



Online sales restrictions and anti-competitive practices within a distribution network: practices implemented in the luxury tea sector.

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Resume: *In decision no. 23-D-12 of December 11, 2023, the French Competition Authority fined the Mariage Frères group 4 million euros. Mariage Frères was found guilty of anti-competitive cartel practices on the French premium tea market, for the period July 2008 to January 2023, aimed in particular at prohibiting online sales of its own-brand products by its distributors, as well as resales to other distributors, practices contrary to articles 101, paragraph 1 of the TFEU and L.420-1 of the French Commercial Code.*

The fight against restrictions on competition on the Internet within distribution networks is a crucial issue for competition law, particularly in view of the constant evolution of digital technology and new regulations in this area. Even more so when these practices concern highly prized sectors such as luxury goods, where brand image is of particular importance. This was demonstrated by the French Competition Authority in its decision no. 23-D-12 of December 11, 2023. This issue is far from new to the French authority, as a few days after this decision, a new sanction concerning the same practices was pronounced against the luxury watch company Rolex for restricting internet sales to its distributors.¹

Founded in 1854, Mariage Frères is a French company operating in the high-end tea

market. To do this, it relies on a large network of distributors around the world. In June 2019, the DGCCRF sent to the French Competition Authority an administrative investigation report on the state of competition in the luxury teas sector. In October 2019, the French Competition Authority launched an ex officio investigation into practices in this sector.

On December 11, 2023, the Authority issued a second ruling in the above-mentioned sector, imposing a fine of 4 million euros on the Mariage Frères group for orchestrating practices constituting a vertical cartel. These practices consisted of prohibiting the online sale of Mariage Frères brand products by its distributors, as well as their resale to other distributors. The Authority ruled that the group had deliberately restricted the

¹ Aut. conc., n°23-D-13, dec. 19, 2023

commercial freedom of its distributors for almost fifteen years, over a period spanning from July 2008 to January 2023.

For this purpose, the Authority has chosen to focus on the relevant market for high-end or luxury teas, as opposed to standard teas, particularly given the fact that distribution takes place in grocery stores or specialized stores. The two main players in this market are Mariage Frères and Dammann Frères. The Covid-19 crisis has led to a boom in online sales for these players.² Furthermore, in this decision, the French competition authority rules not only on the merits of the case, but also on procedural issues such as the limitations period and compliance with the main procedural principles during proceedings.

The central legal question raised by this case concerns the way in which the French competition authority articulates the principles of free organization of the distribution network, preservation of the brand image and maintenance of respect for effective competition law.

In order to examine more closely the issues and challenges raised by this decision, we will first consider the disputed clauses inserted in the general sales conditions, constituting

restrictions of competition by object (I), in particular those prohibiting network distributors from selling the brand's products on the Internet as well as to other distributors. We will continue our discussion by analyzing the limits imposed by the Authority on the principle of freedom of organization of the distribution network and brand image, in the interests of free competition (II). Finally, this decision is also interesting from a procedural point of view. Indeed, it allows the Authority to rule once again on the characterization of the continuous infringement and the starting point of the limitation period for restrictive competition practices (III).

I. The disputed clauses in the general terms and conditions of sale constituting restrictions of competition by object

In 2019, the DGCCRF alerted the group as part of a warning procedure, asking it to amend its terms and conditions of sale, which already contained an online sales exclusivity in favor of Mariage Frères, by prohibiting its distributors from using this sales method. However, following this warning and despite the changes made to the terms and conditions of sale, the luxury tea group continued to use this type of practice

² L. 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

in a roundabout way, and the ban on online sales remained in force, to the detriment of distributors. In fact, the amendments made in response to the DGCCRF's warning make the authorization of online sales subject to the approval of the head of the network.

However, and this is where we can speak of devious maneuvers in this case, several distributors confirmed to the Authority's investigating departments that they were prohibited to sell Mariage Frères products on the Internet despite the changes made to the general sales conditions. Indeed, when they asked Mariage Frères for authorization under the new general sales conditions, the latter categorically refused. The group also monitored its distributors compliance with the new terms and conditions, directly contacting those selling its products online to remind them of the ban on online sales, and to ask them to withdraw from sale any products spotted on the Internet³.

The ban on online sales is a recurring and topical issue in the laws of anti-competitive practices law, especially with the development of numerous digital markets and the rise of e-commerce technologies. E-commerce constitutes passive sales that cannot be restricted. In fact, sales can be active or passive⁴, which modifies the entire

protective structure of the distribution network protection, to ensure that distributors do not undermine effective competition with producers, and vice versa.

European decision-making practice has already had the opportunity to rule on such practices⁵, recalling that a clause prohibiting online sales imposed on a distributor is considered a restriction by object if it is not "objectively justified". What remains to be analyzed is what the competent authorities could consider to be an objective justification for such a restriction on the part of the network head.

In the case described above, the authority was able to consider that the clause present in the general sales conditions did indeed constitute *"a restriction of competition comparable to an absolute prohibition of an explicit nature"*⁶, noting moreover that no contract allowing Internet sales had been concluded, even though several distributors had requested them. Thus, in its decision, Authority maintained that the company's objective was indeed to prevent the sale of its products on the Internet.

Regarding the prohibitions on resale to other distributors contained in the general terms and conditions of sale, these stated that only

³ S. Pomar et A. Petit, « Interdiction de vente sur internet dans le secteur du luxe : l'Autorité de la concurrence y apporte un éclairage précieux », *Nomos Paris*, January 31, 2024.

⁴A. Guyon, « Ventes actives et ventes passives », Competition law dictionary, *Concurrences*, Art. N° 12379

⁵ CJEU, October 13, 2011, case no. C-439/09, Pierre Fabre Dermo- Cosmétique SAS.

⁶ Aut. conc., n°23-D-12, dec. 11, 2023, point 141.

Mariage Frères could engage in wholesale sales, authorizing the resale of its products by distributors to private individuals only. This clause, which prohibited the resale of products to other retailers, has remained unchanged since 2008. On this point, the Authority recalled the jurisprudence of the Paris Court of Appeal⁷, which considers that such clauses have an anti-competitive purpose in that they tend, by their very nature, to restrict the freedom of purchasers. Consequently, as the anti-competitive objective of the agreement has been demonstrated, it is not necessary to analyze the effects of the practice. As this is a hardcore restriction, the company cannot claim application of the block exemption provided for in the exemption regulations⁸.

The agreement of wills that establishes the vertical cartel results from the manufacturer's invitation to implement the disputed practice and from the distributors' acquiescence to the proposed practice. The Authority's position on this matter is firm: this prohibition constitutes a restriction in accordance with the Guidelines on Vertical Restraints, "*regardless of the distribution model adopted by the supplier*"⁹ since "*in principle, all distributors must be authorized to use the Internet to sell their*

products"¹⁰. This unambiguously applies to all types of distribution network, as the Authority recently ruled in the De Neuville chocolates case¹¹.

II. Guaranteeing the principle of freedom of organization of the distribution network and brand image in the sector concerned: limits imposed by respect for the free play of competition

European regulation 2022/720 of May 10, 2022 and its guidelines enshrine the freedom of distributors to use the Internet to sell contract goods or services, by explicitly classifying as a hardcore restriction the prohibition of "*preventing the effective use of the Internet by the buyer or its customers to sell the contract goods or services, as this restricts the territory in which the customers to whom the contract goods or services can be sold*"¹².

However, the defendant company strongly argues that the objective justification in this case is none other than the preservation of the brand's image and prestige. This argument is regularly invoked in this type of dispute and is also found in a previous decision handed down by the authority on December 19, 2023¹³ concerning practices implemented in the luxury watch distribution

⁷ CA Paris, March 4, 2008, n° 2007/00370

⁸ GOUACHE Avocat, « L'interdiction de vente en ligne constitutive d'une entente », Jeudi 21 mars 2024

⁹ Aut. conc., n° 23-D-12, 11 déc. 2023, préc., § 138

¹⁰ Comm. UE, Guidelines on vertical restraints, 2010/C 130/01, May 19, 2010, pt. 52

¹¹ Aut. conc., n°24-D-02, 6 févr. 2024

¹² Comm. UE, règl. (UE) 2022/720, 10 mai 2022, art. 4, e : JOUE n° L 134, 11 mai 2022, p. 7

¹³ Aut. conc., n°23-D-13, dec. 19, 2023

sector. In this case, the Coty ruling comes to mind, since the CJEU accepted that, in the context of a selective network, a manufacturer could control the marketing of its products on the Internet to "*preserve the luxury image of those products*"¹⁴.

Indeed, if European Union case law accepts that a manufacturer can control the marketing of its products on the Internet, this must be done based on specific qualitative criteria, and within the framework of a selective distribution system. However, Mariage Frères does not organize itself as a selective distribution network, so the solution offered by the above-mentioned judgment cannot save the defendant company's claims.

While a supplier is free to organize its distribution network as it sees fit, this organization must not give rise to anti-competitive practices. The principle of free organization of the network cannot authorize a manufacturer to restrict the commercial freedom of its resellers. A manufacturer's desire to retain control over the distribution of its products, the way in which they are marketed, and the quality of its website cannot constitute an objectively justified or proportionate measure acceptable under competition law.

III. Characterization of a continuing infringement and the starting point of the statute of limitations on restrictive competition practices

In this case, the defendant company claims that the statute of limitations has expired on the practices that took place prior to June 22, 2017, in that they took place more than five years before the first investigative act. On this point, the French competition authority recalls that it is settled case law, in the presence of a continuous infringement, to fix the starting point of the limitation period on the day following the day on which the infringing conduct ceased.

It should be remembered that the concept of a single infringement refers to a situation in which several undertakings have taken part in an infringement consisting of a continuous course of conduct pursuing a single economic objective aimed at distorting competition, or of individual infringements linked together by identity of object (same purpose of all the elements) and of subjects (identity of the undertakings concerned, aware of participating in the common object)¹⁵.

However, Mariage Frères' argument was rejected by the authority, which ruled that "*the insertion of the disputed clauses in different distribution contracts constitutes a single and continuous infringement, provided that they have not*

¹⁴ CJEU, December 6, 2017, case no. C-230/16, Coty Germany c/ ParfümerieAkzente

¹⁵ EUCJ, July 8, 2008, BPB/Commission, T-53/03, Rec. p. II-1333, point 25

been amended". In this case, the practices in question continued until the notification of grievances dated January 24, 2023.

This decision also includes an important detail concerning the method of proving in anti-competitive practices law. The Authority considers that the general sales conditions alone can be used to characterize an anticompetitive invitation, even in the absence of other contractual documents. In this respect, the Paris Court of Appeal, in a decision of May 16, 2013¹⁶, mentioned in point 100 of the decision, recalls that the presence of contractual evidence is sufficient

to retain the qualification of restriction of competition by object, without need to prove behavioral evidence.

In conclusion, this decision sheds light on the Authority's current position on arguments relating to brand image and the fight against off-network reselling. In particular, the trend is to invite the companies concerned to see what solutions have been found by their competitors, as part of the self-assessment they must make of their Internet sales practices.

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¹⁶ CA Paris, May 16, 2013, *Kontiki*, RG n° 12/01227