

December 2019

French Competition Law Newsletter

Highlights

- The French Competition Authority Closes Probe against Expedia and HRS regarding Parity Clauses
- The French Competition Authority Fines Compote Manufacturers For Operating A Cartel
- The New Caledonian Competition Authority issues its first decision to impose sanctions relating to the exclusive distribution of elevators

The French Competition Authority Closes Probe against Expedia and HRS regarding Parity Clauses

On December 10, 2019, the French Competition Authority (“FCA”) decided not to continue its investigation into hotel booking platforms Expedia and HRS, initiated in 2013 after complaints from French hotel unions and the Accor group regarding certain clauses imposed by the platforms.¹

Background

The FCA’s investigation looked into practices whereby Booking.com, Expedia and HRS subjected hotels to allegedly anticompetitive “parity” clauses regarding prices, room availability and commercial terms.

Under these clauses, hotels were required to make offers to these platforms that were at least as favourable as those offered through competing online platforms, travel agencies

and hotels themselves. Parity clauses can be “wide”, if they restrict the ability of hotels to offer better terms on other sale channels, or “narrow” if they prevent hotels from offering better terms on their own websites.

Several competition authorities consider that parity clauses lead to reduced price competition between booking platforms and to the exclusion of potential new entrants from the market. Narrow parity clauses are sometimes considered justified to prevent hotels from free-riding on the platforms’ services.

In 2015, the FCA accepted commitments from Booking.com which included heavy restrictions on the use of parity clauses.² A few months later, France modified Article L311-5-1 of the French Tourism Code to guarantee

¹ Decision of the French Competition Authority of December 10, 2019, No. 19-D-23.

² Decision of the French Competition Authority of April 21, 2015, No. 15-D-06, paras. 115 et seq. The FCA jointly conducted its investigation with competition authorities in Italy and Sweden, which accepted similar commitments, and with the assistance of the European Commission. Separately, later in 2015, Ireland also accepted commitments from Booking.com regarding parity clauses.

the freedom of hospitality operators to offer discounts and price advantages by prohibiting both wide and narrow price parity clauses.³

In parallel, French courts also took issue with parity clauses and imposed fines on Booking.com (in 2015) and Expedia (in 2017) while ordering them to remove price and availability parity clauses from their contracts with hotels.⁴

The FCA's Decision

The FCA considered that the parity clauses at issue constituted a practice that has been dealt with by other national competition authorities. In Sweden, Italy, Greece, Poland and the UK, the authorities decided to close the case against Expedia further to its commitment to remove the parity clauses in its contracts with hotels across the EEA for five years from August 1, 2015.

According to Article L. 462-8 of the French Commercial Code, which implements Article 13 of Regulation 1/2003, the FCA can decline its jurisdiction when a complaint about a potentially anticompetitive practice has already been handled by the European Commission or another national competition authority.

In addition, the FCA noted that the European online booking sector has evolved since the beginning of the investigation, as shown by an increased price differentiation in the wake of the Booking.com commitments and the satisfaction expressed by hotels with the statutory prohibition of price parity clauses in France. The FCA also pointed to the smaller presence in France of Expedia and HRS compared to Booking.com.

Based on the foregoing, the FCA decided to reject the hotel unions' complaint and close its investigation.

The French Competition Authority Fines Compote Manufacturers For Operating A Cartel

On December 17, 2019, the French Competition Authority ("FCA") fined six compote manufacturers for a total of 58.3 million euros for price fixing and market sharing practices. The fines were imposed on Materne (13.6 million euros), Andros (14.1 million euros), Conserves France (1.9 million euros), Délis SA (9.5 million euros), Charles Faraud (16.4 million euros) and Valade (2.8 million euros).

After endives, flour, yoghurt or laundry detergents, the FCA adopted a new sanction decision on compotes, another everyday consumer product. The FCA found that compote manufacturers Materne, Andros, Conserves France, Délis SA (a Lactalis group company), Charles Faraud and Valade had participated for more than three years in a price fixing and market sharing cartel.

The infringement covered the entire French territory and lasted from October 2010 to January 2014. The companies sanctioned supplied compotes under private labels to supermarket chains, catering companies and players in the hospitality industry in France. Together, they held 90% of the French market for compotes sold under private labels and 100% of the market for out-of-home catering.

According to the FCA, compote producers secretly fixed prices and shared the French market among themselves. The companies agreed to coordinate on price increases, as well as on the arguments used to justify the price increases. The cartel participants also shared market volumes and customers amongst each other.

³ Law No. 2015-990, August 6, 2015, Article 133. To date, Austria, Belgium, Italy and Switzerland have passed similar legislation.

⁴ Paris Tribunal of Commerce, March 24, 2015, No. 2014/027403; Paris Court of Appeal, September 15, 2015, No. 15/07435; Paris Court of Appeal, June 21, 2017, No. 15/18784.

Similar to the yogurt cartel, the companies used a relatively sophisticated *modus operandi*. In particular, they organized secret meetings in hotels and restaurants across France and used separate mobile phones specifically for the cartel.

To set the level of financial penalties, the FCA took into account the role played by operators in the cartel organization, increasing Materne's fine for having played an active role in the cartel organization and decreasing Andros' financial penalty for having disrupted the cartel organization. The amount of the financial penalties also takes into consideration the fact that certain companies were controlled by large groups and benefitted from significant resources.

Finally, Charles Faraud's fine was reduced from almost 22 million euros to 16 million euros after the 10% turnover cap was applied.

A seventh player, the Dutch company Coroos, was also involved in the cartel. It was fully exempted from a fine of nearly 5 million euros after it blew the whistle on the cartel.

Interestingly, the Dutch competition authority assisted the FCA in the dawn raids on the Dutch company's premises. This cooperation demonstrates the growing trend among European regulators to work together in order to ensure antitrust enforcement across borders.

The New Caledonian Competition Authority issues its first decision to impose sanctions relating to the exclusive distribution of elevators

On December 26, 2019, the New Caledonian Competition Authority issued its first decision to impose sanctions, fining four undertakings, two suppliers and two distributors for having established exclusive import rights in the elevator sector (Decision 2019-PAC-05). The Authority issued a total fine of CFP 7.6 million (approx. 63,688 euros) and accepted the binding commitments offered by the four undertakings.

Following a complaint, the New Caledonian Competition Authority (the "Authority") began *ex officio* proceedings on January 29, 2019 relating to exclusive practices in the elevator sector. The alleged practices involved four elevator suppliers, Koné, Otis, Sodimas and ThyssenKrupp (none of which manufactured the products locally, except for a few spare parts) and their local distributors, Intec, Pacific Ascenseurs, Semep and Socometra. The local distributors import elevators and spare parts and ensure their installation and maintenance.

In its Decision, the Authority found that the suppliers had implemented exclusive import rights in New Caledonia to the benefit of local operators, a practice banned under the local

Law of October 24, 2013. Such exclusive rights, which were granted in the supply agreements between the suppliers and their local distributors, or sometimes even formalized through a simple letter, are inconsistent with Article Lp. 421-2 of the Commercial Code in its version applicable locally, as well as the local Law of October 24, 2013.⁵ These provisions incorporate into New Caledonian law a broad prohibition of exclusive import agreements imposed by the so-called "Lurel Law" of November 20, 2012 on Economic Regulation in French overseas "*départements*".

Although these provisions make exclusive import rights a form of restriction by object in French overseas territories, the Authority did provide, in its Decision, a summary analysis of their effects on the New Caledonian market. In substance, the Authority noted the remoteness and tightness of the local market (only 1,100 elevators, which are typically installed for 10 years, on average). These characteristics, combined with the exclusivity clauses, have reinforced the market power of local distributors and their potential ability to raise prices with respect to maintenance operations.

⁵ Law of New Caledonia No. 2013-8 of October 24, 2013.

Koné, Otis, Pacific Ascenseurs and Socometra did not dispute the charges and offered commitments to (i) end their exclusive distribution agreement or ongoing exclusivity relating to elevators and spare parts in New Caledonia; (ii) ensure that future distribution agreements would not include any exclusivity clauses and non-compete obligations and (iii) inform customers of the termination of the exclusivity. Koné and Otis also offered commitments to (iv) submit to the Authority any new agreement with an operator from New Caledonia and (v) define the minimum criteria that distributors would have to fulfil in order to sell their products in New Caledonia, including the number of training modules and training hours, consistent with European and local security standards. As a result, they benefited from the negotiated procedure established under Article Lp. 464-2 (III) of the Commercial Code in

its version applicable locally, and their fines were reduced by 50%. The fines were further reduced because of the commitments undertaken by the Parties by 20% for the manufacturers and 30% for the distributors, respectively.

While the overall amounts of the fines remain modest, this case is a useful reminder that the prohibition of exclusive imports to overseas territories constitutes a priority issue for the New Caledonian Authority as well as the French Competition Authority, as discussed in its Opinion relating to competition in overseas territories of July 4, 2019 (Opinion 19-A-12). Operators should therefore be careful to avoid transposing into French overseas *départements* and territories exclusivity clauses that might be otherwise acceptable in mainland France.

CONTACTS



Antoine Winckler
+32 22872018
awinckler@cgsh.com



François-Charles Laprévôte
+32 22872184
fclaprevote@cgsh.com



Frédéric de Bure
+33 1 40 74 68 00
fdebure@cgsh.com



Séverine Schrameck
+33 1 40 74 68 00
sschrameck@cgsh.com



Laura Chovet Ballester
+33 1 40 74 68 00
lchovetballester@cgsh.com



Maeva Lagoute
+33 1 40 74 68 00
mlagoute@cgsh.com



Sarah Aït Benali
+33 1 40 74 68 84
saitbenali@cgsh.com



Jeanne Lévy-Bruhl
+32 22872226
jlevybruhl@cgsh.com



**François-Guillaume
de Lichtervelde**
+32 22872104
fdelichtervelde@cgsh.com



Sophie Troussard-Fauré
+33 1 40 74 68 54
troussard@cgsh.com