



The French Cour de cassation states that the Polynesian Competition Authority is a jurisdiction

Clément GARNIER

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Resume: *Is the Polynesian Competition Authority a jurisdiction? This is the question that the French Cour de Cassation¹ had to answer. In case n° 19-13.775, on 4 June 2020, the French Court of Cassation had to determine whether the Polynesian Competition Authority is a judicial Authority. The Court held that the Polynesian Competition Authority is a judicial Authority.*

Is the Competition Authority a judicial Authority? In case n° 19-13.775, on June 4th, 2020², the French *Cour de Cassation* held that the Polynesian Competition Authority is a judicial Authority. The Court had to rule on the application of a procedure of legitimate suspicion.

In this case, companies were under a procedure by the Polynesian Competition Authority. During of the procedure, the companies have discovered that the President of the Polynesian Competition Authority issued an *affidavit* in favor of the employee during a labor dispute opposing one of the companies with a former employee.

In this document, the President acknowledged that he discussed the case with one of the parties during the investigation. Eventually, he issued a judgment on the investigation conducted against the company, thereby violating his duty of impartiality.

The companies then appealed before the first President of the Paris Court of Appeal, which is competent to decide on appeals against decision pronounced by French Competition Authorities³. They filed a request based on the legitimate suspicion procedure.

The legitimate suspicion procedure is defined in Article 356 of the French Code of Civil Procedure. It is used when one of the parties

¹ The Cour de cassation is the highest court in the French judiciary.

² French Court of Cassation, 2nd civil chamber, 4 June 2020, case 19-13.775.

³ According to French D. n° 2018-880, 11 October 2018.

suspects a lack of impartiality⁴ of one or more magistrates. In such a situation, the party requests the transfer of a case to the same Court composed differently or to another competent Court⁵.

The order issued on appeal dismisses the request on the basis that no statutory dispositions provided a legitimate suspicion procedure regarding proceedings before the Polynesian Competition Authority. In addition, the appeal order refused to recognize the Polynesian competition Authority as a jurisdiction.

Many criticisms were raised against this decision⁶. The companies appealed a point of law before the French Cour de Cassation.

The French Supreme Court had to determine whether the Polynesian Competition Authority is a judicial Authority. It allowed the appeal and set aside the Court of appeal's decision.

⁴ For a definition: "Absence of any favoritism, obligation to do not favor any plaintiff", Gérard Cornu, *Vocabulaire juridique* (Puf 2020), free translation.

⁵ French code of civil procedure art.360.

⁶ For a detailed analysis, see D. Bosco, 'A propos de l'application aux autorités de concurrence du renvoi pour cause de suspicion légitime' [2019], *Contrats Concurrence Consommation* ; B. Bouloc, 'Une autorité de concurrence doit-elle être impartiale ? A propos de l'ordonnance du 1er mars 2019 rejetant une requête en suspicion légitime contre l'Autorité polynésienne de la concurrence', [2020], *RLC* ; E. Dieny, 'L'Autorité polynésienne de la concurrence échappe-t-elle à tout contrôle d'impartialité ? *L'Essentiel du droit de la distribution et de la concurrence* [2019].

⁷ For a detailed analysis : L. Vogel and J. Vogel, 'Le Premier Président de la Cour d'appel de Paris fait droit

Its solution is based on Article 6 § 1 of the ECHR and Article L.111-8 of the French Code of Judicial Organization. The Court linked the procedure allowing the Polynesian competition Authority to pronounce sanctions to criminal proceedings. Consequently, when the Polynesian competition Authority rules on penalties, it must be regarded as a jurisdiction. Even in the absence of a statutory provision, the Authority is subject to the general principle of impartiality of which the legitimate suspicion procedure is a guarantee.

This decision has been followed up in case n° RG 20/08122 before the Paris Court of Appeal on July 29th, 2020. The Court granted the request for legitimate suspicion raised by the companies. The order then returned the case to the French Metropolitan Competition Authority⁷. By decision n° 20-D-18 of November 18th, 2020⁸, the French

à une requête en suspicion légitime contre l'Autorité Polynésienne de concurrence (Ordonnance du 29/07/2020)' [2020], available on <https://www.vogel-vogel.com/le-premier-president-de-la-cour-dappel-de-paris-fait-droit-a-une-requete-en-suspicion-legitime-contre-lautorite-polynesienne-de-concurrence/>.

⁸ For a detailed analysis of the case: A. Ronzano, 'Compétence : l'Autorité de la concurrence se refuse à connaître de pratiques mises en œuvre en Polynésie française en opposant sa compétence territoriale et surtout sa compétence d'attribution, même après l'admission de la requête en suspicion légitime contre l'autorité polynésienne de la concurrence (Wane)' [2020], 18 November, *Concurrences* N° 4-2020, Art. N° 97997.

Metropolitan Competition Authority declined its competence about practices occurring in French Polynesia, a territory that is not in its territorial jurisdiction. The case could be subjected to appeal again on the first hand before the Paris Court of Appeal, which could judge on the merits of the case or on the second hand refer it to the investigation on the Polynesian Competition Authority. The president has since being removed from office⁹ on July 31st, 2020 for repeated breaches of his duty of neutrality¹⁰.

It is possible to draw a parallel between this decision and another one issued recently by the Court of Justice of the European Union (ECJ). On September 16th, 2020¹¹ (C-462/19), the ECJ stated that the Spanish Competition Authority is not a jurisdiction. Are these two cases contradictory? Not

necessarily. Indeed, according to the UE principle of Member States' procedural autonomy, in the absence of EU rules on a subject, "it is for the domestic legal system of each member state to designate the Courts having jurisdiction and to determine the procedural conditions governing actions at law or equity intended to ensure the protection of the rights which citizens have from the direct effect of community law"¹². It thus seems that, despite the ECJ ruling, the French Cour de cassation has a margin of discretion to decide whether a competition authority is a jurisdiction, as soon as the scope of the decision is limited to domestic procedural issues.

Clément GARNIER

⁹ For a detailed analysis: F. Venayre, 'Premier cas de démission d'office d'un président d'autorité administrative indépendante pour manquements graves et répétés à l'éthique professionnelle', *RLC* 2020/98, n° 3902.

¹⁰ For many examples about it, see: A. Ronzano, 'Prix excessifs : La Cour d'appel de Paris ordonne le sursis à exécution d'une décision de l'Autorité polynésienne de concurrence dans l'affaire du service de réfrigération des boissons (Wane)', 16 October 2019, *Concurrences* N° 1-2020, Art. N° 92046 ; E. Dieny, 'Procédure : quand l'Autorité polynésienne de la concurrence se fait taper sur les doigts par la Cour d'appel de Paris' [2020], *L'Edico*, 1 January, p. 6 ; F. Venayre [2019], *op. cit.* ; J. Vogel and L. Vogel, 2019,

'Suite de l'affaire polynésienne des boissons réfrigérées...' [2019], *La Lettre CDC*, n° 10, October ; F. Venayre, 'L'Autorité polynésienne de la concurrence prononce un non-lieu pour défaut d'impartialité dans l'affaire du gardiennage' [2019], *Dalloz Actualité* ; J. Vogel J. and L. Vogel [2020], *op. cit.*, A. Ronzano, *Polynésie française : Le nouveau collège de l'Autorité polynésienne de la concurrence rend une décision de non-lieu dans l'affaire du gardiennage (Haumani Sécurité / Jurion Protection, Tabiti Vigiles)*, 26 novembre 2019, *Concurrences* N° 1-2020, Art. N° 92563.

¹¹ ECJ, 16 September 2020, C-462/19, Anesco.

¹² See ECJ, 16 December 1976, 33-79, Rewe.