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Insights

BAN ON ONLINE SALES IN A FRANCHISE NETWORK

THE FRENCH COMPETITION AUTHORITY SANCTIONS FRANCHISOR DE NEUVILLE

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On February 6, 2024, the French Competition Authority ("**l'Autorité**") fined chocolate producer De Neuville 4 million euros for vertical agreements. This decision is interesting in several respects:

- With this decision, the Autorité confirms that the general restriction of a distributor's online sales is anti-competitive, whatever the type of distribution network concerned, including franchise.
- However, it has adopted a more lenient method of calculating the penalty for De Neuville than that used in its recent decisions concerning the restriction of online sales in a distribution network.
- Lastly, it noted that the distribution system set up by the franchisor via the network's "ethical rules" applicable to professional clients created an anti-competitive mechanism for sharing sales to professional customers between franchisees, even though the franchise contract did not provide for any exclusivity with regard to this clientele.

The Autorité extends to franchise networks its practice of prohibiting all restrictions on online sales

This decision follows two noteworthy decisions handed down on December 11 and 19, 2023 (decision no. 23-D-12, Thés Mariage Frères and no. 23-D-13, Rolex - see the Paris Litigation Gazette of February 14, 2024), in which the Autorité reiterated that suppliers may not restrict a distributor's effective use of the Internet, whether as part of a "free" distribution network (Thés Mariage Frères decision) or a selective distribution network (Rolex decision).

The Authority is concerned here with the franchising network set up by chocolate producer De Neuville, under which franchisees operated the brand's physical outlets, but could only sell products online with the franchisor's prior authorization, based on criteria that were either not defined or were too restrictive. The franchisor thus reserved exclusive rights to Internet sales.

To justify restricting online sales, De Neuville cited (i) the need to preserve the unity of its network, (ii) the desire to protect its brand image, and (iii) the scale of the investments made in its website, which it could legitimately reserve for itself.

None of these arguments convinced the Autorité. On the contrary, it believes that restricting online sales:

- is not necessary to set up a franchise network, even when the franchisor grants territorial exclusivity to its franchisees,
- cannot be justified by the need to protect the franchisor's brand image, as is the case with a selective distribution system (in line with the Pierre Fabre case law of the Court of Justice (C-439/09, October 13, 2011) and recently reiterated by the Autorité in decision no. 23-D-13, Rolex), and
- was not motivated in this case by a supposed need to make a profit on major investments, which do not appear in any of the contractual stipulations of the franchise agreements in question.

Lastly, the Authority considers that De Neuville's restriction on online sales limited active and passive sales by franchisees, without this restriction having generated any efficiency gains, thus preventing any benefit from an individual and block exemption.

The AMF's method of calculating the fine for restricting online sales is less severe than that used in its recent decisions.

In its Rolex decision, the AMF used a severity coefficient of 4% to calculate the fine for practices that prohibited the resale of products online (it had opted for a flat-rate penalty in its Thés Mariage Frères decision).

In the present case, the Autorité has set a severity coefficient of "only" 1% for the grievance relating to the restriction of online sales, without giving any reasons for such a discrepancy in the determination of the penalty. This is all the more surprising given that, in the present case, the Authority has set a severity coefficient of 3% for the grievance relating to the distribution of business customers among franchisees, without providing any justification for this difference in treatment.

This kind of heterogeneity, and the lack of reasons for it, makes it difficult to understand the Authority's decision-making practice with regard to the severity of restrictions on online sales within a distribution network.

The AMF sanctions the franchisor's division of business customers between franchisees where this is not specifically provided for in the franchise agreement.

The Autorité also penalized De Neuville for having created a system for dividing up sales to professional customers among its franchisees, "*despite the absence of contractual exclusivity for this clientele*" (§110 and §139).

His reasoning is twofold:

- It first notes that the contractual stipulations governing relations between De Neuville and its franchisees state that professional customers are not covered by any exclusivity clause. It concludes that professional customers are subject to "the *principle of free competition within the De Neuville franchise network*" (§105).

- It goes on to note that, despite this contractual freedom given to franchisees, De Neuville published an operating manual and gave it to each franchisee, under which they were not allowed to (i) canvass business customers outside their trading area, unless this area had been fully prospected (limitation of active sales), nor (ii) honor unsolicited requests from business customers located in another franchisee's area, except with the latter's agreement (limitation of passive sales).

The Autorité deduced that De Neuville's system, although contractually characterized by free competition, "in *reality establishes a sales allocation system*" (§104) "*which has the effect of restricting passive sales and active sales by network members outside their catchment area*" (§263).

This decision is a reminder of the importance for franchisors to be vigilant when drafting their operating manuals, particularly when no territorial exclusivity is granted to franchisees.

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