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No abuse of dominant position without a link between the predatory practice and the dominated market

In a landmark decision dated March 17, 2009, the *Cour de cassation* (French Supreme Court) upheld the position adopted by the Paris Court of Appeals in a judgment dated April 8, 2008 that reversed a ruling of the *Conseil de la concurrence* [1](the French competition authority which is now known as the *Autorité de la concurrence*) that imposed a EUR 10 million fine on GlaxoSmithKline laboratory ("Glaxo"). The *Conseil de la concurrence* held that this laboratory ought to be sanctioned for having hindered the entry of generic drugs in hospitals through a predatory policy -that constituted an abuse of dominant position- in relation to the price of an injectable antibiotic (cefuroxime sodium, widely used in hospitals) sold by Glaxo under the name *Zinnat*®.

In France, this was the first case in which a company was penalized for applying predatory prices. A predatory pricing policy constitutes an abuse of dominant market position insofar as it can, in principle, only be applied by economic actors with a dominant position on a specific market: the predatory price is an unusually low

price (below the company's variable costs) and can therefore be applied only by companies with a strong market position. The objective is "to evict or discipline one or more competitors or to make more difficult the entry of future competitors on the market so as to protect or strengthen one's dominant position"[2].

The *Conseil de la concurrence* considered that the prices applied by Glaxo for the *Zinnat®* product had a predatory nature in order to "*build an aggressive reputation*" and "send a signal" aimed at deterring generic manufacturers from entering the market of hospital medicines; it held that Glaxo's strategy was to appear as an "aggressive" player on the *Zinnat®* market to deter generic manufacturers from entering the market on which Glaxo sells its flagship product, i.e. *Zovirax®* (an injectable antiviral, the active substance of which is aciclovir).

As such, Glaxo "who held a dominant position on the market of injectable aciclovir sold under the brand injectable Zovirax" was blamed for "abusing its position on the cefuroxime sodium market on which it sold its product called injectable Zinnat. The prohibited anticompetitive practices used by Glaxo consisted in applying a predation policy for the injectable Zinnat proposed to *several hospitals and purchasing centers. Such practices, applied in 1999 and 2000, are prohibited by Article L.420-2 of the French Commercial Code and Article 82 of the EC Treaty* [abuse of dominant market position] *».*

To establish the existence of an abuse of dominant position, the *Conseil de la concurrence* relied notably on a judgment rendered on July 3, 1991 by the Court of Justice of the European Communities (Akzo judgment) and held that "*case law has established that, if the dominant company can seek to protect its position in applying predatory prices on the dominated market, it can also do so on an ancillary market if this practice helps it protect or strengthen its position on the dominated market*".

The *Cour de cassation*, following the position of the Paris Court of Appeals, held however that even though Article L.420-2 of the French Commercial Code and Article 82 of the EC Treaty assume the existence of a link between the prohibited anticompetitive practice and the dominated market on which such practice is implemented, such an assumption should not come into play when the prohibited practice is implemented on a market other than the dominated market.

In this case, the *Cour de cassation* recalled that there must be "*particular circumstances*" establishing (i) just like in the Akzo judgment[3], that it was indeed "to strengthen its dominant position on a market that a company decides to implement a prohibited practice on another market on which it has no dominant position" or (ii) just like in the Tetra Pak Judgment[4] that "the two concerned markets are so closely associated that a company is placed in a situation comparable to that of holding a dominant position on the markets in question as a whole".

For the *Cour de cassation*, none of the following facts can be used to justify the existence of "particular conditions likely to establish a link between Glaxo's [predatory] practice on the undominated market [cefuroxime sodium or hereinafter "A Market"] and Glaxo's dominant position on the other market [injectable

aciclovir or hereinafter “B Market”]”:

- There is no link between the products sold on the A Market (antibiotics curing infections) and those sold on the B Market (antivirals used for a different purpose): the link between these two markets is limited to the existence of general characteristics that can be explained by the sole fact that these two markets are non-administered hospital markets;
- The laboratories likely to enter the B Market are not present on the A Market (except for Panpharma and Ggam);
- There is no element demonstrating that Glaxo’s potential competitors on the B Market had a sufficiently precise and complete knowledge of the prices applied on the A Market and, therefore, Glaxo’s predatory practice on the A Market cannot be considered as an “aggressive signal aimed at deterring such potential competitors from entering” the B Market.
- The declarations made by the representative of Panpharma, Glaxo’s main competitor, never refered to Glaxo’s behavior on the A Market to explain why Panpharma eventually never entered the B Market.

Even though it is established that Glaxo applied predatory prices on the cefuroxime sodium market (by applying a sale price below the cost price) the EUR 10 million fine cannot be imposed on Glaxo on the basis of Article L.420-2 of the French Commercial Code and Article 82 of the EC Treaty since no link has been established between the predatory pricing on the undominated market and the market in which Glaxo enjoys a dominant position.

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[1] Decision n°07-D-09 of March 14, 2007 relating to practices applied by the laboratory GlaxoSmithKline France

[2] Extracted from the judgment of the Paris Court of Appeals dated April 8, 2008

[3] Judgment dated July 3, 1991, Akzo Chemie BV, C-62/86 §§ 35 to 45

[4] Judgment dated November 14, 1996, Tetra Pak International, C-333/04, §§ 21 to 33

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