



Abuse of a dominant position: tying in the air freight transport of live animals

sector to French Polynesia

Marwa BERROUBA

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Resume: By a decision ruled on February 15th, 2022, the French Competition Authority fines the French company Goldenway International pets (GIP), a company specialized in pet transportation, for abuse of a dominant position on tying in the air freight transport of live animals to French Polynesia. The company has imposed other services to its customers that are not normally linked to the offered services.

Tying is a practice often committed by companies. It consists in a dominant company selling or imposing products in the same batch without proposing the products separately. Those practices may constitute an abuse committed by a company in a monopoly situation.¹

The decision that we are going to comment is a good example.² It is a decision of the French Competition Authority rendered on February 15th, 2022 concerning the practices executed by the company Goldenway International Pets (GIP) in the air freight transport of live animals sector.

GIP is a French company specialized in the pet air transport. The services of this company consist in maintaining and organizing sanitary controls of pets to French Polynesia. The company detains a monopoly on this service because French Polynesia imposes a strict sanitary protocol which consists in a control of animals by veterinarians before their arrival on the territory. This implies a stay in quarantine. However, French Polynesia does not have a quarantine station unlike the GIP company, which has one in France.

¹ ADLC, notice 10-A-13 of June 14, 2010 relating to the cross-use of customer databases, *point 31*

² Decision 22-D-05 of February 15, 2022 regarding practices implemented in the air freight transport of live animals sector

Taking advantage of its monopoly on the quarantine market, GIP decided to link its services with other services concerning the road transport of those animals between the quarantine station of Le Grais and Roissy-Charles de Gaulle airport, but also the organization of the air freight transport of those animals between Roissy-Charles de Gaulle and Papeete airports.

Therefore, the company created a leverage preventing any competition.

Because of these practices, many requests were made by consumers to buy services separately, however, those requests were rejected by the company GIP.

As a result, several complaints were addressed to the Directorate General of Competition, Consumer Affairs, and Fraud Control (DGCCRF) by consumers. By a post dated on February 27th, 2019, the Economy Minister addressed to the French competition authority an administrative investigation report prepared by the DGCCRF relating the competition situation concerning the air freight transport of live animals sector.

By a decision of September 6th, 2019, the authority has taken up this case on its own initiative. In 2020, the authority requested the

assistance of the general rapporteur of the Polynesian Competition Authority.

The French Competition Authority identified three relevant markets³: the quarantine market, the road transport market, and the organization of the air freight transport market. The company detains a monopoly on the three markets.

GIP justified its practices by health considerations. According to the company, the Polynesian authorities validated the sanitary protocol considering to link services concerned and therefore it applied this protocol so that it won't lose its authorization. These justifications were rejected by the French Competition Authority, which considered that they were not valid since they did not justify that the services should be provided by one provider.

Finally, GIP requested to benefit from the procedure of the article L. 464-2 of the French Commerce Code, not contesting the grievances notified by the French authority.

Did the company Goldenway International pets abuse its dominant position in the air freight transport of live animals sector by committing tying practices prohibited by

³ Anne Wachsmann, Nicolas Zacharie, Tying: The French Competition Authority sanctions a company with a de facto monopoly for a tying

practice (Goldenway International Pets), 15 February 2022, Concurrences N° 2-2022, Art. N° 106496, p. 111

articles L420-2 of the French Commerce Code and 102 of the TFEU? What are the consequences on the market and on the consumer by a company taking advantage of its monopoly situation?

The French Competition Authority fines the company Goldenway international pets €65,000 for its abuse of a dominant position in the air freight transport of pets sector.

Indeed, tying committed by the company caused negative effects on the market because it limited competition by preventing other competitors to enter the market. These practices have a considerable impact on the consumer by imposing on him services that they didn't ask for.

In addition to this sanction, GIP has proposed a commitment related to the publication and the dissemination of the decision of the authority in order to inform and to warn the public and companies about the illegality of tying practices. A summary of the decision is available on the home page of its website.

We will see that the abuse of a monopoly situation by GIP company on the quarantine market causes a considerable impact on the market (I) and an infringement against the consumer rights. (II)

I. The assessment of an abuse of a dominant position by a company in a monopoly situation on the market of a tying product having a considerable impact on the market.

A) The observation of an abuse of a monopoly situation

First of all, GIP took advantage of its monopoly on the quarantine market.

Indeed, it is the only company on the metropolitan French territory which received an authorization to hold a quarantine station for pets and to offer custody services and organization of sanitary controls of pets to go to French Polynesia. In other words, it is the only company to possess a quarantine station in metropolitan France authorized by the Polynesian authorities⁴. Thus, according to the analysis of the French Competition Authority, the company has a *de facto* monopoly on the quarantine market.

The article L. 420-2 of the French Commerce Code prohibits the abuse of a dominant position through tying, as does Article 102 (d) TFEU.

In this case, according to the authority *“the effect of the tying was, on the one hand, to extend and/or strengthen GIP's dominant position on the national markets for road transport to CDG airport and for the organization of air freight transport of pets*

⁴ *Ibid*

to French Polynesia, by excluding all competition on these markets, and, on the other hand, to prevent consumers from using the services potentially offered by GIP's competitors on these two related markets.”⁵ In other words, tying committed by the company constitutes an abuse of a dominant position in that their purpose was to prevent competition and impact consumers in their choice to use other services.

This is therefore an anti-competitive practice prohibited by the above-mentioned articles.⁶ Thus, GIP violated Articles L420-2 of the French Commerce Code and 102 TFEU.

Then, the authority notes that there were barriers to entry into the quarantine market. Those barriers are technical, administrative, and economic barriers.

Concerning the technical barriers, the company GIP is the only one to have the specific professional skills required to carry out the activity of guarding and organizing sanitary controls of pets. Moreover, building a quarantine station also requires technical skills.

Concerning the administrative barriers, it is necessary to obtain an authorization for a quarantine station to receive pets to French Polynesia.

⁵ Decision 22-D-05 of February 15, 2022 regarding practices implemented in the air freight transport of live animals sector, *point 402*

Finally, concerning the economic barriers, entering the quarantine market requires investments that can cost more than the revenues generated by the activity in question.

Consequently, the accumulation of these barriers makes it difficult for any new economic operator to enter the market.

This accumulation therefore reinforces the monopoly position of GIP and its ability to act independently on the quarantine market.⁷

B) *A monopoly situation creating a leverage*

According to the authority's decision, the GIP's monopoly situation creates a “leverage”. A leverage is the fact that a company takes advantage of its position of strength on a market in order to conquer a connected market. Indeed, the authority notes that *“the competitive eviction induced by the behavior it has implemented, consisting of a double tied sale, is therefore all the greater since this behavior has the effect of giving it a monopoly on the two downstream markets of road transport to Roissy-Charles de Gaulle airport and the organization of air freight transport (leverage) to Papeete.”*

In addition to being in a monopoly situation on the quarantine market with the presence

⁶ Article L420-2 of the French Commerce Code and 102 TFEU

⁷ *Op. cit. point 391*

of several barriers at the market entrance, the company is present on two other markets: the road transport of animals market and the chartering market.

According to the authority, by being present on these two other markets while it detains a monopoly on the quarantine market, GIP wanted to prevent other competitors to enter the market. There is here a strategy of eviction because the company wanted to eliminate the competition.

Then, the authority notes that the monopolies did not have the same origin since the monopoly on the quarantine market comes from the fact that the company GIP is the only one with the required authorization, while the monopolies on the other two markets were only the consequence of the tying implemented by the company on the first market.

In addition, we learn that the practices committed have lasted too long, ten years. According to the authority, *“the fact that GIP has a monopoly on the three markets mentioned above for more than ten years is direct evidence of the anti-competitive lock-in to which its practice has led”*. Therefore, during these years, no competitor could enter the road transport and the chartering market.

We can understand that this had a strong impact on the situation of competitors in connected markets.

The company *“knowingly implemented the tying practices of which it is accused”*.⁸

II. The finding of an abuse of a dominant position by a company in a monopoly situation on the market of a tying product having a strong impact on the consumer

A) Practices that disadvantage the consumer

The practices realized by GIP also raise issues for the consumer.

In this case, several complaints were made by consumers because of the practices committed by the company.

Indeed, the company took advantage of its monopoly position by refusing to allow its customers to obtain the tying product (the quarantine service) without purchasing the related products (the road transport services for animals and those related to chartering).⁹ GIP doesn't allow its customers to obtain those services separately. Moreover, those services are very expensive for consumers. The latter considered these prices “too high”. This puts consumers at a significant disadvantage because they cannot benefit

⁸ *Op. cit. point 394*

⁹ Alain Ronzano, Sanction: The French Competition Authority sanctions a tying practice on the air

transport of pets to French Polynesia (Goldenway International Pets), 15 February 2022, Concurrences N° 2-2022, Art. N° 105343, www.concurrences.com

from advantageous prices from other competitors.

In terms of article 102 TFEU¹⁰, “*Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.*”

Such abuse may, in particular, consist in:

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

By imposing the other two services on its customers with its own, GIP violated article 102 TFEU. The road transport services for animals and the services related to the chartering are not linked with the quarantine service carried out in France.

Thus, according to the analysis of the competition authority, “*tying took the form of global quotations linking quarantine services, the road transport and the organization of transport by air freight, the GIP company refusing to carry out only the services linked to quarantine for consumers who requested them*”.¹¹

In order to justify its behavior, GIP considered that it wished to “*avoid that the*

taking over by other service providers would lead to a recontamination of the animals”.

However, according to the competition authority, the arguments supported by the company are not valid because “*there is nothing to prevent, from a health point of view, the sealed cages containing the animals that have completed the quarantine within the GIP station being handed over to other service providers*”. In other words, GIP could very well separate the services and give consumers the choice to use another provider regarding the other services related to road transport and chartering.

Thus, the practices prevented consumers from using the services potentially offered by GIP's competitors in these two connected markets.

B) A decision justified by the will to protect the consumer but questionable in view of the seriousness of these practices

This decision is justified by the will to protect consumers, since in this case they are affected by the practices committed by the company because it offered a set of services and not just the quarantine service. Nevertheless, it is questionable about the calculation of the amount of the fine.

In order to protect the consumer, the authority imposed to the company to respect its commitment to post the decision on its

¹⁰ Article 102 (d) of the Treaty on the Functioning of the European Union

¹¹ *Op.cit. point 402*

website in order to warn and inform consumers and also companies of practices committed by GIP in the air freight transport of pets sector. This post can damage the company's reputation because it could dissuade new customers to choose its services. It could also dissuade potential partners to work with the company.

Concerning the calculation of the amount of the sanction, the authority imposed a fine of €65,000 on GIP. According to article L464-2, I of the French Commerce Code, the amount of the fine is calculated according to several criteria such as the nature of the acts or the duration of the practices.

In this decision, the amount of the fine is lower than the legal ceiling of the sanction provided for by article L464-2, III of the French Commerce Code.¹²

The authority was merciful because it accepted the settlement procedure from GIP under Article L464-2, III of the French Commerce Code so that the company could benefit from a less severe fine. This settlement procedure consists in the company committing itself to modify its behavior in the future¹³ and to show the authority's decision on its website. In this case, GIP did not

contest the grievances and benefited from the settlement. We can say that the company was lucky to have this settlement procedure otherwise the sanction would be higher.

Despite the settlement procedure accepted by the authority, its position is rather surprising. Indeed, the authority considers that the practices are serious, however, the amount it imposes on the company is rather low considering the practices committed which have a considerable and very harmful impact on the market. In this case, the tying concerned all the sales made. The authority notes that *“the crowding out of these practices on the downstream markets of road transport and the organization of air freight transport is therefore total there, as no competitor can practice an activity on these markets.”*¹⁴

In addition, the duration of the practices implemented by GIP is particularly long since they began in 2010, that is to say ten years.¹⁵

Thus, this is a questionable sanction because in this case the authority was not severe, unlike in other decisions concerning tying practices where it imposed firmer fines.

Conclusion

¹² Decision 22-D-05 of February 15, 2022 regarding practices implemented in the air freight transport of live animals sector, *point 434*

¹³ *Ibid, point 425*

¹⁴ *Ibid, point 392*

¹⁵ *Ibid, point 420*

To conclude, the abuse of a dominant position by Goldenway International Pets company causes considerable consequences because the company is in a monopoly situation on the three markets, thus limiting competition. Moreover, tying committed by the company may restrict competition in the air freight transport of pets. Consumers are also affected by the realization of these practices. Indeed, they find themselves to buy very expensive services whereas they can buy them separately to other competitors.

This decision is significant through the French Competition Authority reminding to companies detaining a monopoly on the way they have to act on the market. Interventions by the authority are justified by the need of

preserving competition and protecting consumers.

Nevertheless, in this case, it is surprising that the amount of the sanction imposed by the authority is not high enough in view of the seriousness of the practices committed by GIP despite the settlement procedure accepted by the authority. The practices committed by GIP had a huge impact in that they prevented the entry of new competitors into the connected markets for ten years, which is a very long time. So, in this decision, the authority was merciful with the company.

Marwa BERROUBA