



Strict interpretation of commitments: The Paris Court of Appeal overturns the decision of the French Competition Authority condemning PMU for non-compliance with its commitments

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To quote this paper: M. CILLUFFO, “Strict interpretation of commitments: The Paris Court of Appeal overturns the decision of the French Competition Authority condemning PMU for non-compliance with its commitments”, *Competition Forum*, 2023, n° 0044, <https://competition-forum.com>.

***Resume:** Insisting on the need to precisely define the commitments in light of the competition concerns identified, the Paris Court of Appeal has, for the first time, overturned in its entirety a decision of the French Competition Authority which had condemned the economic interest group PMU for non-compliance with commitments made under the negotiated procedure of Article L. 464-2 of the French Commercial Code to put an end to practices likely to constitute an abuse of a dominant position in the gambling sector.*

The Paris Court of Appeal ruling in question¹ relates to a commitment procedure targeting PMU. Pari Mutuel Urbain (PMU) is a French horse betting Economic Interest Grouping whose activities are the conception, promotion, marketing and processing of bets on horse racing. PMU is the number one horse racing betting operator in Europe and number three worldwide.

After the opening of the online betting monopoly by the law of May 12, 2010², the Betclik company (operating an online betting site), in 2012, had referred to the French Competition Authority practices implemented by the PMU in the online horse betting sector, which it considered to be

abuses of a dominant position within the meaning of Articles L. 420-2 of the French Commercial Code³ and 102 of the Treaty on the Functioning of the European Union⁴, as well as constituting a cartel within the meaning of Article L. 420-1 of the same code⁵ and Article 101 TFEU⁶. Indeed, Betclik denounced that the PMU, holder of a legal monopoly on "hard" horse betting, would mutualize the bets it recorded on this type of betting with those it took on its online betting site.

In this case, the Authority decided to initiate a commitment procedure to put an end to practices that would have allowed PMU to offer higher winnings than its competitors

¹ Paris Court of appeal, 2 Sept. 2021, n°20/093587 – G.I.E. PARI MUTUEL URBAIN

² Law n° 2010-476, 12 May 2010, relating to the opening to competition and the regulation of the online gambling sector

³ Art. L. 420-2 French Commercial Code

⁴ Art. 102 Treaty on the Functioning of the European Union

⁵ Art. L. 420-1 French Commercial Code

⁶ Art. 101 Treaty on the Functioning of the European Union

and to create a barrier to entry in the online betting market.

This was a new application of this negotiated procedure that allows the Authority to accept commitments from companies in order to close a case without imposing a financial penalty. However, in case of non-compliance with the commitments, the Authority may impose such a sanction of up to 10% of worldwide turnover⁷.

Following negotiations with the Authority, PMU had proposed commitments that were made binding by Decision No. 14-D-04 of February 25, 2014⁸. They provided, in particular, that PMU had to separate, before September 30, 2015 and for each of the bets offered on its online site, its stakes pools recorded online from those recorded on "hard" (the "Commitment n° 1")⁹.

However, in December 2017, the companies Betclic and Zeturf again referred the matter to the Authority for PMU's failure to comply with this commitment. More specifically, the referral concerned the PMU's marketing of bets on foreign races under agreements of common pool with a foreign operator, both in its online and hard channels.

After noting that PMU had indeed pooled its hard and online stakes pools through foreign operators, the Authority found that PMU had violated its commitment with respect to foreign horse races that should have been separated and imposed a fine of €900,000¹⁰. The commitment in question consisted of a general commitment to separate the funds collected online from the funds collected offline by PMU in the context of betting on races listed in the betting racing calendar, approved by decree by the Minister of Agriculture and Food, which races may be held in France or abroad¹¹. Thus, even if the commitment did not explicitly target foreign races in common pool, nor did it target the various categories of French races, the stakes collected by the PMU on foreign races in common pool could not be considered as anything other than as being part of the PMU's pool of own stakes according to the Authority¹².

Challenging this decision before the Paris Court of Appeal, PMU argued that commitment no. 1 did not concern these foreign races: they were never expressly referred to in its proposal of commitments nor analysed in decision no. 14-D-04¹³. Moreover, the agent in charge of monitoring the commitments, appointed by the Authority, would have validated the exclusion

⁷Art. L. 464-2 French Commercial Code

⁸ ADLC, n° 14-D-04, 25 February 2014 concerning practices implemented in the online horse betting sector

⁹ *Ibid*, point. 117

¹⁰ ADLC, n°20-D-07, 7 April 2020

¹¹ *Ibid*, point. 101

¹² *Ibid*

¹³ Paris Court of appeal, 2 Sept. 2021, *op. cit.*, point. 87

of these races from the scope of the said commitments¹⁴. However, for the Authority, the common betting pool should have included both French and foreign races, insofar as the letter of commitments corresponded to a general commitment to separate the pools collected on hard and online, without distinguishing between the different types of races, whether French or foreign¹⁵.

The Paris Court of Appeal first rejected two procedural arguments put forward in support of the PMU's appeal, but accepted the argument that the PMU criticized the French Competition Authority for having considered that foreign races were covered by the commitment. In this way, in its decision of September 2, 2021, the Paris Court of Appeal rejected the Authority's argument and considered that betting on foreign races was not part of commitment no. 1.

On the one hand, it considers that the PMU's commitment to effectively separate its single pool of stakes between the bets collected in its physical sales outlets and those on its website, relates to the pool of stakes that it collects, manages and distributes itself; this is not the case for bets on foreign races, which are the subject of partnerships with foreign operators for hard and online collection¹⁶.

On the other hand, the Court notes that the geographical market in question was delimited by the Authority as being national and that it never dwelt on this international dimension during the negotiated procedure¹⁷. Existing partnerships were not analysed by the investigating departments at the preliminary assessment stage or during the market test, and the agent had also mentioned the situation of international races several times, without any reaction from the Authority¹⁸.

Thus, the Paris Court of Appeal has upheld the PMU's appeal: it has overturned the Competition Authority's decision in its entirety for the first time and has ruled that the failure to comply with the undertaking in question was not characterized.

In this ruling, the Paris Court of Appeal recalls the necessity of the proportionate nature of commitments (I) and reaffirms their strict interpretation (II), essential principles that should govern each commitment procedure.

I. A reminder of the necessary proportionality of commitments to the competition concerns raised

¹⁴ *Ibid*

¹⁵ *Ibid*, point. 94

¹⁶ *Ibid*, point. 118.

¹⁷ *Ibid*, point 122.

¹⁸ *Ibid*, point. 138

The Paris Court of Appeal recalls that, in addition to their relevance in remedying the competition concerns they are intended to address, the commitments must also be proportionate to them¹⁹.

Indeed, as quoted by the Court, the Authority must examine the relevance, credibility and verifiability of the commitments offered by the company and ensure that they are proportionate. The procedural announcement on competition commitments provides further clarification on the proportionality test, stating that it requires that the commitments are both necessary and sufficient to remove all identified competition concerns²⁰. The commitment must remedy the competition problem while being the least harmful possible to the firm that undertakes.

In this case, the Court considers that to retain the interpretation given by the contested decision by including foreign partnerships in the scope of the commitment would mean depriving these partners of part of their turnover and the PMU of part of its activity, as these consequences had neither been evaluated nor envisaged. However, it considers that betting on foreign races does not, in itself, have the same consequences as betting on French races²¹. Indeed, the foreign partnership contracts provide for ratios and

winnings to be distributed that are necessarily identical for all participants in the pool, so that there is nothing to prevent other operators active on the French market from concluding a contract similar to that of the PMU and thus benefiting from the disputed pool, in an equal relationship.

The Court's reasoning here is intended to demonstrate that the concerns identified in Decision No. 14-D-04²², which called into question the advantages that could not be replicated by PMU's competitors, and which strengthened the attractiveness of its online offer, do not, therefore, apply here²³.

Thus, the interpretation adopted by the Authority is disproportionate to the purpose of the commitments, as PMU's competitors are able to enter into equivalent partnerships, under the same conditions and with the same advantages as PMU: the practice in question does not undermine the equality of arms between online horse betting operators²⁴.

II. Reaffirmation of the strict interpretation of commitments

In its solution, the Paris Court of Appeal also recalls that, like any binding measure, the

¹⁹ *Ibid*, point. 116

²⁰ ADLC, « Communiqué de procédure relatif aux engagements en matière de concurrence », 2 March 2009, point. 34

²¹ Paris Court of appeal, 2 Sept. 2021, *op. cit.*, point. 127

²² ADLC, n° 14-D-04, *op. cit.*

²³ Paris Court of appeal, 2 Sept. 2021, *op. cit.*, point. 128

²⁴ *Ibid*, point. 143

commitment, which is an obligation of result, is to be interpreted strictly in favor of the party making the commitment. Consequently, as the commitments are essentially defined in terms of the competition concerns, they are intended to address, the preliminary assessment of these concerns must be sufficiently precise and unequivocal as to their scope to allow monitoring of compliance with the commitments²⁵.

On this point, it specifies that if commitment n° 1, written in general terms, does not limit its application to certain types of horse betting, nor to the only bets collected that it totals and distributes, it must be noted that it uses a possessive ("its unique pool") which can be understood as referring to the pool of stakes that it collects, manages and distributes itself, which therefore does not concern partnerships relating to foreign races²⁶.

Moreover, in its decision n° 14-D-04²⁷, the Authority defined the geographical dimension of the relevant market as only the national market, international races not even being mentioned²⁸. Foreign operators, partners of PMU, were not even included in the market test. Also, the appointed agent, who concluded that the PMU had perfectly fulfilled its obligation to separate the stakes

pools, mentioned several times the situation of international races, without this eliciting the slightest reaction from the Authority's investigation services²⁹.

Consequently, and contrary to what the Authority maintains, the competition concerns that originated in the operation of the PMU's mutual betting on French races did not include foreign races in their scope. As a result, when it proposed its commitments, PMU could not reasonably consider that it should include its activities of taking bets on races organized by foreign operators, to which Decision No. 14-D-04 of February 25, 2014 did not devote any development, or the slightest investigation, particularly during the market test³⁰.

In the end, the Competition Authority cannot rely on its own deficiencies to deplore the fact that the issue was never raised, according to the Court, which insists on the fact that it does not appear from any of the elements in the file that the commitment in question, like the competition concerns identified in decision no. 14-D-04 to which it responded, explicitly included PMU's international activities³¹.

Conclusion:

²⁵ *Ibid*, points. 115-116

²⁶ *Ibid*, points. 117-118

²⁷ ADLC, n° 14-D-04, *op. cit.*

²⁸ Paris Court of appeal, 2 Sept. 2021, *op. cit.*, point. 125

²⁹ *Ibid*, points. 134, 136, 139

³⁰ *Ibid*, point. 130.

³¹ *Ibid*, point. 141

Through this decision, the Paris Court of Appeal seems to send a message to the French Competition Authority by censuring it.

Of course, the commitments procedure has its advantages, whether they concern the Competition Authority itself or the companies. It allows the Authority to carry out its mission, which is to guarantee the functioning of competition on the markets, while benefiting from a procedure that is faster and more flexible than the one leading to a finding of infringement, and therefore freeing up more resources for the examination of the most serious infringements³².

Furthermore, it allows the company to benefit from an acceleration of the procedure and to voluntarily contribute to the search for appropriate solutions to the identified competition concerns, and to obtain the closure of the case before any final assessment and qualification of the facts³³, although the commitments remain nonetheless binding, as the companies would be exposed to an annulment action and/or to a procedure for non-compliance with commitments.

Nevertheless, in this ruling, the Paris Court of Appeal makes it a point of honour to ensure that the commitments remain strictly interpreted and do not go beyond the resolution of competition concerns, a position with which the French Competition Authority should align itself in the future in the negotiated procedure of Article L. 464-2 of the French Commercial Code³⁴.

This decision can be put in perspective with the ruling "GIE Les indépendants" of the Court of Cassation³⁵ which preceded it. In that case, the EIG had made several commitments before being sanctioned for their non-compliance by the Competition Authority³⁶. It then appealed to the Paris Court of Appeal, which, despite finding that two of the nine breaches were not established, rejected the EIG's appeal and upheld the sanction³⁷. After an appeal by GIE, the Court of Cassation held that the characterization of a breach of commitments requires verification of their formal compliance and, where applicable, the absence of a breach with respect to the competition concerns that gave rise to the commitments. According to the High Court, the court of appeal that carried out the formal checks was not required to verify the absence of a breach.

³² ADLC, « Communiqué de procédure... », *op. cit.*, point. 6

³³ *Ibid*, point. 7

³⁴ Art. L. 464-2 French Commercial Code

³⁵ Cour de cassation, 26 sept. 2018, n° 16-25.403 – G.I.E. Les indépendants

³⁶ ALDC, n°15-D-02, 26 févr. 2015

³⁷ Paris Court of appeal, 6 oct. 2016, n°15/06776 – G.I.E. Les indépendants

The judgment of September 2, 2021 thus seems to reflect a real stand taken by the Paris Court of Appeal, which asserts itself against the Competition Authority with a real analysis

of its reasoning followed by a reversal of its decision.

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