of that provision, does not include action by a public authority of a Member State against companies established in another Member State for the purpose of securing the recognition, sanction and cessation of restrictive competition practices in respect of suppliers established in the first Member State, where that public authority exercises powers to bring legal proceedings or powers of investigation which are exorbitant in relation to the rules of ordinary law applicable in relations between private individuals.* ".

Observations. One might venture to think that this judgment, although interesting in terms of the light it sheds on the material scope of application of the so-called " *Brussels I bis* " regulation, does not perhaps deserve the media hullabaloo it has generated with its headlines (" *La centrale d'achat européenne Eurelec (Leclerc et Rewe) gagne contre Bercy* ", Y. Puget, lsa-conso.fr, Dec. 23, 2022) or even a little excessive at this stage of the proceedings in terms of the conclusions that are sometimes drawn (" *Distribution: la justice européenne légitime les centrales d'achat européennes* ", lesechos.fr, P. Bertrand, Dec. 23, 2022; " *Eurelec contre Bercy: la justice européenne légitime les centrales d'achats européennes* ", A.S Le Bras, reussir.fr, Dec. 26, 2022). The increasingly tense context of trade negotiations is probably not unrelated to this. In our opinion, this does not mean that the "European" central banks have been given a *free hand* or that their practices are questionable under French law. Nor is there, for the time being, at least directly with regard to the rule covered by the preliminary interpretation, any question of applicable law or, more generally, of the application in the area of restrictive competition practices of Chapter II of Title IV of Book IV of the Commercial Code. It is simply a question of jurisdiction, or more precisely, whether the jurisdiction of the French courts could be determined in this case on the basis of the above-mentioned regulation (CJEU judgment, pt. 20). This is not insignificant in terms of the effectiveness of the Minister's action, but it is certainly not all, because the case as a whole is far from being settled.

From this judgment, it is noted that in order to determine whether or not a matter falls within the concept of " *civil and commercial matters* ", within the meaning of Article 1, § 1, of Regulation No. 1215/2012, and consequently within the scope of that Regulation, it is necessary to identify the legal relationship existing between the parties to the dispute and the subject matter of the dispute, or, alternatively, to examine the basis and manner of exercise of the action brought (Judgment of 16 July 2020, Movic and Others, C-73/19, pt. 37 and the case law cited) (CJEU judgment, pt 23). In this regard, the Court reviews the nature of the action at issue (paragraphs 24 to 28) and notes, among other things, that it is clear from the order for reference that, "first, *the action at issue in the main proceedings, the object of which is the defense of French public economic order, was brought on the basis of evidence obtained in the course of on-site visits and seizures of documents. However, such investigative powers, even if their exercise must be authorized in advance by the judge, are nonetheless exorbitant in relation to ordinary law, in particular because they cannot be implemented by private persons and because, in accordance with the relevant national provisions, any person opposing the exercise of such measures is liable to imprisonment and a fine of 300,000 euros.* " (pt. 26).

The CJEU concludes that " *In those circumstances, in bringing the action at issue in the main proceedings, the Minister for Economic Affairs and Finance is acting 'in the exercise of official authority (acta jure imperii)', within the meaning of Article 1(1) of Regulation No 1215/2012, so that that action does not fall within the concept of 'civil and commercial matters' referred to in that provision, which it is, however, up to the national court to verify.* " The reference to " *acta jure imperii* " refers to Article 1 of the Regulation, which provides in both instances of its paragraph 1 that: " *It* [ie the Regulation] *shall not apply, in particular, to revenue, customs or administrative matters or to the liability of the State for acts or omissions in the exercise of State authority (acta jure imperii).* " (pt. 29), i.e., related areas involving concerns of sovereignty and not of a purely civil and commercial nature. The unification of the conflict of jurisdiction rule by the Brussels I bis Regulation (cf. Regulation 1215/2012, recital 4), is therefore not absolute and leaves out these areas. More broadly speaking, it should be remembered that the exclusion of tax, customs or administrative matters from the first of these areas is found in other rules that are nevertheless intended to unify (*cf.* art. 1, pt. 1 of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (or *new Lugano Convention*) of 30 October 2007; art. 1, pt. 1 of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters of 2 July 2019, to which the EU acceded during 2022, with the aim of establishing a common multilateral framework for the international circulation of judgments in civil and commercial matters).

But to see that the determination of jurisdiction and the rules for resolving a conflict of jurisdiction that it establishes are not covered by the " *Brussels I bis* " Regulation would not mean that there are no rules of general law or national PIL in matters of international jurisdiction, in the light of which the courts of the forum seized could examine their jurisdiction. There will be no shortage of arguments on both sides and the parties will have the opportunity to discuss them before the referring court. While this does not prevent us from having an opinion on the question, our bias in these columns is one of neutrality and we will leave it at that with regard to the competing arguments.

Let us simply point out, on these interesting questions, the existence of a bill (n° 575) " *aiming at securing the supply of the French with consumer products* ", filed last November 29 at the National Assembly, subject to an accelerated examination procedure. This bill, submitted before the CJEU ruling, includes in its preamble provisions to " *counter the phenomenon of legal evasion, which consists of relocating contractual negotiations in order to subject them to legal provisions that are more favorable and less protective of the interests of French farmers and of products manufactured in France* . A " *forum shopping* " of sorts. Thus, according to the first article of the text in question, the preliminary chapter of Title IV of Book IV of the Commercial Code would be completed by an article L. 440-2, which would read as follows " *All of the provisions of this title apply to any commercial relationship where the products or services concerned are marketed on French territory. Any clause to the contrary shall be deemed unwritten. Any dispute relating to the application of the provisions of this title shall fall under the exclusive jurisdiction of the French courts, subject to the application of an express provision to the contrary provided for by a European regulation or an international treaty ratified by France* ", which does not limit its scope to the agricultural sector.

Although subject to a reservation ("subject to the *application of an express provision to the contrary provided for in a European regulation (...)*"), this new provision, combined with the CJEU's interpretation of the non-application of the reservation with regard to the content of the Brussels I bis Regulation to the Minister's action as described, could probably contribute to greater procedural efficiency in the fight against abusive practices at the initiative of the Minister. By coupling the theoretical prohibition of a given practice with the concrete exercise of the legal means to have it sanctioned, it could thus complement that resulting from the ASAP Law of December 2020, which obliges written agreements to mention the advantages of "international" agreements (cf. art. L. 441-3 III 4. Administrative fine against a central office for not having included in the annual agreements concluded with its suppliers the elements relating to commercial cooperation services invoiced by its international offices located in Switzerland and Belgium, even though the services were provided in France: *https://www.economie.gouv.fr/dgccrf/sanctions-administratives-pour-manquements-au-formalisme-contractuel*).