



A winery sanctioned by the French Competition Authority for imposing minimum resale prices on its distributors

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Resume: *A winery has been sanctioned by the French competition authority as the author with the parent company, for having implemented practices aimed at imposing a resale price on distributors of wines in the "Uby" range, marketed under the "Côtes de Gascogne" Protected Geographical Indication, and of Armagnacs, practices which are contrary to Article L.420-1 of the French Commercial Code.*

SAS Distribution du Domaine d'Uby (hereinafter referred to as "SDU") has been sanctioned by the French Competition Authority¹ as the author, and SAS Holding François Morel, as the parent company, for having implemented practices aimed at imposing a resale price on distributors of wines in the "Uby" range, marketed under the "Côtes de Gascogne" Protected Geographical Indication, and of Armagnacs, practices which are contrary to Article L.420-1 of the French Commercial Code.

In this case, SAS Distribution du Domaine d'Uby (SDU) communicated recommended prices to its distributors (wholesalers to cafés, hotels and restaurants, as well as wine merchants and online retailers), and

encouraged them to maintain retail prices for its products.

In order to limit the "dumping" practiced by certain retailers, which, according to the winery, was threatening the organization of the network, the latter contacted distributors who were not complying with its pricing guidelines and penalized those who continued to ignore them by delaying deliveries.

For their part, distributors have adopted this policy of price regulation by signing contracts, applying imposed tariffs or denouncing the commercial practices of their competitors.

¹ Decision no. 24-D-07 of July 17, 2024

These anti-competitive practices, by virtue of their purpose, lasted more than three years, from March 1, 2015, to October 1, 2018. They have a certain gravity, due to their nature and their consequences on end consumers.

On May 10, 2019, French competition authority took over the case on its own initiative following the transmission of an investigation report drawn up by the Interregional Investigation and Competition Brigade, denouncing, among other things, price-fixing practices.

On January 8, 2024, the General Rapporteur of the Authority notified the respondents of the charges brought against them, in particular the widespread agreement between SDU (author) and its parent company with its resellers on the fixing of sales prices, which had the object and effect of distorting competition on the wine distribution markets.

Under both domestic and EU law, within a group of companies, the conduct of a subsidiary may be imputed to the parent company in particular where, despite having a separate legal personality, that subsidiary does not autonomously determine its conduct on the market, but essentially applies the instructions given to it by the parent

company, having regard to the economic, organizational and legal links which unite those two legal entities² (Court of Justice of 20 January 2011, General Química SA and Others v Commission).

Having examined all the facts of the case, the French Competition Authority deemed it necessary to impose a fine of 500,000 euros on SDU, jointly and severally with its parent company, this amount being within the range indicated in the settlement agreement.

The French Competition Authority found a pricing agreement (II) based on the establishment of recommended prices between the SDU and its distributors (I).

I. The introduction of recommended selling prices by the SDU to its distributors

The practice of recommended selling prices was transformed by the SDU into a practice of fixed selling prices (A), the justification for which was to limit dumping (B).

A. A renewed practice of fixed selling prices

Under competition law, recommended prices can be tolerated as long as they remain non-binding suggestions. However, if a supplier monitors their

² Court of Justice of January 20, 2011, General Química SA and Others v Commission

application or exerts pressure on its distributors (e.g., by delaying deliveries or imposing penalties), these practices can be qualified as imposed prices³, which is prohibited by Article L. 420-1 of the French Commercial Code, which punishes anti-competitive agreements.

To determine sales prices for its retailers, the SDU introduced pricing grids and account opening forms with wine merchants right from the start. These documents effectively communicated minimum resale prices, presenting them as the baseline for commercial dealings with the SDU.

In fact, between 2015 and 2017, the information contained in these pricing grids and account opening forms increasingly shifted from recommended pricing to what can be interpreted as an obligation to adhere to specific resale price levels. Furthermore, the SDU actively monitored the prices practiced by its distributors, sometimes involving other distributors to report deviations. This collective oversight mechanism further reinforced the control exerted by the SDU over the retail pricing practices.

In addition to this monitoring, indirect sanctions were employed against distributors who failed to comply with the required resale price levels. While the contracts between the

SDU and its distributors did not explicitly include provisions for penalties, the evidence reveals that non-compliance with pricing expectations could result in delays or interruptions in deliveries. This practice created a clear disincentive for distributors to diverge from the prescribed price structure, effectively pressuring them into compliance with the SDU's imposed resale prices.

B. A practice justified by a desire to limit dumping

Dumping is an unfair commercial practice involving the sale of a product on a foreign market at a price lower than that on the domestic market, or even at a price lower than the cost of production. In competition law, this practice is often seen as a form of abuse of dominant position or unfair competition, when its aim is to eliminate competitors by disrupting the normal play of the market.

In this case, the SDU justified imposing prices on its retailers in order to limit dumping. In particular, the head of the SDU asserted that "these mentions on the account sheets and pricing grids were introduced because a very marginal number of wine merchants were dumping our products".

³ Paris Court of Appeal, January 26, 2012, BeautéPrestige International

In addition, the SDU manager's determination was reinforced by the aggressive sales policies of certain distributors, with online retailers and wine merchants regularly complaining about this unfair competition.

According to the SDU, the minimum sales price stipulations included in price lists and account opening forms were designed to counteract the aggressive commercial practices of a few "opportunistic" distributors who were disrupting the distribution network.

II. The Competition Authority's finding of a pricing agreement between SDU and its distributors

A pricing agreement necessarily presupposes an agreement between the parties (A), which in this case led to a restriction of competition on the market (B).

A. An agreement between the parties

Proof of a vertical requires the demonstration of the agreement of the parties to the cartel expressing their common will to behave on the market in a certain way⁴.

The French Competition Authority is not required to gather a body of evidence to prove the existence of a vertical price cartel when it has documentary or behavioural evidence establishing the manufacturer's invitation and the distributors' acquiescence to the disputed practice.

In this case, it should be noted that the SDU monitored the price levels charged by its resellers, that it had put in place various sanction measures in the event of any deviation by the latter and, lastly, that the various surveys carried out by the DGCCRF show very significant monitoring of resale prices by the various resellers.

In fact, the agreement between the SDU and its distributors to apply the minimum prices it had communicated to them has been established it is therefore possible to establish the existence of an agreement between the SDU and its distributors on these price levels.

The French competition authority has described the practices of resale price maintenance as serious because of their intrinsically anti-competitive nature and their direct impact on distributors pricing freedom, as well as on the final prices paid by consumers. Moreover, these practices extended over a period of more than three years, affecting a significant proportion of

⁴ Court of Justice, July 15, 1970, ACF Chemiefarma v. Commission

distributors and retailers, with active monitoring and indirect threats or sanctions in the event of non-compliance. The justifications put forward show that the practices were aimed at meeting immediate commercial challenges, but this does not exonerate them from their illegality.

On the other hand, it is important to point out that although the case concerns a niche sector, SDU's practices affected distributors throughout the traditional network (CHR, wine merchant and online retailers). The authority mentions a certain effect on competition and end consumers, justifying an exemplary sanction.

B. An agreement of will leading to a restriction of competition

Article L. 420-1 of the French Commercial Code stipulates that express or tacit agreements are prohibited if they tend "to prevent the free market from setting prices by artificially favoring their rise or fall".

The Court of Justice of the European Union recently stated that "the essential legal criterion for determining whether an agreement, whether horizontal or vertical, contains the 'restriction of competition by object' test lies in the finding that such an

agreement is, in itself, sufficiently harmful to competition"⁵.

Moreover, it follows from the case law of the Court of Justice that certain types of coordination between undertakings, such as, but not exclusively, price cartels, inherently reveal a sufficient degree of harmfulness to competition for it to be considered unnecessary to examine their effects⁶.

In this case, as regards the content of the agreement, it is clear from all the above considerations that the SDU agreed with its wholesalers, wine merchants and online retailers to set a minimum level for retail prices.

Such an objective, aimed at altering the competitive functioning of the sector, by limiting intra-brand competition with a view to maintaining a sufficiently high price level, establishes the harmfulness of the practice and helps to characterize its anti-competitive purpose.

Finally, since a vertical agreement on prices constitutes a restriction of competition by object, it is not necessary to establish the existence of the effects it can produce. The practices at issue in this case therefore constitute restrictions of competition by object contrary to Article L. 420-1 of the French Commercial Code.

⁵ Court of Justice, June 29, 2023, C-211/22, Super Bock Bebidas SA v. Autoridade da Concorrenca

⁶ Court of Justice of September 11, 2014, Groupement des cartes bancaires

Regarding the penalty imposed by the French competition authority, it is true that it may be debatable. The amount could be perceived as high in view of the size of the company and its role in a niche market, especially as the effects on the sector as a whole seem limited in comparison with large cartels involving major players.

Indeed, a penalty of 500,000 euros could be perceived as excessive in view of the company's size, and an adjustment of the amount could have considered SDU's specific characteristics as a small company, without neglecting the exemplary nature of the penalty.

On the other hand, the penalty is justified by the duration, seriousness and impact of the practices, and may therefore be necessary to deter such cartels in a market where competition must be preserved.

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