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The tricky demonstration of the excessive nature of prices implemented by a de facto monopoly company

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Resume: *In its decision of July 7, 2021 n° 19-25.586 and n°19-25.602, the commercial chamber of the Court of Cassation ruled on the assessment of the excessive nature of the prices implemented by an undertaking in a dominant position. In doing so, the Court confirmed the necessary criteria to identify the practice of excessive pricing, which is prohibited by both European and national laws.*

In its decision of July 7, 2021 n° 19-25.586 and n°19-25.602, the commercial chamber of the Court of Cassation ruled on the assessment of the excessive nature of the prices implemented by an undertaking in a dominant position. In doing so, the Court confirmed the necessary criteria to identify the practice of excessive pricing, which is prohibited by European and national laws.

According to the Court of Appeal's verdict of November 14, 2019, the Minister of Economy referred to the Competition Autorité regarding practices of abuse of dominant position implemented by the company Sanicorse and Groupe [J], which are prohibited by the provisions of Article L. 420-2 of the French Commercial Code, in the sector of waste from infectious risk care activities in Corsica.

In its Decision No. 18-D-177 of September 20, 2018, the Autorité sanctioned the company Sanicorse for an abuse of a dominant position consisting of a practice of sudden, significant, persistent, and unjustified increase in the prices for disposal of infectious risk healthcare waste in Corsica from 2011 to 2015.

Sanicorse and Groupe [J] filed an action for annulment and reversal of this decision. The Paris Court of Appeal ruled in their favor, finding that it had not been established that Sanicorse, as the author, and Groupe [J], as the parent company, had violated the

provisions of Article L. 420-2 of the French Commercial Code. The Autorité and the Minister of Economy therefore appealed to the Court of Cassation.

According to the Autorité, excessive pricing constitutes an abuse of a dominant position within the meaning of Article 102 TFEU, which can be established either by demonstrating that the price has no reasonable relation to the economic value of the service provided, or by comparison with a reference price, provided that the difference between the price set by the company and the reference price is appreciable, i.e. it is significant and persistent, and not justified by that undertaking.

In the absence of external reference prices, i.e. prices charged by competitors in a comparable situation, or prices charged by the same company on other markets, the excessive nature of the prices can be established by a comparison over time (by reference to the prices previously charged to the same customers) by noting a significant price difference that is not justified by the undertaking.

In this case, the French Competition Autorité had demonstrated the abuse of a dominant position by comparing the prices charged by Sanicorse over time. The Court of Appeal noted that the company had imposed significant increases on several clinics between 2011 and 2015 (up to +137%) and on public health institutions (up to +194%). By criticizing the Autorité for not having used one of the two alternative methods of analysis without investigating whether the abuse was established by the new method used by the Autorité (comparison over time), the Court of Appeal deprived its decision of a legal basis under Article L. 420-2 of the Commercial Code.

Secondly, it is clear from the judgment under appeal that Sanicorse imposed significant increases over a relatively brief period of time in its rates on health care institutions in Corsica, and that there was therefore a significant and persistent increase in the rates at issue. By failing to investigate whether Sanicorse justified these increases, which was not the case as the Autorité had demonstrated, the Court of Appeal deprived its decision of a legal basis under Article L. 420-2 of the French Commercial Code.

Thus, the Commercial Chamber had to answer the following question: Is a significant, unjustified, sudden, and non-transitory price increase by a company in a monopolistic position sufficient to constitute an abuse of exploitation within the meaning of articles 102 TFEU and L.420-2 of the Commercial Code?

The Commercial Chamber answers in the negative and rejects the appeals of the applicants on two grounds.

First, since the Autorité argued before the judges that a price increase could, in itself, constitute an abuse, without maintaining that the comparison of prices charged over time by an undertaking in a dominant position was necessary to identify the abuse, the first part of its plea, which is mixed of fact and law, is new and, as such, inadmissible.

Secondly, according to the judge's ruling, a price increase is nothing more than the setting of a price, and the assessment of the excessive or non-excessive nature of such an increase can be conflated with that of the excessive or non-excessive nature of the resulting price. The Autorité does not maintain that the prices resulting from the price increases applied by Sanicorse between 2011 and 2015 were unreasonably high in relation to the economic value of the service provided and, consequently, did not qualify them as excessive, so that, in view of the burden of proof on the Autorité, it must be presumed that the prices resulting from the increases were fair. As such, the Court of Appeal correctly held that the alleged abuse was not established by the Autorité.

By validating the reasoning of the Paris Court of Appeal, the Commercial Chamber thus clarifies that it constitutes an abuse of a dominant position for a dominant company to impose excessive prices or other unfair trading conditions. However, increases in the price of its services, even if they are significant, unjustified, and imposed suddenly and persistently, do not constitute unfair trading conditions if it is not claimed that they would have resulted in excessive prices, i.e. without a reasonable relation to the economic value of the service provided.

Hence, the Commercial Chamber chose to disregard the comparison over time analysis method elaborated by the Autorité for price increases implemented by a de facto monopoly company (I), a particularly severe decision that contributes to further reinforce a dominant undertaking's monopoly position (II).

I - The exclusion of the comparison over time analysis method for price increases implemented by a de facto monopoly company

A - A price increase insufficient to label a price as excessive

"A price increase is nothing more than the setting of a price, and the assessment of the excessive or non-excessive nature of such an increase can be conflated with that of the excessive or non-excessive nature of the resulting price."

When implemented by a company in a dominant position, the practice of excessive pricing constitutes an abuse of exploitation prohibited by Articles 102 TFEU and L. 420-2 of the Commercial Code. Paragraph 2 of this article states that: "The abuse by an undertaking or group of undertakings of a state of economic dependence of a customer or supplier is prohibited, where it is liable to affect the functioning or structure of competition."

In this case, the Autorité found that Sanicorse had implemented significant increases in the price of its waste treatment and disposal services (up to +194%) for several years (from 2011 to 2015), increases that Sanicorse did not justify. Thus, the Autorité found that Sanicorse was guilty of a sudden, significant, and persistent increase, which was devoid of any objective justification. Sanicorse argued that its rate increases were justified by its increased costs and investments. However, it turns out that these price increases were in fact intended to dissuade Sanicorse's clients from developing alternative solutions for the treatment of hazardous waste, thereby eliminating any competition.

Nevertheless, the judges, validated by the commercial chamber of the Court of Cassation, considered that a sudden, significant, and persistent price increase implemented by a dominant company, even in the absence of objective justification, is not sufficient in itself to constitute an abuse of a dominant position. Such reasoning can be explained by the judges' concern to preserve the legal security of contracts and to prevent the Autorité from becoming a "price regulator," which would contravene the freedom to set prices protected by the freedom of contract.

Thus, the Autorité also needed to establish the excessive nature of the price itself.

B - The necessary demonstration of the absence of a reasonable relation to the economic value of the service provided

"The Autorité does not maintain that the prices resulting from the price increases applied by Sanicorse between 2011 and 2015 were unreasonably high in relation to the economic value of the service provided and, consequently, did not qualify them as excessive."

The United Stand ruling rendered by the European Court of Justice (ECJ) on February 14, 1978 (Case 27/76) defines excessive pricing as that which "has no reasonable relation to the economic value of the product supplied." The ECJ thus developed a two-pronged test to verify the excessive nature of a price, which consists of assessing "whether the difference between the costs actually incurred and the price actually charged is excessive" and "if the answer to this question

is in the affirmative, whether a price has been imposed which is either excessive in itself or when compared to competing products."

In the case at hand, the Autorité had focused on the price increase itself, which it found to be sudden, significant, persistent, and unjustified, without demonstrating that the prices were in themselves excessive. This failure by the Autorité to demonstrate the excessive nature of those prices is, however, perfectly understandable. First, because of Sanicorse's monopoly position, there were no competitors in Corsica charging their own prices. In addition, Sanicorse did not operate outside Corsica, which prevented any comparison outside that territory.

In such circumstances, the Autorité had to revise its decision-making practice to consider this specific scenario. Hence, the Autorité states that: "In the absence of external reference prices, i.e. prices charged by competitors in a comparable situation, or prices charged by the same company on other markets, the excessive nature of the prices may be established by a comparison over time, i.e. by reference to the prices previously charged to the same customers, by noting an appreciable difference in price that is not justified by the company."

The judges, approved by the Commercial Chamber, were particularly severe in ruling out an abuse of exploitation in this case, considering that the Autorité did not prove that the price increases had the purpose or effect of dissuading or driving out potential competitors. On the contrary, the judges concluded that an increase in rates by Sanicorse was likely to encourage health care institutions to develop other solutions.

Thus, the Autorité could not just assess that there was a price differential over time; it also had to show that the prices had no reasonable relation to the economic value of the service provided. While this decision may seem particularly severe, it is nevertheless consistent with burden of proof that bears the Autorité.

II - A severe decision contributing to reinforce a dominant undertaking's monopoly position

A - A presumption of price fairness in the absence of evidence to the contrary

"In view of the burden of proof the Autorité bears, it must be presumed that the prices resulting from the increases were fair."

Article 2 of Regulation 1/2003 governs the allocation of the burden of proof in all national and European proceedings under Articles 101 and 102 TFEU. In accordance with the adage "the party that asserts a truth bears the burden of proof, not the side that denies it," article 2 provides that the burden

of proving an infringement of Article 101(1) or Article 102 TFEU lies with the party or authority alleging it. The latter is "required to prove every constituent element of the infringement, including its duration" (GCEU, March 3, 2011, T-110/07, Siemens, § 174) and "establish all the facts enabling the conclusion to be drawn that an undertaking participated in such an infringement and that it was responsible for the various aspects of it" (ECJ, July 8, 1999, C-49/92 P, Anic, § 86). Any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed (GCEU, January 26, 2022, T-286/09 RENV, Intel, §§ 161-162).

In this case, it was up to the Autorité to prove that the prices were excessive, i.e. that they bore no reasonable relation to the economic value of the service provided. Thus, to rule that Sanicorse's conduct constituted an abuse of exploitation even though the Autorité did not provide proof of the excessive nature of the prices would have led to the judges reversing the burden of proof. In that case, Sanicorse would have to prove that the prices it charged were not excessive, without the Autorité having to prove the facts it alleges.

Since the Autorité had neither argued nor demonstrated that the prices were unreasonably high in relation to the economic value of the service provided, the Court of Appeals was able to consider that the prices were fair, thereby establishing a presumption of fairness of the prices in favor of Sanicorse, which exonerates it from any justification.

Lastly, as the Court of appeal's verdict is not devoid of legal basis, the Commercial Chamber could only reject the appeals lodged by the Autorité and the Minister of the Economy.

Nevertheless, the question of demonstrating the excessive nature of the prices charged by a company holding a de facto monopoly remains.

B - The tricky demonstration of the excessive nature of prices implemented by a dominant undertaking holding a de facto monopoly position

Knowing that it could not allege that the prices were excessive without providing proof, the Autorité had drafted up a method of analysis that made it possible to identify an abuse of exploitation in this case. This method consists, in the absence of external reference prices or prices charged by the same company on other markets, in establishing the excessive nature of the prices via a comparison over time, i.e. by reference to the prices previously charged to the same customers, by noting an appreciable price difference that is not justified by the company.

The judges were not receptive to this analysis. However, the assessment of the abuse of exploitation must be made *in concreto*, and the circumstances of the case at hand made it impossible for the Autorité to make any other type of analysis in order to meet its burden of proof.

Firstly, in addition to its decision-making practice, the Autorité had relied on European case law on abuse of exploitation. As such, the CJEU has already ruled that the practice of abusive pricing, with respect to private individuals or professionals, in the context of a monopoly can be established if there is a clear gap between the price and the value of the corresponding service (ECJ, November 13, 1975, General Motors, Case 26/75) or if such an anomaly appears as a result of a comparison carried out on a homogeneous basis within the framework of an analysis of the components of the price charged (ECJ, February 14, 1978, United Brands, Case 27/76). Such a practice does not exist if the gap found is justified by the undertaking (ECJ, June 8, 1971, Deutsche Grammophon, Case 78/70). In this case at hand, however, Sanicorse did not justify its price increases.

Secondly, the Autorité did find that Sanicorse's conduct had generated an illegitimate additional cost for public health care institutions and that it had also discouraged all customers from seeking an alternative supplier, for fear of retaliatory pricing measures that Sanicorse might be tempted to take.

Hence, this ruling only further reinforces the monopolistic position of an undertaking that seemingly cannot be controlled on the grounds of excessive pricing under either European or domestic law.

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