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# French BPA Case Highlights Antitrust Law Boundaries for Association Recommendations and Initiatives

Valentine Lemonnier (Kapellmann) · Friday, February 2nd, 2024

The French competition authority, the *Autorité de la Concurrenc*e, has recently published a cartel decision (see here) which deals with a cartel of industry associations and their members with regard to product qualities and product information. The case is an important reminder to industry associations and companies of the boundaries between antitrust compliant lobbying and providing a forum for illicit collusion.

## Background

In 2012, the French legislator adopted a ban for the use of "Bisphenol A (BPA)" in all food containers, which came into force as of 1 January 2015. There was a long transitional phase (to allow stocks to be used up), during which food containers with and without BPA could simultaneously be placed on the market. The ban of BPA was highly debated *inter alia* in France at the time, not only among experts but also in the broader public. Accordingly, the relevant associations were involved in the legislative process and engaged with their members during the implementing period.

## Findings of the *Autorité de la Concurrence* in the BPA case

The *Autorité* has found that, from 2010 to mid-2015, three professional canning associations and a can manufacturer's trade union implemented practices intended to prevent competition on the presence, or absence, of BPA in food containers in the transitional phase. The sanctioned practices were part of an overall plan to neutralise the competitive risks arising from the introduction of BPA-free food containers on the market. In short, the authority identified two infringements:

- Preventing manufacturers from communicating on the absence of BPA in their food containers (thus, eliminating the competition on one element of the product quality),
- Encouraging manufacturers to refuse to supply BPA-free cans before 1 January 2015 and then to refuse to stop selling cans with BPA after this date, despite the demands of the mass retail distribution sector to this effect.

The *Autorité* considers that these practices, which concern essential parameters of competition, namely information on the composition of products (first strand) and the quality of products (second strand), are anticompetitive by object, due to their nature, purpose, and context. The justifications put forward by the respondents (notably that the sector would be "destabilised") were not sufficient to exonerate them.

The *Autorité* identified eleven companies who, in their capacity as members of the three professional canning associations, participated in the cartel. The four associations and eleven of their member companies were fined a total of 19.553.400 EUR.

**Decision up-holds previous decision practice**

The French BPA case is in many ways a continuation of previous decisions by the European Commission and the *Autorité de la Concurrence*:

- In 2011, the European Commission found that Procter & Gamble, Unilever and Henkel had formed a **cartel in the market for household laundry powder detergents** (case AT.30579, decision of 13.04.2011, see here). The cartel started when the companies implemented an initiative through their trade association to improve the environmental performance of detergent products. The companies thought to achieve market stabilisation by ensuring that none of them would use the environmental initiative to gain competitive power over the others and that market positions would remain at the same level as prior to actions taken within the environmental initiative. In addition, the companies also agreed on prices and exchanged sensitive information on prices and trading conditions, thereby facilitating the various forms of price collusions.
- The *Autorité de la Concurrence* fined a **cartel in the floor coverings sector** (decision 17-D-20 of 18 October 2017, see here): Three companies and the relevant trade union had, *inter alia*, signed a non-competition agreement concerning communication relating to the environmental performance of their products. Manufacturers were permitted only to communicate on the environmental performance of their product through joint data sheets produced by the trade association. The authority found that tradesmen, retailers and consumers could not obtain the degree of information that might have prevailed in the absence of the non-competition agreement. The missing information might have enlightened their purchasing decision, in particular since there was, at the time, an increasing sensitivity to the debate surrounding the impact of air quality on human health, specifically as a result of releases from PVC floor coverings. Further, the authority found that the agreement may have acted as a disincentive to manufacturers to innovate.
- In the **car emissions cartel**, the European Commission found that Daimler, BMW and Volkswagen group (Volkswagen, Audi and Porsche) had breached EU antitrust rules by colluding on technical development in the area of nitrogen oxide cleaning (case AT.40178, decision of 08.07.2021, see here). In short, the companies agreed to avoid competition on using a specific technology's full potential to a higher extent than the minimum required by law. The car manufacturers agreed on the AdBlue tank sizes and ranges and a common understanding on the average estimated AdBlue consumption. This way, the car manufacturers avoided competition on cleaning the NOx emissions better than required by law despite the relevant technology being available. As a result, the companies removed the uncertainty about their future market conduct concerning NOx emissions cleaning beyond and above legal requirements and AdBlue refill ranges.

The element that ties those different cases together is that the cartels were formed in the **context of the pressure to comply with regulatory changes and added special public interest in the composition of and information on products**. Such interest in product components and the resulting public and political pressure is likely to be even bigger today. This is particularly evident when it comes to the notion of sustainability, which today may not only be of relevance for the purchase decision of end consumers but has become an important marketing aspect throughout the product value chain.

**Relevance for advocacy work of associations**

The discussed case practice also illustrates the special role of associations in antitrust infringements: The initiative for the collusions almost always came from the associations or was coordinated or monitored by them. Yet, the involvement of industry associations is rather typical for illicit sector-wide initiatives. It is therefore to be expected that the competition authorities will keep a close eye on sector initiatives that could hinder competition. Therefore, industry associations should ensure from the start that any industry initiative, however well-intentioned it may be, respects the boundaries set by antitrust law.

However, it remains a challenge, in practice, to find the right balance between, on the one hand, advocating the interests of their sector and, on the other hand, not coordinating the competitive behaviour of association members by illicit recommendations or the like. Association staff is typically under particular scrutiny by the association members in times of important regulatory reforms, e.g., when a change in law puts a vast majority of a sector under pressure to adhere to the new legal framework. Nevertheless, any measures to “relieve” pressure from the competition or otherwise align the member companies must comply with antitrust law.

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