



Anticompetitive agreement among industry players regarding Bisphenol A in food packaging

Valentin JOBARD

To quote this paper: V. JOBARD, “Anticompetitive agreement among industry players regarding Bisphenol A in food packaging”, *Competition Forum*, 2024, n° 0054 <https://competition-forum.com>.

Resume: *In its decision numbered 23-D-15 dated December 29, 2023, the Competition Authority sanctioned a collective strategy involving three professional associations of food preservers, a syndicate of can manufacturers, and eleven companies as members of these professional associations. The agreement aimed to eliminate competition among businesses within the value chain regarding the presence or absence of Bisphenol A (BPA) in food products, a chemical substance used for the internal protection of metal food containers. The Authority found the practices to be anti-competitive due to their nature, purpose, and context, resulting in a collective fine of €19,553,400 imposed on the professional associations and companies involved.*

By decision number 23-D-15 dated December 29, 2023, the French Competition Authority (hereinafter referred to as the "Authority") sanctioned an anticompetitive agreement involving three professional canning organizations, a can manufacturers' union and eleven companies in their capacity as members of these professional organizations.

The aim of the collective strategy was to eliminate competition between companies in the value chain concerning the presence or absence of Bisphenol A ("BPA") in products

sold. Bisphenol A is a chemical substance used to protect the inside of metal food cans.

This agreement falls within the specific regulatory framework of the suspension imposed by Law no. 2012-14.42 of December 24, 2012 concerning the use of BPA in all packaging, containers and utensils intended to come into contact with foodstuffs within the meaning of Regulation (EC) no. 1935/2004 of October 27, 2004¹ from January 1, 2015. This suspension led to a transitional period during which products containing and not containing BPA were

¹ Regulation (EC) no. 1935/2004 of October 27, 2004 on materials and articles intended to come into contact with food

and repealing Directives 80/590/EEC and 89/109/EEC.

simultaneously placed on the market, to enable manufacturers to sell off their stocks.

Of the two grievances notified by the Authority, only the first, relating to the limitation of BPA-free communication and the marketing of BPA-free products, was upheld. The grievance is made up of three parts, of which only two are examined in depth²:

- The first concerns the strategy aimed at preventing manufacturers from communicating about the absence of BPA in their food containers, despite the fact that this substance was considered as a potential health hazard.
- The second involves encouraging manufacturers to refuse to supply BPA-free containers before January 1, 2015. Only the Fédération des Industries d'Aliments Conservés ("FIAC") and the Syndicat National des Fabricants de Boîtes ("SNFBM") are involved in this second practice, which together with the first constitutes a single, complex and continuous infringement.

The main objective of this joint strategy was to prevent one company from gaining a competitive advantage over the others by

communicating the absence of BPA in products sold. These practices were implemented between October 2010 and July 2015, i.e. for over 4 years.

The French Competition Authority considers these practices to be anti-competitive by their very nature, purpose and context, since they concern essential parameters of competition such as information on product composition and quality.

As a result, the Authority found four professional bodies liable - FIAC, SNFB, Association des Entreprises de Produits Alimentaires Elaborés ("ADEPALE") and Association Nationale des Industries Alimentaires ("ANIA") - as well as eleven member companies of these professional bodies.

A total penalty of 19,553,400 euros was imposed on the professional bodies and companies for these practices. In order to take account of the heterogeneity of the economic weight, nature and role within the sector of the collective bodies and companies being prosecuted, the Authority has departed from the penalty notice, as it is entitled to do, by adopting a flat-rate method for determining the financial penalties.

² ADLC decision no. 23-D-15 of December 29, 2023, §585 and §755

In this decision, the French Competition Authority first dismisses grievance No. 2 and revises grievance No. 1, which encompasses two objectionable elements ab initio (I), characterizing them as a single, continuous, and complex practice while condemning some of its perpetrators (II).

I. Discrepancy and recasting of grievances

While the Authority has chosen to reject grievance no. 2, which accused an anticompetitive agreement of restricting information on BPA substitutes (A), it has also considered the double practice of grievance no. 1 as a common practice (B).

A. The absence of agreement restricting information on BPA substitutes

The French Competition Authority (French Competition Authority) carefully examined grievance no. 2³, concerning the alleged agreement to restrict the transmission of information on substitutes for varnishes containing bisphenol A. The complaint stated that the parties "took part in an anticompetitive agreement in the sector of the manufacture and sale of foodstuffs in contact with materials which may contain or may have contained bisphenol A or its

substitutes. The participants in this anticompetitive agreement adopted and implemented a series of decisions by associations of companies and agreements setting a common course of action and consisting in limiting a parameter of competition, by restricting information on substitutes for bisphenol A used in materials in contact with foodstuffs. Such behavior has an anti-competitive object and effect, and is prohibited by Article L. 420-1 of the French Commercial Code and Article 101 TFEU." The aim of this collective conduct was to limit the individual economic risks associated with these substitutions. However, after an in-depth analysis, the Authority concluded that this practice was not solidly established.

More specifically, when examining the documents and testimonies submitted, it became apparent that the parties concerned did not hold exhaustive information on the composition of varnish substitutes. In some cases, the parties were bound by contractual agreements that limited their ability to disclose such details. As a result, the Authority considered that the criticism levelled at the parties for agreeing not to disclose this information, or for restricting its dissemination, was unjustified.

³ ADLC decision no. 23-D-15 of December 29, 2023, p. 310, pt. 1479

As a result, the Authority has decided not to pursue the examination of the entire second grievance. This decision was taken after a rigorous analysis process, despite the grievances initially notified to a large number of professional organizations and companies. In the end, only four professional organizations, three can manufacturers and eight canners (and their parent companies) were sanctioned, reflecting the specificity and complexity of the practices examined in this case.

B. Dual dimensions of Collective Strategy Addressing Individual Risks from BPA-Free Materials in Canned Goods

Grievance no. 1 in this case is central, highlighting an alleged anticompetitive agreement in the sector of the manufacture and sale of foodstuffs in contact with materials likely to contain bisphenol A or its substitutes. The French Competition Authority (French Competition Authority) described this practice as a unique, complex and ongoing anticompetitive agreement, characterized by its unitary nature, its complexity and its durability over time⁴.

The first aspect of this practice concerns the implementation of a collective strategy aimed at neutralizing Bisphenol A as a marketing

argument, thus facilitating a discreet transition to containers without this substance. This strategy, initially proposed by FIAC and subsequently adopted by ADEPALE and ANIA, involved widespread communication to all players in the sector to dissuade them from competing on the basis of the presence or absence of Bisphenol A in their products. This strategy was extended to can manufacturers via the SNFBM, with the aim of gaining the support of supermarkets via the FCD.

The parties involved justified this strategy on the grounds that it complied with consumer law, while at the same time setting up a monitoring system to identify deviant behavior. In particular, the law suspending the presence of bisphenol A in the interior varnish of cans from January 1, 2015, opened a period during which cans with or without BPA were simultaneously present on the French market. Companies had to develop replacement solutions within a short timeframe and incur research costs. In this context, the risk of destabilizing the industry was not negligible if communication about products without BPA occurred. Furthermore, although public authorities neither knew nor encouraged nor authorized the contested practice, the context of the law's adoption and consumer law issues may

⁴ ADLC decision no. 23-D-15 of December 29, 2023, p. 235-241.

have created some confusion among professionals. As a result, the Authority considers the particular legal and regulatory framework in which the practices in question occur and the general behavior of the administration towards sector actors as mitigating circumstances.

The second aspect of the practice under review concerns the collective refusal to market Bisphenol A-free cans. Starting in 2014, the Fédération des Industries Agroalimentaires de Conservation (FIAC) and the Syndicat National de la Fabrication des Boîtes Métalliques (SNFBM) took part in discussions aimed at collectively defining a roll-out date for Bisphenol A-free containers. This approach was taken in order to postpone the demands for early substitution made by certain distributors. In this context, FIAC played a leading role in the implementation of this concertation, according to the conclusions of the French Competition Authority. This body found that these players collectively opposed the early marketing of Bisphenol A-free cans, thus setting up a barrier to entry for alternative products on the market.

The Authority concluded that, given their nature, purpose and context, these practices were inherently anti-competitive. The parties involved adopted a collective strategy aimed at preventing any competitive advantage arising from highlighting the absence of

Bisphenol A in products, thus making this element a competitive parameter on which they agreed.

II. Characterization of a single practice leading to different penalties

While the Authority has considered the practice to be unique, complex and continuous (A), economic players are faced with sanctions that vary in form and amount (B).

A. A unique, complex and continuous practice

As we have already seen, the practice contained two axes which, together, enabled the parties concerned to eliminate an important parameter of competition, namely the presence or absence of Bisphenol A in canned goods, thus presenting an overall anti-competitive character. The French Competition Authority thus highlights the complexity and continuity of the practices examined, considering them as a single, complex and continuous infringement linked to a concerted global plan. This integrated vision is illustrated by various elements in the file, such as the fear expressed by economic players regarding the potential risks linked to the transition period between containers with

and without Bisphenol A⁵. For example, the industry feared loss of sales of containers containing Bisphenol A, loss of market share to competitors promoting Bisphenol A-free containers, and changes in consumer preferences. This delicate and uncertain transition period was a catalyst for industry players to coordinate their actions and minimize the associated economic risks.

The two main thrusts of the strategy, clearly defined in the decision, show how trade organizations have worked together to mitigate these risks and ensure a smooth transition for the entire industry. For example, the implementation of collective strategies such as communication on the absence of Bisphenol A in products and the collective refusal to market Bisphenol A-free cans illustrate this coordination. What's more, the similarity of the behaviors observed, and their complementary contribution to achieving the plan's overall objectives, reinforces the idea of a single, complex practice. Each action taken, whether collective communication or refusal to market, is part of an overall strategy designed to protect against the economic risks associated with the introduction of new containers on the market. Despite the justifications put forward by the parties,

notably concerning the stability of the sector and the risks of breaches of the consumer code, the Authority rejected these arguments. It also rejected the idea that the practice of non-communication on the absence of Bisphenol A constitutes a restriction ancillary to the main cooperation. Finally, no individual exemption under Article 101(3) TFEU was granted in the absence of efficiency gains.

In examining the individual participation of organizations and their members, the Authority found FIAC, SNFBM, ADEPALE and ANIA liable, as well as three can manufacturers and seven canners, some of whom only participated in the first part of the infringement.

B. Sanction and statute of limitations

As we saw earlier, four associations, three can manufacturers and seven canners were sanctioned by the Authority. First of all, the Authority dismissed the objections relating to the application of the 2021 communiqué on sanctions⁶, taking the view that it did not violate the principle of non-retroactivity of the more severe criminal law. Similarly, it rejects objections concerning the removal of the 750,000 euro fine ceiling for cases

⁵ ADLC decision no. 23-D-15 of December 29, 2023, p. 105, pt. 527

⁶ Communiqué de l'French Competition Authority relatif à la méthode de

détermination des sanctions pécuniaires, July 30, 2021

examined without a prior report, under the simplified procedure. Lastly, it rejects arguments concerning the applicability of Ordinance no. 2021-649 of May 26, 2021⁷, which provides for the removal of the criterion of damage to the economy. In view of the diversity of the defendants involved, the Authority opted for a flat-rate method of setting fines, thus abandoning the method described in the announcement of the sanction.

In assessing the amount of the penalty, the Authority takes an individual approach, characterizing the particular seriousness of each case. Firstly, these practices were aimed at controlling production, which has a direct impact on the competitive operation of the market. This desire to control production is a key element in demonstrating the seriousness of these practices, as it restricts the freedom of action of economic players and distorts market mechanisms. Secondly, these practices were implemented by professional bodies representing virtually all operators at different levels of the sector's value chain. This widespread involvement underlines the scope of the collective strategy and its impact on the entire sector, reinforcing its detrimental effect on competition. In

addition, the horizontal dimension of these practices⁸ confirms their seriousness. Indeed, they involved coordination between players considered to be competitors on the market, accentuating the negative impact on competition. What's more, even if the sector features a diversity of players at different levels of the value chain, the strong structuring around a few professional organizations, notably grouped around the ANIA, reinforces the effect of these practices on the market as a whole. This concentration of decision-making powers in the hands of a few entities restricts the diversity of initiatives and hampers the emergence of competition. Finally, depriving consumers of the possibility of choosing Bisphenol A-free products, at a time when this substance was considered dangerous to health, underlines the direct impact on consumer well-being and reinforces the seriousness of the practices examined. This ethical dimension reinforces the importance of punishing such anti-competitive behavior. In addition, the Authority takes into account the degree of participation of certain companies, limited in certain cases, as well as the increase in the penalty due to the economic power of the groups to which they belong. In addition, the

⁷ Ordinance No. 2021-649 of May 26, 2021 on the transposition of Directive (EU) 2019/1 of the European Parliament and of the Council of December 11, 2018 aimed at providing the competition authorities of the Member States with the means to

enforce competition rules more effectively and to ensure the proper functioning of the internal market

⁸ ADLC decision no. 23-D-15 of December 29, 2023, p. 341, pt. 1680

repetition of practices by certain companies constitutes an aggravating circumstance.

With regard to the statute of limitations, when analyzing the documents provided in the file, the French Competition Authority noted that several companies benefited from the statute of limitations, in accordance with article L. 462-7 of the French Commercial Code. This article stipulates that the statute of limitations applies when ten years have elapsed since the cessation of the anti-competitive practice, without the French

Competition Authority having taken a decision on the matter.

For example, some of the companies concerned, such as Fleury Michon, Danone, Coca-Cola, Nestlé and many others, ceased their anti-competitive practices more than ten years ago, making it impossible to take legal action or impose sanctions against them for these specific practices.

Valentin JOBARD