



## Concerted practice implemented in the sector of securing tobacco: a consistent decision of the Competition Authority

Di Martino Florent

**To quote this paper:** F. DI MARTINO, “Concerted practice implemented in the sector of securing tobacco: A consistent decision of the Competition Authority”, *Competition Forum*, 2024, n° 0053 <https://competition-forum.com>.

**Resume:** *In a recent decision (23-D-03, March 20th 2023) the french Competition Authority jointly and severally imposed a fine of 25,000 euros on “GROUPE SAVE” and its parent company “AGE INVEST” for implementing anti-competitive practices in the tobacco security sector through concerted practices. In view of these practices, the companies in question have violated article L420-1 of the Commercial code for distorting competition.*

First of all, in this case, the company “GROUPE SAVE” and her parent company were jointly sanctioned by the Competition Authority for violating provisions under the article L420-1 of the Commercial Code because of concerted practices.

In fact, between February 18th 2015 and November 28th 2017, the company “GROUPE SAVE” has established roofing estimates with several tobacco security companies regarding their safety.

Nevertheless, the preparation of these quotations was contrary to the principles of competition law, indeed several companies have benefited of these roofing estimates as a result of concerted practice generating sales of 205,000 euros.

Regarding the procedure, on January 6th 2020 the Hauts-de-France Interregional Competition Investigation Brigade has drawn up an administrative report of an investigation into concerted practices.

On March 3rd 2021, some companies have accepted the measures proposed by the

DGCCRF, however this was not the case for “GROUP SAVE” refusing to compromise.

On May 31st 2021, the Minister of the Economy has referred the case of “GROUP SAVE” to the french Competition Authority.

Finally in a decision dated of March 20th 2023<sup>1</sup>, “GROUPE SAVE” and its parent company “AGE INVEST” were fined 25,000 euros by the French Competition Authority because of practices aimed at restricting competition on the tobacco outlet security market contrary to article L420-1 of Commercial Code.

The decision handed down by the French competition authority can be broken down into two points: firstly, the conviction of “GROUP SAVE” for a concerted agreement (I), and secondly, the application of the theory of imputability with regard to its parent company “AGE INVEST” (II).

<sup>1</sup> Decision no. 23-D-03 of March 20th, 2023 concerning practices implemented in the sector of

securing tobacco in the Hauts-de-France and Île-de-France regions

## I) The Conviction of "GROUP SAVE": Collusion on Coverage Quotes

In its 2023 decision, the French competition authority grounded its analysis and rationale on a thorough examination of the tobacco retailing sector and competition law (A), as well as on its experience with concerted practices deemed anticompetitive by their very nature in this sector (B).

### A) The Sector of Tobacco Retail Security and Competition Law

In every decision rendered by the competition authority, a sectoral study is conducted to better understand and define the market it seeks to protect in light of competition law.

Indeed, in its decision, the competition authority has recontextualized the case by stating that, following a series of national decrees concerning the security of tobacco outlets facing numerous acts of delinquency, on November 14th, 2017, through Decree No. 2017-1695<sup>2</sup>, any tobacco retailer wishing to obtain state aid for the security of their business could obtain multiple quotes from competing companies to secure the best option.

However, it remains that the sector of tobacco outlet security has already undergone in-depth analyses, given that the practice in question, deemed anti-competitive, has already been implemented in sectors where public funds have been employed.

Indeed, several recent decisions have involved similar practices in the tobacco outlet security sector<sup>3</sup>, as well as in the context of military relocations.

---

<sup>2</sup> No. 2017-1695 of December 14th, 2017, amending Decree No. 2006-742 of June 27, 2006, establishing assistance for the security of tobacco outlets and modifying Article 281 of Annex II to the General Tax Code.

The experience gained by the competition authority in this sector has also facilitated a quicker analysis of the harmfulness of such a practice deemed anti-competitive by its nature.

### B) A concerted practice deemed anticompetitive by its nature

With this decision, the competition authority confirms the previous reasoning and, therefore, its own jurisprudence, as this case, as previously indicated, is not unprecedented in the tobacco distribution security sector.

In this case, the company "GROUPE SAVE" issued several quotes and also benefited from several quotes from other companies. This practice resulted in a turnover of 205,000 euros.

More specifically, this practice consists of taking advantage of a higher quote from a competing company to be selected in the context of a call for tenders.

In this case, it is acceptable, after several investigations, to establish that the "SAVE" company maintained close ties with the "SLS" and "AP Protect" companies in the implementation of this "complacent" quote production.

The competition authority justifies its decision by the fact that for independent companies, coordinating or exchanging information for the production of coverage quotes allows characterizing an agreement between them. It follows the same reasoning as for other previous decisions<sup>4</sup>.

It is therefore considered that the practices in question are anticompetitive by their nature since they restrict competition in the market

<sup>3</sup> Competition Authority, March 11<sup>th</sup>, 2021, Decision No. 21-D-06 and Paris, December 20, 2018, Decision No. 18/07722

<sup>4</sup> Competition Authority, March 3<sup>rd</sup> 2022, No. 22-D-08

for securing tobacco distribution points and are therefore contrary to Article L420-1 of the Commercial Code.

The experience gained by the competition authority in dealing with these practices and their harmfulness to this market justifies that it did not seek to establish the anticompetitive effects of such a practice since its nature itself was an obstacle to the free fixing of prices.

Nevertheless, while the competition authority condemns the "GROUP SAVE" company, the same does not hold true for its parent company, according to the theory of imputability.

## **II) Implementation of the Theory of Imputability Regarding the Parent Company "AGE INVEST »**

In this decision, the competition authority implements the theory of imputability consistently (A) by jointly and severally condemning the company "AGE INVEST" for a practice carried out by its subsidiary (B).

### A) Imputation of Anticompetitive Practices from a Subsidiary to its Parent Company: a Consistent Admission

This decision is not unprecedented in its reasoning, as competition law has consistently admitted for a long period that a parent company can be held accountable for anticompetitive actions of its own subsidiary<sup>5</sup>.

Indeed, this theory of imputability regarding the parent company is a principle of European origin<sup>6</sup>.

In this regard, the theory is based on the principle of the concept of the enterprise, which, from the perspective of competition

law, must be an autonomous and independent actor. Therefore, if a subsidiary is not autonomous in its decision-making, practices, and behavior, despite its distinction from its parent company, it will be very difficult to demonstrate that these two entities are not one and the same.

The competition authority merely applies this principle of imputability consistently, based on purely material criteria, namely the exclusive or quasi-exclusive ownership of a subsidiary by its parent company<sup>7</sup>.

Thus, the competition authority establishes a rebuttable presumption of ownership for the parent company, in theory, but in practice, this presumption is often irrefutable.

It is evident that the decision rendered by the competition authority is merely a strict application of competition law and the principles that derive from it, as exemplified by the parent company "AGE INVEST."

### B) The Parent Company "AGE INVEST" Held Accountable for the Concerted Practice of its Subsidiary

Indeed, upon examination by the competition authority, the parent company "AGE INVEST" controls its subsidiary "GROUP SAVE" at 100%, thus it is presumed to exercise a decisive influence.

Therefore, in accordance with the theory of imputability, the practice carried out by the subsidiary "GROUP SAVE" also implicates the responsibility of its parent company, which is consequently jointly and severally condemned to pay the fine imposed by the competition authority.

Furthermore, this decision may appear contrary to the principle of individualization

<sup>5</sup> Paris Court of Appeal, judgment of March 29<sup>th</sup> 2012, No.11/01228

<sup>6</sup> Court of Justice of the European Communities, judgement of July 14<sup>th</sup> 1972, Case 48/49

<sup>7</sup> Court of Justice of the European Union, judgment of January 27<sup>th</sup> 2021, Case C595/18

of penalties since one might question why a company external to any action of its subsidiary could also be condemned.

The competition authority, in its decision, personally notifies the parent company "AGE INVEST" of the allegations against it. As indicated earlier, the reasoning of competition law focuses solely on the concept of the undertaking, meaning an independent and autonomous economic and financial entity.

This decision of March 20, 2023, is therefore a formality. The competition authority, after studies and findings, simply applies the guiding principles of competition law, as well

as the theory of imputability of jurisprudential nature.

All of this suggests that, currently, competition law is attempting to adapt to various sectors to regulate the market, and, given its European origin, national authorities have limited freedom in their decision-making as they are subject to guiding principles of European standards<sup>8</sup>.

**Florent DI MARTINO**

---

<sup>8</sup> Treaty on the Functioning of the European Union, Articles 101 & 102