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French Competition Law Newsletter

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The French Competition Authority fines Dammann Frères tea for imposing resale prices on its online retailers

On December 3, 2020, the French competition authority ("**FCA**") imposed a fine of €226,000 on Dammann Frères ("**Dammann**"), a producer of gourmet tea, for imposing resale prices on its online retailers.

Resale price maintenance

The FCA first recalled that it is not required to apply the usual three-prong test in resale price maintenance ("RPM") cases, which is met when (i) the supplier communicated recommended retail prices ("**RRPs**") to its retailers, (ii) the supplier monitored the application of its RRPs by retailers, and (iii) the retailers actually applied the RRPs. The FCA explained it did not need to apply this test if it has evidence showing an invitation from the supplier to apply its recommended prices and acceptation from the retailers, which is consistent with the FCA's approach in the Apple decision from March 2020.[1]

[1] As mentioned in FCA Decision of March 16, 2020, n°20-D-04 regarding practices in the Apple products distribution sector, in order to demonstrate the existence of a cartel, the FCA needs to establish "*the invitation of a party to the agreement to implement a practice and the acquiescence to at least one other party to this invitation*" (para. 833).

The FCA noted that the RRPs issued by Dammann to its retailers matched Dammann's own retail prices in its physical stores and on its own website. The FCA also found that Dammann's general terms and conditions compelled retailers to align their online prices with offline prices. The retailers adhered to Dammann's policy through online distribution agreements restricting their freedom to determine their resale prices.[2]

In addition, the FCA found that Dammann monitored whether the prices displayed on distributors' websites complied with the RRPs and requested non-complying distributors to increase their prices.[3] If the RRPs were not applied, Dammann would implement retaliation measures against non-complying retailers, such as by removing their discounts, stopping/delaying deliveries, or blocking their accounts to prevent them from placing orders. Dammann also relied on monitoring carried out by a number of its retailers, which would inform Dammann in case of non-compliance.

Based on the above, the FCA considered that there was sufficient evidence to conclude that Dammann had imposed prices on its retailers.

Restriction of sales on online marketplaces

The FCA also examined whether Dammann had unduly restricted its distributors' ability to sell online.

However, the FCA found that Dammann did not prohibit retailers from making online sales but only restricted sales on third-party online marketplaces. The FCA considered that this conduct did not amount to an hardcore restrictions and could qualify for an exemption under the EU Vertical Block Exemption Regulation No. 330/2010. The FCA noted in this regard that Dammann and its retailers' market shares for online sales were below 30%.

The Paris Court of Appeals ruled that the decision of some of the parties to an antitrust investigation not to contest the FCA's objections does not prevent other companies from challenging the objections

On December 3, 2020,[4] the Paris Court of Appeals ruled in the *Brenntag* case that a company challenging its participation in a cartel cannot be held liable simply because other companies did not contest the alleged objections from the FCA. This judgment, issued in the context of a cartel case in the chemical distribution sector, constitutes a turnaround in the case law, although the Court of Appeals, ruling on the merits of the case, ultimately confirmed the fines imposed by the FCA.

Background

In May 2013,[5] following leniency applications, the FCA fined the four main distributors of chemical products in France—Brenntag, Caldic Est, Univar, and Solvadis, accounting for 80% of the sales in the sector—€79 million for artificially allocating customers and coordinating prices between 1997 and 2005 in several French regions (Burgundy, Rhône Alpes, and Northern and Western France). According to the FCA, these regional practices

[2] FCA Decision of December 3, 2020, n°20-D-20 regarding practices implemented in the gourmet tea sector, paras. 199-209.

[3] For instance, Dammann Frères' sales director himself stated his willingness to exert pressure on recalcitrant distributors to invite them to comply with the common discipline and to monitor that such interventions had been followed by action.

[4] Paris Court of Appeals, December 3, 2020, case no. 13/13058, *Brenntag S.A. e.a.*

[5] FCA, May 28, 2013, Decision no. 13-D-12 regarding practices implemented in the marketing of chemical commodities.

constituted a single, complex, and continuous infringement.

Three of the companies sanctioned by the FCA chose not to non-contest the FCA's objections and received a fine reduction in return. Brenntag, however, challenged the existence of a single, complex and continuous infringement. The FCA argued that the other companies' choice not to dispute its objections prevented Brenntag from challenging the classification of the infringement as single, complex, and continuous.

The FCA referred to the *Manpower* case law from the French *Cour de cassation*'s judgment of 2011.[6] According to this decision, for horizontal cartels, the fact that some companies had waived their right to challenge the FCA's objections was sufficient to enable the FCA to consider that the infringement in question was established with regard to all undertakings, even those that challenged the FCA's objections. The FCA only needed to establish the participation of the non-settling companies in the infringement.

However, on December 3, 2020, the Paris Court of Appeals did not apply the *Manpower* case law, although it ultimately confirmed the fines imposed by the FCA.

The Paris Court of Appeals' assessment

The Paris Court of Appeals relied on the principle of presumption of innocence and ruled that an undertaking cannot be held liable simply because other undertakings involved in a cartel chose not to contest the FCA's objections.[7] In light of this principle, undertakings which challenged the FCA's objections must be able to defend themselves on the materiality of the facts alleged against them, even if these same facts constitute the basis for the objections that are not contested by other undertakings.

The Paris Court of Appeals thus accepted to assess the infringement at stake constituted a single, complex, and continuous infringement, as well as Brenntag's participation in that infringement. Ultimately, the Paris Court of Appeals confirmed the FCA's findings as to the existence of a single complex and continuous infringement due the similarity of products, undertakings, time periods, and practices concerned by the practices.

The Court of Appeals also confirmed Brenntag's participation in the infringement.

The Paris Court of Appeals therefore essentially upheld the fines imposed by the FCA, *i.e.*, €52 million in total for Brenntag and its former parent company Deutsche Bahn, instead of €53 million.

The French Competition Authority finds that intra-group bids to a tender no longer fall within the ambit of competition law

On November 25, 2020, the FCA chose to depart from its long-standing decisional practice on intra-group bidding.[8] Following the European Court of Justice's ruling in *Ecoservice projektai*,[9] the FCA concluded that intra-group bids to tenders no longer fall within the ambit of competition law.

[6] French *Cour de cassation*, March 29, 2011, Judgment no. 10-12-913.

[7] Paris Court of Appeals, December 3, 2020, case no. 13/13058, para. 173.

[8] FCA, Decision 20-D-19 of November 25, 2020 regarding practices adopted in the sector for the procurement of food products by the national public body France AgriMer (the "**Decision**").

[9] *Šiaulių regiono atliekų tvarkymo centras* and *Ecoservice projektai UAB* (Case C-531/16) EU:C:2018:324 ("**Ecoservice projektai**").

Background

Until the Decision, the FCA and the Paris Court of Appeals had consistently held that the submission of seemingly independent, but actually coordinated, bids from companies part of a single group could constitute a violation of Articles 101 TFEU and L. 420-1 of the French Commercial Code, under the principle that subsidiaries presented as independent and competing against each other should thus be deemed autonomous.[10]

On May 17, 2018, the ECJ handed down a preliminary ruling in which it held that Article 101 TFEU does not apply where the agreements or practices it prohibits are carried out by undertakings which constitute a single economic unit and that there is therefore no need to examine whether the submission of such tenders constitutes conduct in breach of Article 101 TFEU.[11]

The FCA's decision

In May 2019, the FCA launched an investigation against bidders that participated in a call for tender issued by the public entity France AgriMer ("**AgriMer**") for the supply of agricultural and seafood products to charities and subsidized grocery stores. From 2013 to 2016, four subsidiaries belonging to the Ovimpex group (*i.e.*, Ovimpex, Etablissements Dhumeaux, Mondial Viande Service, and Vianov; the "**Ovimpex subsidiaries**") submitted separate and allegedly non-coordinated bids in response to AgriMer's calls for tenders.

In February 2020,[12] the FCA notified a statement of objections to the Ovimpex subsidiaries alleging that they had coordinated their bids to AgriMer's tenders between 2013 and 2016. The investigation services relied on the existence of a framework agreement between the Ovimpex subsidiaries assigning to Dhumeaux the drafting of the bids on their behalf, as well as declarations from employees at the Ovimpex group.[13] The Decision indicates that the relevant tenders amounted to more than €290 million. The Ovimpex subsidiaries did not dispute the facts brought against them and agreed to a settlement.

At the hearing in September 2020, the FCA's investigation services and Government Commissioner however pled in favor of abandoning the objection while relying on "*a recent change in EU case law*" on agreements on the submission of public procurement tenders between companies part of a same group.[14] The FCA's *Collège* followed the investigation services' proposal.

In its Decision, the FCA first recalled EU and French case law according to which (i) Articles 101 TFEU and L. 420-1 of the French Commercial Code do not apply to agreements and practices implemented within a single economic unit,[15] and (ii) the presumption of decisive influence that a parent company exercises over the conduct a subsidiary when the subsidiary is wholly-owned by the parent company.[16] The Decision then notes that under settled French case law, the prohibition of restrictive agreements also applied to agreements concerning undertakings of a same group in a situation where these undertakings would submit separate bids in a call for tender. Guided by the "first" ECJ ruling on this topic, the FCA therefore reconsidered its decisional practice.[17]

Applying this change in law to the case at hand, the Decision recognizes that the Ovimpex subsidiaries are wholly-owned by Ovimpex,

[10] *E.g.*, Paris Court of Appeals, société Maquet, October 28, 2010, No. 2010/03405 and FCA decision No. 18-D-02 of February 19, 2018.

[11] *Ecoservice projektai*, para. 28-29.

[12] The exact date of notification of the statement of objection is unclear (*see* February 4, 2020 at para. 4, and January 28, 2020 at para. 39).

[13] AgriMer Decision, paras. 21-35.

[14] Decision, para. 44, free translation.

[15] The Decision refers to *Imperial Chemical Industries Ltd v. Commission* (Case 48-69), EU:C:1972:70 and several FCA decisions (No. 91-D-12, No. 92-D-68, No. 99-D-18, and No. 07-D-12).

[16] The Decision refers to *Akzo Nobel NV e.a. v. Commission* (Case C-97/08 P), EU:C:2009:536, *Arkema SA v. Commission* (Case T-168-05), EU:T:2009:367, and FCA decisions No. 09-D-36 and No. 10-D-39.

[17] FCA Decision, para. 66.

parent company between 2013 and 2016. The Ovimpex subsidiaries therefore constitute a single economic unit under competition law, even if they submitted separate bids to AgriMer's tenders. As a result, the FCA closed its investigation.

The FCA however made clear that parallel bids by several companies of the same economic group remain subject to public procurement rules.

The French Competition Authority rejected travel agencies' complaint against several airlines for failing to refund cancelled flights amidst COVID-19 crisis

On December 8, 2020, the FCA dismissed a complaint by French travel cooperative CEDIV on behalf of 55 member travel agencies against several airlines which denied travellers refunds for their flights, cancelled due to the COVID-19 pandemic (the "**Decision**").[18]

In June 2020, CEDIV filed a complaint with the FCA against 90 airlines for allegedly agreeing, through the International Air Travel Association (the "**IATA**") to disregard their obligation to reimburse passengers for cancelled flights booked through travel agencies. While, pursuant to European Regulation n°261/2004, airlines must either refund passengers' tickets or re-route them under satisfactory conditions,[19] the airlines instead granted vouchers. CEDIV argued that such a behaviour constituted a concerted practice in breach of Articles 101 TFEU and L. 420-1 of the French Commercial Code, as well as abuses of collective dominance and of a situation of economic dependency in violation of Articles 102 TFEU and L. 420-2 of the French Commercial Code. Additionally, CEDIV asked the FCA for interim measures to put an end to the airlines' denials of refunds.

The FCA rejected the complaint and request for interim measures on the grounds that CEDIV failed to provide evidence of the concerted practices to prevent refunding cancelled flights.[20]

The FCA considered that the alleged parallel conduct changed over time and rather resulted from the airlines' individual non-coordinated responses to the COVID-19 pandemic.[21] The FCA found no evidence that the IATA had helped coordinate the airlines' behaviour and that some of the airlines allegedly involved were not even members of the association.[22] The FCA also noted that certain airline companies, such as Air France, Lufthansa, and Qatar Airways, changed their policy by either starting to refund cancelled flights or improved the conditions of use of their vouchers. Following the same reasoning, the FCA dismissed the claims of abuses of collective dominance and of economic dependency.[23]

However, the FCA considered that a number of airlines may have breached their obligation to inform passengers of their right to a refund for a cancelled flight and unduly forced them to accept a voucher. The FCA concluded that this issue rather fell within the French Civil Aviation Authority's jurisdiction.[24]

[18] FCA, Decision No. 20-D-21 of December 8, 2020 regarding practices implemented in the travel sector.

[19] Commission Regulation No. 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, OJ 2004 L46/1.

[20] Decision, para. 80.

[21] Decision, para. 89.

[22] Decision, paras. 81 and 88.

[23] Decision, paras. 105 and 111.

[24] Decision, para. 79.

The French Supreme Court reiterates that during dawn raids the legal privilege is only applicable to attorney-client communications which concern the exercise of the rights of defence

On November 25, 2020, the French Supreme Court ruled that attorney-client communications could not be seized during dawn raids provided they are related to the exercise of the client's rights of defence.

Background

On April 24, 2018, the Directorate-General for Competition, Consumer Affairs, and Prevention of Fraud (the "**DGCCRF**") launched an antitrust investigation and conducted dawn raids at the premises of Au Vieux Campeur, a French sport and leisure goods retailer. The DGCCRF seized a number of files, including Au Vieux Campeur's email exchanges with its outside legal counsel. Au Vieux Campeur successfully challenged the validity of the raid before the Chambéry Court of Appeals on legal privilege grounds, and had this correspondence removed from the DGCCRF's file. The DGCCRF challenged the Court of Appeals' decision before the French Supreme Court.

The French Supreme Court's decision

First, the French Supreme Court stressed that attorney-client communications are always confidential because they are covered by legal privilege under French law.[25] The Court however noted that, in the context of dawn raids, such communications may be seized so long as they do not regard the exercise of the rights of defence.[26] Specifically, the Court considered that the Court of Appeals could order the removal of emails between an attorney and its client from the seized files on confidentiality grounds,[27] but observed that Au Vieux Campeur had adduced no evidence showing that the emails in question concerned the exercise of its rights of defence. The Court concluded that the Court of Appeals should have assessed whether the communications in dispute related specifically to the exercise of the rights of defence. Therefore, the Court quashed the Chambéry Court of Appeals' decision and the case was remanded to the Grenoble Court of Appeals.

In practice, this means that attorney-client communications which are not directly related to the investigation at stake are not protected, and can be seized during a dawn raid.

[25] Article 66-5 of Law No. 71-1130 of December 31, 1971.

[26] The Court relied on article L. 450-4 of the French Commercial Code.

[27] French Supreme Court, November 25, 2020, Judgment n°19-84-304, para. 7.

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