



# *Ne bis in idem* principle in competition law enforcement: the treatment of complaints alleging anti-competitive practices and abuse of dominance in the chemical commodities distribution sector

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**Resume:** *The French Competition Authority examined and dismissed (French Competition Authority, December, 4th, 2025, Decision No. 25-D-09), allegations brought by Gaches Chimie against Brenntag concerning practices implemented in the chemical commodities distribution sector. The Authority held that certain alleged practices had already been examined in a previous decision (Decision No. 13-D-12) and therefore could not be reassessed under the ne bis in idem principle. As for the remaining allegations assessed under Article 102 TFEU and Article L420-2 of the french Commercial Code, the Authority found that the conditions for establishing an abuse of dominant position were not met and therefore dismissed the complaint.*

The distribution of chemical commodities plays a key intermediary role in industrial supply chains. Products such as solvents, acids and other basic chemical compounds are widely used in different sectors including manufacturing, pharmaceuticals and agrochemicals. Their distribution relies on specialised intermediaries capable of ensuring storage, handling transport under strict safety and regulatory constraints. As a result, the number of distributors operating at a national scale is limited, and entry into the market requires significant adjustments.

From the early 2000s onwards, several practices implemented in the chemical commodities distribution sector were denounced by market operators, leading to a long procedural history before the French Competition Authority. In 2001, Gaches Chimie first alerted the French competition authorities to alleged abuses of dominant position by Brenntag SA, including discriminatory or predatory pricing and exclusive supply agreements with major producers. Following an investigation opened in 2002 and a formal referral in 2003, the French Competition Authority concluded

in Decision No. 06-D-12<sup>1</sup>, on the 6th of June 2006, that the alleged practices were not established, mainly on the ground that Brenntag's dominant position on the market was not demonstrated. However, this decision was annulled by the Paris Court of Appeal in 2007<sup>2</sup> and in 2008 the Court of Cassation<sup>3</sup> confirmed this position.

These proceedings gave rise to several parallel investigations concerning practices in the same sector. Complaints relating to horizontal agreements resulted in Decision No. 13-D-12 May 2013<sup>4</sup>, by which the Authority sanctioned Brenntag for customer allocation and price coordination practices. The Authority also adopted Decision No. 17-D-27 on the 21st of December 2017 imposing a financial penalty on Brenntag for obstruction of the investigation<sup>5</sup>. After further procedural investigations, the joinder of several complaints and addition of other elements from the parties, the Authority adopted Decision No. 25-D-09 on the 4th of December 2025 regarding alleged abusive practices in the distribution of chemical commodities<sup>6</sup>.

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<sup>1</sup> Decision of French Competition Authority No. 06-D-12 of 6 June 2006 concerning practices implemented in the chemical commodities distribution sector.

<sup>2</sup> Judgment of the Paris Court of Appeal of 13 March 2007

<sup>3</sup> Judgment of the French Court of Cassation of 26 February 2008.

<sup>4</sup> Decision of the French Competition Authority No. 13-D-12 of 28 May 2013 concerning practices implemented in the chemical commodities marketing sector.

In the course of her investigation, the Authority had to examine the conditions prevailing in the chemical products market for the distribution of chemical commodities and determine whether Brenntag held a dominant position capable of affecting its competitors and the competitive market. It also had to evaluate whether the alleged practices could constitute an abuse of such dominance under Article 102 of the Treaty on the Functioning of the European Union<sup>7</sup> and Article L420-2 of the French Commercial Code<sup>8</sup>. At the same time, the Authority was confronted with the question of whether certain practices could be re-examined under a different legal qualification, despite having already been sanctioned in a previous decision concerning horizontal agreements in the same sector.

The French Competition Authority ultimately recognized Brenntag's dominant position in the national market for the distribution of chemical commodities. Moreover, it was considered that the examined practices did not establish the existence of an abuse. Additionally, the Authority held that several allegations could

<sup>5</sup> Decision of French Competition Authority No. 17-D-27 of 21 December 2017 concerning obstruction practices implemented by Brenntag.

<sup>6</sup> Decision of the French Competition Authority No. 25-D-09 of 4 December 2025 concerning practices implemented in the chemical commodities distribution sector.

<sup>7</sup> Article 102 of the Treaty on the Functioning of the European Union (TFEU).

<sup>8</sup> Article L420-2 of the French Commercial Code.

not be reassessed in application of the principle *ne bis in idem*, which prevents from being sanctioned twice for the same conduct<sup>9</sup>.

Accordingly, this decision calls for an analysis of the recognition of Brenntag's dominant position in the market for the distribution of chemical commodities (I), of the Authority's finding that the alleged practices did not amount to an abuse of such dominance (II), and, therefore, of the limits imposed by the *ne bis in idem* principle on the re-examination of practices previously sanctioned as collusive agreements (III).

### **I. The recognition of Brenntag's dominant position on the market for the distribution of chemical commodities**

In the context of the prosecution, the Authority first had to clarify the relevant market within the chemical products sector to recognise Brenntag's dominant position (A), in order to examine Brenntag's power on said market (B).

#### **A. The complex delineation of the relevant market in the chemical products sector**

The determination of the relevant market within the sector was complicated by the

diversity of products and the specific organisation of the distribution system.

The sector usually distinguishes between three main categories: chemical commodities, chemical specialties and fine chemicals. Chemical commodities correspond to basic raw materials characterized by a fixed composition such as acids, alcohols, solvents or alkalis. They are generally sold in large volumes and involve significant logistical and constraints and heavy investments related to storage and transport. By contrast, chemical specialties are typically sold in smaller quantities and higher prices for professional end-users, they include products such as detergents, adhesives and dyes. Fine chemicals such as calcium or zinc compounds are mostly destined to pharmaceutical laboratories or food producers. These are rarer products (research, production and distribution).

Defining the relevant market proved difficult due to the organisation of the distribution chain. While most chemical commodities are sold directly by producers to industrial users in large quantities (approximately 95% of production), distributors also play an essential role in the chain by supplying smaller volumes and providing logistical services such as storage, dilution, conditioning and transport.

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<sup>9</sup> P.Fauchon, "Communication on the draft framework decision on the application of the *ne bis in idem* principle", French Senate website.

Since many chemical products tend to be unsafe, this activity is submitted to strict regulatory constraints. Moreover, some of the installations constructed for storage or other services can be subjected to the Seveso directives, which impose safety standards as well as environmental requirements. Those rules require significant investments in specialized infrastructures, sometimes creating obstacles for competitors who wish to enter the chemical products market.

In light of these elements, the Authority defined the relevant downstream market as the national market for the distribution of chemical commodities, thus disregarding the parties' disagreements regarding the classification of certain products and the geographical scope. In contrary, the upstream production of chemical products was considered to be a distinct market.

#### B. The establishment of Brenntag's dominant position on the relevant market

Having defined the relevant market, the Authority examined the competitive position of the active operators in the sector in order to determine whether Brenntag held a dominant position. Under competition law principles, a dominant position refers to a

situation of economic strength enabling an undertaking to behave independently of its competitors, customers and consumers<sup>10</sup>. Its existence is assessed through several indicators, including market shares, market structure, barriers to entry and the economic advantages.

In the present case, market shares constituted a first indication of Brenntag's strong position. In 2005, Brenntag held approximately 46% of the national market for the distribution of chemical commodities, being significantly ahead of its main competitor Univar which held slightly more than 20%. Other distributors, such as Quaron, Solvadis and Gaches, held considerably smaller shares. The Authority also insisted on several structural factors reinforcing Brenntag's market power. The sector is highly concentrated and characterised by significant barriers to entry. The operators may be dissuaded by the obligation to respect specific infrastructure safety and environmental regulations, which increase the investment cost. Brenntag benefits from a large network of depots, including numerous Seveso-classified sites (11 in 2024). In addition, Brenntag belongs to a global group leading the distribution of chemical products, benefiting from significant financial and organisational resources.

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<sup>10</sup> Judgement of the Court of Justice of 14 February 1978, *United Brands and Others v Commission*, Case 27/76, para 65.

The Authority, after examining these elements, concluded that Brenntag held a dominant position on national market for the distribution of chemical commodities.

## **II. The rejection of the abuse of dominant position allegations despite the recognition of Brenntag's leading role on the market**

In order to examine whether or not there was an abuse of dominance, the Authority first had to examine each of the alleged practices denounced by the complainants (A), and then evaluate if these practices could produce anticompetitive effects within the market (B).

### A. The anti-competitive practices alleged by the parties

Several distributors including Gaches Chimie, Solvadis and Chimiphar, all active in the chemical commodities distribution section, brought complaints before the French Competition Authority alleging a range of anticompetitive practices committed by Brenntag.

Firstly, Gaches Chimie alleged predatory and discriminatory pricing in the South-West of France. Indeed, according to the complainant, Brenntag offered significantly lower prices in that region compared to

others although the market does not differ much, in order to eliminate competitors, particularly Gaches itself. It also claimed that certain services, such as technical fees or container deposits, were not systematically invoiced in that area. In response to these allegations, the Authority followed a detailed economic analysis based on Brenntag's accounting data and transaction records, focusing mainly on the activity of the Saint-Sulpice-la-Pointe area.

Secondly, several complainants accused Brenntag of concluding exclusive distribution agreements with major chemical producers, including companies such as Exxon, Petrol, Lyondell, Petrogal or Bayer. According to them, these agreements restricted the access to essential sources of supply.

Finally, other allegations concerned various practices of intimidation or unfair competition. Solvadis claimed that Brenntag had exerted pressure on competitors, professional organisations and potential informants to maintain its commercial advantages. Chimiphar also accused Brenntag of engaging in practices such as employee poaching and denigration of competitor.

### B. The rejection of the alleged abuses due to the absence of anticompetitive effects

The Authority carried out several tests in order to determine whether Brenntag's prices could be considered predatory. The economic analysis showed that the prices charged by Brenntag generally covered both variable costs and long-term incremental costs. The Saint-Sulpice-la-Pointe site also appeared to be globally profitable during the period analysis. Furthermore, the examination of transactions with customers common to Brenntag and Gaches did not reveal any systematic strategy of below-cost pricing or any exclusionary intent. As such, the Authority concluded that the alleged predatory pricing practices were not established.

Regarding exclusivity agreements, the Authority recalled that such arrangements are not unlawful per se, even when concluded by a dominant company. Their legality depends on their effects on competition. Regarding this matter, the Hoffman-La Roche decision of 1979 is relevant<sup>11</sup>, insofar as it states that a dominant company cannot impose exclusivity agreements that limits the commercial liberty and closes entry to the market for new competitors. In the present case, the investigation showed that the proportion of Brenntag's sales covered by exclusivity agreements was relatively limited and had declined over time. In addition, these agreements could be explained by legitimate

economic elements, such as logistical economic and distribution efficiency. The authority therefore found no evidence that these arrangements had negatively impacted the market, as well as the competition.

Therefore, the allegations relating to intimidation and unfair competition were dismissed due to the lack of evidence. The investigation did not confirm the alleged pressures on professional organisations or competitors. Furthermore, the claims relating to employee poaching and denigration were not proved. The Authority concluded that, although Brenntag was recognized as holding a dominant position on the national downstream market for the distribution of chemical commodities, the conditions required to establish an abuse of dominance were not met and dismissed all the allegations raised by the complainants.

### **III. The impossibility of re-examining certain practices due to the principle of *ne bis in idem***

The analysis by the Authority of this issue required first to insist on the existence of a prior decision sanctioning collusive agreements in the sector (A), and then dismiss the allegations in application of the *ne bis in idem* principle (B).

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<sup>11</sup> Judgment of the Court of Justice of the European Union of 13 February 1979, Hoffman-La Roche v Commission, Case 85/76.

A. The existence of a prior decision sanctioning collusive agreements in application of the Articles 101 TFEU and L420-1 French Commercial Code

Some of the practices alleged by the complainants concerned horizontal agreements involving several chemical distributors, including Brenntag, operating on the French market for the distribution of chemical commodities.

However, these practices had already been examined in a previous decision of the French Competition Authority. Following several leniency applications submitted in September and December 2006, the Authority opened a separated investigation which led to Decision No. 13-D-12 on the 28th of May 2013. In that decision, the Authority found that several distributors participated in the conclusion of horizontal agreements involving allocation and price coordination. Brenntag was identified as being a key coordinator of the practices due to its strong market position and its involvement in the organisation of the collusive arrangements. The Authority observed that the company had taken part in meetings organising the arrangements and had participated in the implementation of said agreements across several regions.

Moreover, these findings were later confirmed by the Paris Court of Appeal, which upheld Brenntag's role in its judgment on the 3rd of December 2020. In addition, Brenntag was also sanctioned in Decision No. 17-D-27 on the 21st of December 2013 for obstructing the investigation by providing incomplete and delayed responses to the Authority's requests for information.

Since the alleged collusive practices had already been examined and sanctioned in Decision No. 13-D-12, the Competition Authority had to determine whether it could assess the same conduct again within the latest proceedings. This issue raised the question of the application of the *ne bis in idem* principle, which prevents the same facts from being examined twice once a final decision has been adopted.

B. The application of the *ne bis in idem* principle and the resulting dismissal decision

The Competition Authority ultimately refused to reassess the alleged collusive practices on the basis of the *ne bis in idem* principle. This principle is recognized at both the European and national levels. It is enshrined in Article 50 of the Charter of Fundamental Rights of the European

Union<sup>12</sup> which establishes the prohibition of double jeopardy, as well as in Article 4 of Protocol No. 7 to the European Convention on Human Rights<sup>13</sup>, according to which no one may be prosecuted or punished twice for the same offense following a final judgment.

The *ne bis in idem* principle applies when three conditions are met : identity of facts, identity of offender and identity of the protected legal interest. The Authority considered that these conditions were fulfilled. First, the practices alleged by Gaches and Solvadis correspond to the same facts already examined in Decision No. 13-D-12. Secondly, the parties concerned are identical, since Brenntag and several competing distributors had already been sanctioned in that decision. Finally, the legal interest protected was also the same, namely the preservation of effective competition on the market.

As a result, the Authority refused to re-examine these practices, even under a different legal qualification such as abuse of dominance. It therefore concluded that there was no ground for any further action and reaffirmed the importance of the *ne bis in idem* principle in competition law enforcement.

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<sup>12</sup> Article 50 of the Charter of Fundamental Rights of the European Union.

<sup>13</sup> Article 4 of Protocol No. 7 to the European Convention on Human Rights.