



Anticompetitive practices and penalty calculation in franchise Network: comparing online sales and professional clientele restrictions

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Resume: *In a recent decision (24-D-02, February 6th 2024), the French Competition Authority imposed a fine of 4 million euros on De Neuville and its parent company, Savencia Holding, for having implemented vertical agreements aimed at restricting, on the one hand, the online sale of De Neuville brand chocolates by franchisees, and, on the other hand, the sales of the franchisees to professional customers, practices contrary to Articles 101, paragraph 1 of the TFEU and L. 420-1 of the French Commercial Code.*

The regulation of commercial practices within franchise networks is a crucial issue for competition law, as demonstrated by the decision 24-D-02 issued by the French Competition Authority.

De Neuville stands out in the chocolate sector through its wholesale and retail distribution activities. Operating solely in the French market, it boasts 154 points of sale, making it the third-largest network of specialized chocolate distribution in France. Most of its stores, about 90%, are operated as franchises, establishing De Neuville as the leader among French chocolate franchise networks.¹ De Neuville was criticized for instituting restrictions that limited competition within its network. On one hand, the limitation of online sales imposed on

franchisees from March 2006 to June 2019, by which De Neuville centralized online sales exclusively through its own website, thus preventing its franchisees from developing their own online sales channels. On the other hand, restrictions concerning the solicitation of professional clientele were imposed from March 2006 until March 29, 2022, impeding free competition among franchisees as well as between the franchisees and the franchisor itself. Following an investigation, the French Competition Authority initiated a procedure against De Neuville, leading to the aforementioned decision.

The central legal issue raised by this case concerns the legality of the commercial restrictions imposed by De Neuville on its franchisees and their compliance with the

¹ Press Releases of the French Competition Authority, “L’Autorité de la concurrence sanctionne les chocolats

De Neuville pour avoir entravé la liberté commerciale de ses franchisés”

fundamental principles of competition law, particularly regarding online sales and client solicitation.

The French Competition Authority sanctioned De Neuville, based on articles 101 of the TFEU and L. 420-1 of the French Commercial Code, for violating competition rules through the implementation of two distinct anti-competitive practices. The first, concerning online sales, and the second, relating to the solicitation of professional clientele, were considered as anti-competitive agreements. The financial penalties amount to 2,312,000 euros for the restriction of online sales and 1,756,000 euros for the restriction on the solicitation of professional clientele.

Our examination of the decision will begin with a detailed study of the sanctioned practices, highlighting how the Competition Authority refers to previous rulings to understand the restrictions implemented by De Neuville (I). Subsequently, our focus will shift to the calculation of the fine, specifically questioning whether the restriction on commercial solicitation with respect to professional clientele was deemed by the Authority to be more detrimental than the limitations on online sales, and how this

² Alain Ronzano, « L'Autorité inflige 4 millions € d'amende aux chocolats De Neuville pour deux ententes verticales avec ses franchisés », *L'actu-concurrence*, n°17/2024

assessment impacted the amount of the fines levied (II).

I. Sanctioned practices: a jurisprudential confirmation

Regarding the restriction on soliciting professional clientele, the French Competition Authority concluded that from March 2006 to March 2022, De Neuville required its franchisees to adhere to specific guidelines and instructions for their commercial solicitation activities targeting professionals. This resulted in a limitation of their mutual competition within their designated geographical areas, even though no exclusivity rights were granted for these customers. By curbing both direct and indirect sales, this strategy divided sales among professional clients and decreased the competitive dynamic among the franchisees and De Neuville, the franchisor participating in the retail market too.² Thus, the Authority deemed these practices to be of significant severity, highlighting that they not only prevented full competition among the franchisees but also reduced the competitive intensity between them and De Neuville.

This restriction was considered a restriction of competition by object³, and could not benefit from the block exemption under

³ Articles 101 TFEU and L. 420-1 of the French Commercial Code

regulations no. 2790/1999 and no. 330/2010, nor from the exemption provided in paragraph 61 of the guidelines on vertical restraints.

Regarding the prohibition of online sales imposed on a distributor, the Authority emphasized, in the decision rendered in the Pierre Fabre case, that such a restriction is perceived as a competition restriction by object when it is not based on an "objective justification".⁴ Only last December, the Competition Authority had to rule, once again, on this practice of online sales restriction.⁵ The French Competition Authority sanctioned a vertical agreement imposed by the Mariage Frères group on the French market for premium teas, implemented from July 2008 to January 2023, aimed at prohibiting the online sale of its brand products by its distributors as well as resale to other distributors. The group was fined €4 million. The Authority considered that this clause indeed constituted "a restriction of competition comparable to an explicit absolute prohibition". It also noted the absence of any agreement allowing online sales, despite repeated requests from several distributors. Thus, it became clear that Mariage Frères' intention was to block the marketing of its products on the internet.⁶

⁴ Court of Justice of the European Union, October 13, 2011, case no. C-439/09, Pierre Fabre Dermo-Cosmétique SAS

⁵ Decision 23-D-12 of December 11, 2023 of the French Competition Authority

In our case, the practice in question follows the same line. The restriction on online sales by De Neuville, implemented between March 2006 and June 2019, was based on a centralized system around its national website, thus limiting the franchisees' ability to sell the brand's products on their own websites. This strategy was formalized by contractual stipulations in the franchise contract and the operational manual, explicitly mentioning the franchisor's exclusivity for mail order or internet sales. The Competition Authority judged this practice restrictive, as it limited the franchisees' ability to actively and passively market De Neuville products online, thus compartmentalizing the market and restricting competition. This restriction was considered a restriction of competition by object, in violation of the applicable texts⁷, as it was neither necessary nor proportionate, limited access to a greater variety of customers, and was not justified by legitimate objectives.

Thus, there is a certain analogy with the decision sanctioning Mariage Frères teas: similar practices, almost identical durations, leading to substantially the same amount of fine. However, the analogy with this decision stops there.

⁶ Lucie Duparcq, "Entente verticale dans le secteur des thés de luxe : Mariage Frères condamné par l'Autorité de la concurrence", *Revue Lamy de la concurrence*, n°134

⁷ Articles 101 TFEU and L. 420-1 of the French Commercial Code

II. Calculation of the fine: is the restriction on soliciting professional clients more infringing than the limitation on online sales?

As a matter of fact, the comparison ends there, since even though the practices in question are substantially the same, the method of calculating the fine differs significantly. In the case of *Mariage Frères* teas, the Competition Authority chose, without further explanation, to penalize the practices in question with a lump-sum determination of the fine. On the contrary, in the *De Neuville chocolates* case, the Authority opted to apply each step of the 2021 sanction notice, notably calculating the value of sales.

Thus, this difference in the calculation method raises questions about the standard of gravity that the Authority may apply. In both cases, it is acknowledged that the practices have a certain gravity. However, the difference in approach to these similar practices does not clarify why, in the case of *De Neuville chocolates*, the ban on franchisees selling contractual products online is penalized to a lesser extent than limiting their sales to professional clients,

despite both actions being deemed significantly serious.⁸

Indeed, after a particularly cursory evaluation, the Authority's College only applies a gravity coefficient of 1% for the prohibition of online sales, a practice frequently addressed in jurisprudence, while it applies a gravity coefficient of 3% for the restriction of sales to professionals, without any explanation.⁹

When questioning the reason for this difference, the analogy with the *Mariage Frères* teas case is not helpful since, in that case, the determination of the penalty was lump-sum and did not make any distinction between the penalized practices. However, it is possible to turn to another case in the luxury watches sector¹⁰, involving the same practices, which also applied the 2021 sanction notice.

However, even though the same method is used, its application does not lead to uniform results : the gravity coefficient applied for the prohibition of online sales is, contrary to the *De Neuville chocolates* case, not 1% but 4%. Given that each context has its nuances and that assessing penalties involves more than mere calculations, there's no clear explanation why the same infraction is met with a

⁸ A. Ronzano, « L'Autorité inflige 4 millions € d'amende aux chocolats De Neuville pour deux ententes verticales avec ses franchisés », *L'actu-concurrence*, n°17/2024

⁹ *Ibid*

¹⁰ Decision 23-D-13 of December 19, 2023 of the French Competition Authority

punishment four times harsher in one instance than in another.¹¹

In conclusion, the standard of gravity applied by the French Competition Authority in assessing anti-competitive practices remains ambiguous and continues to raise questions, despite a plethora of decisions on identical practices. This uncertainty is exacerbated by a glaring lack of motivation. The practice of the Competition Authority regarding the

provision of motivations in its decisions appears arbitrary, fluctuating between cases where it is provided and others where it is absent, without the Authority specifying the criteria for when a motivation is deemed necessary.

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¹¹ A. Ronzano, « L'Autorité inflige 4 millions € d'amende aux chocolats De Neuville pour deux

ententes verticales avec ses franchisés », *L'actu-concurrence*, n°17/2024