July/August 2019

French Competition Law Newsletter

Highlights

— The Paris Court of Appeals cuts the fines imposed by the FCA in the millers cartel case

— The FCA fines a bicycle manufacturer for an online sales ban

— The FCA publishes its 2018 annual report

— The FCA issued its second opinion on French overseas territories

— The Paris Court of Appeals upholds the FCA's decision against Janssen-Cilag's defamatory practices

— The Paris Court of Appeals rules that undertakings may challenge the proportionality of fines imposed in settlement proceedings

FCA Updates

The Paris Court of Appeals cuts the fines imposed by the FCA in the millers cartel case

On July 4, 2019, the Paris Court of Appeals reduced the fines imposed by the FCA in the "flour" case from €242.4 million to €96.1 million.[1] The Court reduced the fines imposed on the millers while upholding the FCA's findings on the merits. The total fine reduction was justified by (i) the shorter duration of the infringement for two millers; (ii) the ability to pay for five millers; and (iii) the existence of a price regulation until 1978, which limited the cartel's impact on the economy.

The "flour" case

In March 2012, the FCA fined 17 millers for participating in two anticompetitive agreements.[2] The FCA's decision resulted from a four-year investigation triggered by a leniency application, which was followed by dawn raids in France (conducted by the FCA) and in Germany (conducted by the *Bundeskartellamt*). First, the FCA found that 13 French and German millers participated in an agreement to restrict access to each other's markets and maintain the French and German exports of packaged flour at an agreed level. Second, the FCA found that French millers

[1] Ruling of the Paris Court of Appeals of July 4, 2019, RG No. 16/23609.

[2] Decision of the French Competition Authority of March 13, 2012, No. 12-DC-09.

had colluded through two joint ventures to fix prices, restrict output, and allocate customers of packaged flour sold to retailers and hard discount outlets in France.

In November 2014, the Paris Court of Appeals partially overturned the FCA's decision. It ruled that it was not established that agreements relating to the French millers joint ventures were anticompetitive by object. Two years later, the Highest Court struck down the judgment for lack of legal basis. It held that the Paris Court of Appeals had not verified if the creation and the functioning of the two joint ventures went beyond what was necessary for the French millers to penetrate and remain on the markets. The case was remanded to the Paris Court of Appeals for a *de novo* review.

The fine reductions granted by the Paris Court of Appeals

In its judgment of July 4, 2019, the Paris Court of Appeals confirmed that the French millers colluded through the two joint ventures—but significantly reduced the fines imposed by the FCA.

Duration. The Paris Court of Appeals held that the FCA incorrectly assessed the duration of two millers' participation in the Franco-German cartel.

In its decision, the FCA held that VK-Mühlen and Grands Moulins de Paris had participated in the Franco-German cartel for its entire duration (*i.e.*, from May 14, 2002 to June 17, 2008), even if the two millers only participated in one of the 12 meetings that took place during that period, *i.e.*, the sixth meeting. To support its finding, the FCA indicated that the two millers did not distance themselves from the cartel as they were continuously invited to certain subsequent meetings.

The Paris Court of Appeals overturned the FCA's finding. First, it found that VK-Mühlen and Grands Moulins de Paris had participated in the infringement as from the sixth meeting, *i.e.*, beginning on September 23, 2004. Second, it found that the mere fact that the two millers did not distance themselves from the cartel was not sufficient to consider that the millers had continued to participate in the infringement until its ending point, because (i) the two millers did not attend any meetings after the sixth meeting and there was a "significant" time-period (*i.e.*, two years) between the sixth meeting and the end of the infringement; and (ii) the two millers did not participate in the monitoring of the cartel. The Court then verified whether other factual elements show that the two millers continued to participate to the cartel after the sixth meeting.

— ***VK-Mühlen:*** The Court found that letters inviting VK-Mühlen to attend subsequent meetings showed that cartel members considered that VK-Mühlen shared their objectives and assumed the risk of participating in the cartel. The Court further found that the fact that VK-Mühlen was not invited and did not participate in the 11th and 12th meetings showed that VK-Mühlen had ceased participation in the cartel at this point. The Court therefore held that VK-Mühlen's participation in the infringement ended after the 10th meeting.

— ***Grands Moulins de Paris:*** For the same reasons, the Court found that Grands Moulins de Paris no longer participated in the cartel as of the letter inviting it to the eighth meeting, *i.e.*, on October 29, 2003.

As a result, the Court held that the two millers' participation in the infringement lasted 10 months for VK-Mühlen, and five weeks for Grands Moulins de Paris.

Inability to pay. The Paris Court of Appeals also significantly reduced the fines of six millers for inability to pay.

In its decision, the FCA had examined the applications of six millers (*i.e.*, Grain Millers, Bliesmühle, VK Mühlen, Flechtorfer, Grands Moulins de Strasbourg, and Grands Moulins de Paris) but granted a 15% fine reduction to only one of them (Grands Moulins de Strasbourg), finding that it was the sole applicant to provide "reliable, complete and objective evidence attesting to the existence of real and current financial difficulties affecting its capacity to comply with the fines imposed [...]."[3] Before the Paris Court of Appeals, Grands Moulins de Strasbourg, Grands Moulins de Paris, and two other millers (Minoteries Cantin and Axiane) asked for a (further) fine reduction for inability to pay.

The Paris Court of Appeals noted that it must assess the companies' ability to pay on the date of its ruling, not on the date of the FCA's decision. The Court therefore took into account the up-to-date documents submitted by the millers on appeal. Substantially, the Court confirmed the test applied by the FCA, *i.e.*, the company's overall economic and financial situation must be considered. Poor results—including losses—cannot in themselves justify a fine reduction.

Based on this methodology, the Court reduced the fines imposed on the six millers, considering that the millers' financial situation drastically deteriorated since the FCA decision.

— ***Grands Moulins de Strasbourg:*** The Court found that the miller could not pay the whole fine imposed by the FCA's decision and was in a critical situation. The Court noted, however, that the miller had 6 million euros in assets that it could mobilize the pay part of the fine. It reduced the fine from 19 million to 2 million euros.

— ***Grands Moulins de Paris:*** The Court noted that the millers had profits of only 2 million euros and a total debt amounting to three times the value of its equity. The Court noted, however, that an important portion of this debt was towards shareholders and that the miller could mobilize receivables to pay a fine. It reduced the fine from 24 million to 6 million euros for Grands Moulins de Paris, and from 35 million to 3 million euros for Euromill Nord (which Grands Moulins de Paris acquired after the FCA's decision).

— ***Minoteries Cantin:*** The Court noted that the miller's turnover had halved between 2015 and 2016, and that the miller cumulated losses of 12 million euros over the last two years. The Court noted however that the miller still had receivables that it could mobilize to pay a fine. It reduced the fine from 23 million to 8 million euros.

— ***Axiane:*** The Court noted that the miller's turnover had dropped by 90% from 2015 to 2016 and that the miller had a negative result of 7 million euros in 2017. It reduced its fine from 44 million to 4 million euros.

Gravity of the facts and damage caused to the economy. As regards the French millers' anticompetitive agreements, the Paris Court of Appeals ruled that the FCA should have taken into account the existence of a price regulation until 1978, which limited the impact of the agreements on competition. The Court held that the agreements nevertheless had other consequences on competition, including because they allocated customers among millers and therefore artificially froze the structure of these millers. The Court reduced the gravity rate applied to the millers from 17% to 16%.

[3] Decision of the French Competition Authority No. 12-DC-09 of March 13, 2012, paragraph 955.

Franco-German cartel		
Company	**Fine in FCA's decision**	**Fine as amended in the Paris Court of Appeals' ruling**
Bach Mühle	€40,000	*No amendment*
France Farine	€8,295,000	*No amendment*
Grands Moulins de Paris	€11,834,000	€334,000
Grands moulins de Strasbourg	€9,890,000	*No amendment*
Axiane Meunerie	€19,927,000	*No amendment*
Bindewald	€2,602,000	*No amendment*
Bliesmühle	€1,929,000	*No amendment*
Flechtorfer	€4,510,000	*No amendment*
Friessinger	€11,770,000	*No amendment*
Heyl	€2,051,000	*No amendment*
Mills United	€5,282,000	*No amendment*
Saalemühle	€297,000	*No amendment*
VK Mühlen	€17,110,000	€5,733,000
Total Fine	**€95,537,000**	**€72,660,000**

French anticompetitive agreements		
Company	**Fine in the FCA's decision**	**Fine as amended in the Paris Court of Appeals' ruling**
Axiane Meunerie	€44,032,000	€4,000,000
Euromill Nord	€35,205,000	€3,000,000
Grands Moulins de Paris	€24,605,000	€6,000,000
Grands Moulins Storione	€95,000	*No amendment*
Grands Moulins de Strasbourg	€18,933,000	€2,000,000
Minoteries Cantin	€23,622,000	€8,000,000
Moulins Soufflet	€393,000	*No amendment*
Total Fine	**€146,885,000**	**€23,488,000**

This ruling confirms the effectiveness of the Paris Court of Appeals' control over the amount of the FCA's fines. Ultimately, in this case, a substantial portion of the fine reduction resulted from the millers' inability to pay the fines imposed by the FCA. This inability to pay was due to the drastic deterioration of the millers' financial situations since the FCA issued its decision almost seven years prior, quite a long time for a company facing financial difficulties.

The FCA fines a bicycle manufacturer for an online sales ban

On July 1, 2019 the FCA imposed a fine of €250,000 on the high-end bicycle manufacturer Bikeurope B.V. and its mother company, Trek Bicycle Corporation, for having imposed and monitored an online sales' ban on its distributors from 2007 to 2014.[4]

[4] Decision No.19-D-14 of July 1, 2019, regarding practices implemented in the high-end cycle distribution sector.

Background

The FCA initiated this case almost ten years ago, when it received evidence from the French Directorate General for Competition Policy, Consumer Affairs and Fraud Control (*Direction générale de la concurrence, de la consommation et de la répression des fraudes*, "DGCCRF"). The FCA conducted dawn raids at various companies active in the distribution of high-end bicycles in June 2013, and sent a statement of objections to Bikeurope and its parent company Trek in July 2018.

Bikeurope assembles, distributes and sells Trek bicycles through a network of authorized distributors. Bikeurope's terms and conditions initially provided that any online sales of Trek bicycles be delivered to an authorized point of sale. In 2010, Bikeurope changed its terms and conditions, explicitly prohibiting online sales. This online sales ban was monitored by Bikeurope, who threatened retailers to terminate their contract if they did not comply with the ban.

According to Bikeurope, these restrictions were to protect consumers' safety, in compliance with two French decrees; a 1995 decree prohibiting the delivery to end-customers of cycles not properly assembled or fully adjusted[5] and a 2016 decree allowing the seller to leave it to the consumer to assemble the wheels and pedals only.[6]

A de facto online sales ban

The FCA held that Bikeurope's terms and conditions amounted to a *de facto* online sales ban in violation of Article 101(1) TFEU and Article L420-1 of the French Commercial Code.

The FCA noted that the organization of a selective distribution network is not prohibited by competition law provided that it complies with certain conditions. In particular, a selective distribution contract cannot prohibit online sales unless this is justified to preserve the quality and proper use of the product being distributed. Moreover, the online sales prohibition must be proportionate to the objective pursued, *i.e.*, it may not go beyond what is necessary to achieve that objective.[7]

In this case, the FCA held that by requiring its distributors to deliver Trek cycles to their physical points of sale, Bikeurope had *de facto* prohibited them from selling the cycles online. This prohibition went beyond what was necessary to preserve consumer safety, the highly technical nature of the bicycles, and Trek's high value-added business model (*i.e.*, brand reputation, service quality, and a personalized relationship with the customer).

The FCA rejected Bikeurope's claim that the obligation to deliver in-store was required by the then applicable regulation. The decrees did not prohibit distance sales (by internet or by mail). They did not require that assembly and adjustment of Trek brand bicycles be carried out within the retailer's store and in the presence of the buyer. Instead, the decrees only required bikes to be fully assembled upon delivery to the customer.

Furthermore, the FCA held that Bikeurope's online sales ban reduced the possibility for its distributors to sell products outside their catchment area. Indeed, the distributors could not compete with resellers who could freely use online channels. The ban also limited the choice of customers who wished to purchase a bike without travelling. The FCA therefore found the ban to be particularly harmful to competition—amounting to a by-object infringement.

The FCA also held that Bikeurope's online sale ban was similar to a hardcore restriction on passive sales and therefore could not benefit from the block exemption regulation applicable to vertical agreements[8] nor did it fulfil the conditions for granting an individual exemption under Articles 101(3) TFEU and L420-4 of the French Commercial Code.

---

[5] Decree No.95-937 of August 24, 1995.

[6] Decree No.2016-364 of March 29, 2016.

[7] The FCA refers here to ECJ Judgments of October 13, 2011 *Pierre Fabre Dermo-Cosmétique*, C-439/09, para. 41 and of December 6, 2017, *Coty Germany GmbH v Parfümerie Akzente GmbH*, Case C-230/16, paras. 43 *et seq*.

[8] Commission Regulation (EU) No 330/2010 of April 20, 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

However, because the impact of the online sale ban on the economy was limited, the fine imposed by the FCA remained modest (€ 250,000) despite the seven year duration of the infringement.

Implications

This is the second time the FCA fined a company for online sales restrictions following the ECJ's *Coty* judgment in 2017.[9] The *Coty* judgment held that online sales restrictions may be permitted in a selective distribution system when necessary to preserve the quality and proper use of the products in question, as may be the case for luxury goods.

In October 2018, the FCA fined Stihl €7 million for banning online sales, concluding that prohibiting distance sales of chainsaws went beyond what is necessary to protect the health of the consumer for the product concerned.[10] The Bikeurope case confirms that suppliers cannot justify online restrictions for consumer safety if less restrictive means to protect consumers exist.

Other FCA News

The FCA publishes its 2018 annual report

The FCA published its 2018 annual report, which, this year, also provides an overview of the FCA's policy and results over the last decade (see our article published in the April newsletter[11]). The FCA estimates that its enforcement action has resulted in a total gain of almost €14 billion for the economy since the adoption of its Fining Guidelines in 2011 (including approximately €5 billion of fines and €9 million of over cost avoided thanks to its investigations and decisions). The FCA is reportedly the most active national competition authority within the European Competition Network based on the number of both investigations opened and decisions adopted.

The FCA issued its second opinion on French overseas territories[12]

On July 4, 2019, the FCA issued an opinion on the functioning of competition for the importation and distribution of consumer products in French overseas territories—one of the FCA's "priorities" for 2019.[13] The opinion assesses progresses made since the FCA issued its first opinion on French overseas territories, and extends its assessment to online restrictions.

The FCA considers that the ban on import exclusivity imposed by the *Lurel* Law in 2017 had positive structural effects on competition, although significant price differences with mainland France remain. The FCA makes twenty recommendations, including in relation to the online business, the goal of which is to lower prices of consumer goods overseas.

[9] ECJ Judgment of December 6, 2017, *Coty Germany GmbH v Parfümerie Akzente GmbH*, Case C-230/16.

[10] FCA Decision No. 18-D-23 of October 24, 2018 regarding practices implemented in the distribution of motorized cultivation equipment.

[11] *See also* "10th anniversary of the French Competition Authority – results and prospects", French Competition Law Newsletter, April 2019.

[12] Opinion 19-A-12 of July 4, 2019 regarding the competition process in the French overseas territories, available in French at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=697&id_article=3449&lang=en.

[13] *See* press release on FCA's priorities for 2019 released on January 11, 2019, available at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=697&id_article=3329&lang=en. Over the past ten years, 10% of the FCA's litigation decisions where adopted in overseas territories; moreover, the FCA reviewed 41 mergers and issued 12 opinions on the overseas territories. In addition, the FCA recently carried out down raids in several companies in the inter-island air transport and retail sectors.

Court Updates

The Paris Court of Appeals upholds the FCA's decision against Janssen-Cilag's defamatory practices

On July 11, 2019, the Paris Court of Appeals dismissed most of the pharmaceutical company Janssen-Cilag's claims in its appeal against the FCA decision fining it for delaying market entry of a generic drug[14], thereby essentially upholding the FCA's third decision fining a pharmaceutical company for denigrating generic drugs after Sanofi-Aventis[15] and Schering-Plough.[16]

Janssen-Cilag markets an originator drug, Durogesic, a strong painkiller for patients with chronic cancer pain, distributed in the form of fentanyl patches. In October 2007, shortly after Janssen-Cilag's patent over Durogesic expired, the European Commission granted a generic drug market authorization to Ratiopharm and ordered national regulatory authorities to follow in doing so. The French health authority (the "AFSSAPS") thus initiated a procedure to grant Ratiopharm a market authorization in France. In March 2008, Janssen-Cilag submitted to the AFSSAPS that Ratiopharm's generic drug (i) failed to qualify as a generic form of Durogesic and (ii) could have adverse effects on public health. The AFSSAPS ultimately granted its market authorization in July 2008, while it was legally bound to issue it within 30 days of the notification of the European Commission's market authorization. In January 2009, the AFSSAPS registered Ratiopharm's generic drug on the French repertoire of generic drugs, but alerted pharmacists on some existing risks for patients substituting Durogesic with the generic drug. Janssen-Cilag then launched a campaign disparaging the generic versions of Durogesic among doctors and pharmacists. Ratiopharm complained about Janssen-Cilag's intervention before the FCA and its communication among doctors and pharmacists.

In December 2017, the FCA fined Janssen-Cilag 25 million euros for delaying and then blocking the market entry of generic versions of Durogesic in France in violation of Article 102 TFEU.[17]

Janssen-Cilag appealed the FCA decision. It claimed that (i) the FCA lacked jurisdiction to assess its intervention before the AFSSAPS; (ii) neither its intervention before the AFSSAPS nor its communication with doctors and pharmacists were anticompetitive under Article 102 TFEU; and (iii) the fine should be reduced.

The Paris Court of Appeals rejected the first two arguments—but slightly reduced the fine on the ground that the damage to the economy was lower than found by the FCA.

First, the Court confirmed that the FCA had jurisdiction to assess an undertaking's conduct before an independent regulatory authority. The Court noted that the FCA had not intruded on the scientific debate on Durogesic's generic drugs. Instead, the FCA had carried out a legal analysis assessing whether Janssen-Cilag's conduct sought to preserve its dominant position, which was in the scope of its jurisdiction.

Second, the Court confirmed that Janssen-Cilag's conduct was anticompetitive under Article 102 TFEU. It noted that a conduct consisting, for a dominant firm, of putting forward arguments known or which ought to be known as legally unfounded before an independent regulatory authority can reduce competition. The Court held that, in this case, the FCA had rightfully found that Janssen-Cilag had abused its dominant position by challenging the qualification of Ratiopharm's drug as a generic before the AFSSAPS while (i) the European Commission had already settled this point, and the AFSSAPS was bound by this determination; and (ii) re-opening the discussions with the AFSSAPS would likely

[14] Paris Court of Appeals, 5-7, July 11, 2019, RG No. 18/01945.

[15] French Competition Authority, Decision No. 13-D-11 of May 14, 2013, relating to practices in the pharmaceutical sector.

[16] French Competition Authority, Decision No. 13-D-21 of December 18, 2013 relating to practices on the French market of high dose buprenorphine marketed in towns.

[17] French Competition Authority, Decision No. 17-D-25, December 20, 2017, relating to practices in the sector of transdermal systems of fentanyl.

delay the generic's registration on the French repertoire, thereby reducing competition on the market. Further, the Court confirmed that Janssen-Cilag had denigrated Ratiopharm's generic by carrying out a campaign *vis-à-vis* pharmacists, falsely claiming that the AFSSAPS was not convinced of Ratiopharm's drug qualification as a generic and that the generic could not replace the Durogesic without risk.

Nevertheless, the Court reduced the fine imposed on Janssen-Cilag. It held that the FCA had incorrectly found that Janssen-Cilag's intervention delayed the issuance of AFSSAPS' market authorization. Indeed, Janssen-Cilag first reached out to the AFSSAPS at the end of March 2008, and the AFSSAPS had already issued opinions on Ratiopharm's generic by then. Instead, Janssen-Cilag's intervention aimed at delaying the registration of the generic on the French repertoire. While this hindered pharmacists' prescribing the generic for patients using Durogesic, it did not prevent the generic from being marketed. As a result, the damage to the economy was less serious than that fined by the FCA. The Court reduced the proportion of the value of sales from 15% to 13%, resulting in a total fine of 21 million euros.

The Paris Court of Appeals rules that undertakings may challenge the proportionality of fines imposed in settlement proceedings

On June 13, 2019, the Paris Court of Appeals ruled that an undertaking can challenge the proportionality of a fine set by the FCA within the range agreed with the *Rapporteur Général* during a settlement procedure.[18]

Under the settlement procedure, companies can negotiate the range of their fine with the FCA's investigation services if they accept to fully cooperate and waive their rights to challenge the FCA's objections. The settlement procedure was introduced in 2015 to accelerate proceedings, reduce the number of appeals, and reduce uncertainty as to the fine amount for companies. During the settlement procedure, the *Rapporteur Général* proposes a range for the fine,[19] and the FCA's *Collège* then imposes a fine within that range.

In this case, the FCA had found that three distributors of veterinary medicinal products had concluded "non-aggression" pacts to allocate customers. It also found that the distributors and their professional association, FDMV, had colluded to set the compensation amount that the French government was to pay for various vaccination campaigns. The companies had asked the FCA to benefit from the settlement procedure. In its decision, issued on July 26, 2018,[20] the FCA fined the distributors and the professional association a total amount of €16 million for the two cartels.[21] Three Alcyon, the company that received the highest fine (*i.e.*, €10 million), appealed the FCA's decision, claiming that the FCA had violated the principle of proportionality when setting the amount of its fine.

In its ruling, the Paris Court of Appeals ruled that the settlement procedure does not prevent undertakings from challenging the final decisions, as long as they do not challenge the range of the fine in itself.[22] The Court added that an undertaking cannot be deemed to have waived its right to challenge the proportionality of the fine during the settlement procedure when the fine has not yet been imposed.[23] In this case, however, the Court rejected Alcyon's claims, finding that the fine was proportionate to the damage to the economy, as well as to the gravity and duration of the infringement.

[18] Paris Court of Appeals, 5-7, June 13 2019, 18/20229.

[19] In the present case, the *General Rapporteur* and the undertaking agreed on a range of €6 million to €11 million.

[20] French Competition Authority, Decision No. 18-D-15 of July 26, 2018 regarding practices implemented in the distribution of veterinary medicinal products sector.

[21] The undertakings which have been fined are Alcyon France and Alcyon, Coveto, Centravet, Hippocampe Caen, Agripharm and Chrysalide, Coveto Limoges, Véto Santé, Elvetis and Neftys Pharma and the Federation for the distribution of veterinary medicinal products (Fédération de la Distribution du Médicament Vétérinaire).

[22] Paris Court of Appeals, *op. cit.*, para. 46.

[23] Paris Court of Appeals, *op. cit.*, para. 47.

CONTACTS

Antoine Winckler
+32 22872018
awinckler@cgsh.com

François-Charles Laprévote
+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

Elena Chutrova
+32 22872028
echutrova@cgsh.com

Anita Magraner Oliver
+32 22872133
amagraneroliver@cgsh.com

Hugo Gilli
+33 1 40 74 68 00
hgilli@cgsh.com

Martha Smyth
+33 1 40 74 68 00
msmyth@cgsh.com

Marcellin Jehl
+32 22872309
mjehl@cgsh.com

19.0920.01_092019