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End of the corsican cement legal saga : lafarge and vicat escape a fine for abusive collective dominant market position

There have always been close links between collective dominant market positions (Article L.420-2 of the French Commercial Code / Article 82 of the TEC[1]) and concerted practices (Article L.420-1 of the French Commercial Code / Article 81 of the TEC). Indeed, the existence of structural links between companies (notably in the form of concluded agreements) on the one hand, and the adoption of a common line of conduct on the market on the other hand, may establish the existence of a collective dominant market position[2]. Yet, these two structural and behavioral requirements must be cumulatively met: while a concerted practice (as defined in Article 81 of the TEC) can be an indication of a collective dominant market position (Article 82 of the ECT), it must also be demonstrated that the companies "*together (…) are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their clients, and consumers*"[3].

This principle was recently re-affirmed in a judgment rendered on April 15, 2010 by the Paris Court of Appeals, to which the case was remanded following a decision of the *Cour de Cassation*, which puts an end to the so-called "Corsican cement" legal saga[4]: the mere existence of agreements jointly concluded by companies is not sufficient to establish a collective dominant market position. Even so, it is indeed necessary to demonstrate the existence of a "market power" that enables them to cut themselves off from competitors and clients in view to defining a common line of conduct on the market.

At the origin of the "Corsican cement" case lies a "*a sub-contract for the operation of a public cement storage and sacking/bagging facility*" signed in 1994 between the Upper Corsica Chamber of Commerce and Industry and two cement producers, Lafarge and Vicat, pursuant to which the latter undertook to "*contribute to the financing of the revitalization of the facilities for cement receipt (storage and sacking/bagging) and distribution on the Bastia harbor (…) in return for the exclusive right to operate such facilities*".

From there, two agreements were successively entered into:

- A sub-delegation agreement for the operation of such storage and sacking/bagging facilities, entered into on November 8, 1994 for a duration of 30 years between Lafarge and Vicat on the one hand and a GIE[5] that included the distributors-wholesalers of Upper Corsica on the other hand. Under this agreement, the two cement manufacturers granted the GIE the exclusive operation of the facilities in return for the GIE members' commitment to purchase cement exclusively from Lafarge and Vicat;
- An agreement entered into on May 6, 1999 between Lafarge and Vicat on the one hand and the Union of Corsican distributors-wholesalers on the other hand. Under this agreement, the Union members committed themselves to purchasing their cement supplies exclusively from Lafarge and Vicat for a minimum of four years, via the transport company Someca chosen by the two cement manufacturers.

In addition, between 1997 and 1999, Lafarge and Vicat granted to the members of the Union and the GIE exceptional rebates on the condition that the benefiting wholesalers do not import in Corsica foreign cement (from Greece or Italy).

In its decision n°07-D-08[6], the French Competition Council held that these three practices were anticompetitive because they prevented Lafarge's and Vicat's competitors from entering the Corsican market: the first two practices infringed Articles L.420-1 of the French Commercial Code and Article 81 of the TEC pertaining to cartels; the third practice – the rebate practice applied by Lafarge and Vicat – infringed Article L.420-2 of the French Commercial Code and Article 82 of the TEC pertaining to collective dominant market positions. Lafarge and Vicat were ordered to pay a fine of EUR 17 million and EUR 8 million respectively.

To justify its decision to fine the two cement manufacturers for abuse of a collective dominant market position, the French Competition Council notably held that the requirement of "*structural links between companies*" (which is necessary to establish the existence of a collective dominant market position) *"not only applies to the existence of capitalistic links or reciprocal shareholdings in management bodies but also to other situations, including contractual links"*. In the case at hand, the Competition Council considered that Lafarge and Vicat acted "*together to sign a series of contracts* » (including the aforementioned agreements) and, therefore, acted as a "*collective entity*" pursuing a common strategy, which established the existence of a collective dominant market position, and all the more so because Lafarge and Vicat together controlled 90% of the wholesale supply of cement to Corsica. As the two cement manufacturers granted fidelity rebates on the express condition to exclude competitors from the Corsican market, the abuse of a collective dominant position was de facto established.

In a judgment dated May 6, 2008, the Paris Court of Appeals confirmed the existence of the abuse of a collective dominant market position and ruled notably that while the existence of agreements was not sufficient in itself to characterize a collective dominant market position, "*the implementation of such agreements may result in the relevant companies adopting linked behaviors on a determined market in such manner that they appear on this market as a collective entity vis-à-vis their competitors, business partners and consumers*".

The Paris Court of Appeals confirmed the reasoning of the French Competition Council regarding the

existence of a collective dominant market position but considerably reduced the fines imposed to Lafarge (EUR 10 million) and Vicat (EUR 4.5 million) on the grounds that the impact on competition and, therefore, the damage to the economy were not as significant as initially found by the Competition Council.

In a decision dated July 7, 2009, the *Cour de cassation* partially reversed the judgment of the Court of Appeals "*solely with respect to the section of the judgment concerning the abuse of a collective dominant market position and the sanctions associated therewith"* and remanded the case, on this specific point only.

The *Cour de cassation* held that the Court of Appeals, by inferring that Lafarge and Vicat had the behavior of "*a collective entity applying a common strategy*" from the implementation of contracts jointly signed by them, failed to legally justify its decision by confusing the behavioral requirement (ability to adopt a common line of conduct) and the structural requirement (the implementation of contracts).

For the *Cour de cassation*, instead of limiting their examination on the existence/implementation of the contracts, the judges of the lower court should have determined whether "*in the absence of anticompetitive agreements with their clients, Lafarge and Vicat could have behaved on the relevant market quite independently from their competitors, clients and consumers*".

It is in this legal context that the Paris Court of Appeals, in its judgment of April 15, 2010, followed the *Cour de Cassation*'s reasoning and ruled that, to be able to condemn Lafarge and Vicat on the basis of Articles 81 and 82 of the TEC, the French Competition Council should have:

- With respect to Article 81 of the TEC, assessed whether the contracts entered into by Lafarge and Vicat on the one hand, and the Union and GIE of wholesalers on the other hand, were likely to significantly affect competition,
- With respect to Article 82 of the TEC, assessed whether Lafarge and Vicat could "*jointly*" determine a strategy, "*independently*" from their clients, competitors and consumers.

In this first case, the existence of cartels/concerted practices (based on the agreements concluded with clients and partners) must be established, whereas in the second case, on the contrary, the existence of an economic domination that is "*independent*" from clients, competitors and consumers must be established.

As such, the judgment of the French Competition Council was legally flawed because it wanted "*to rely on the combination of the two infringements simultaneously prosecuted"* by referring *"on several occasions to the same actions or facts* [namely the contracts jointly entered into by Lafarge and Vicat], *sometimes as an agreement or practice having an anticompetitive object or effect, as defined in Article 81 of the TEC, other times as the stigma of "independence" vis-à-vis its competitors, clients or consumers* [as defined in Article 82 of the TEC]" whereas, on the contrary, it should have disregarded the vertical agreements set up with the clients to assess whether Lafarge and Vicat collectively had a "market power", i.e. the "means" to jointly determine a market conduct in an "independent" manner.

As the file did not contain any conclusive element attesting to Lafarge's and Vicat's possibility to implement a common line of conduct – except for the concluded contracts – the claim of abuse of a collective dominant

market position was rejected, especially as the fidelity rebates were tied to the 1994 and 1999 agreements, thereby making it impossible to assess the anticompetitive nature of such rebates independently from the concluded agreements.

In addition, such rebates did not constitute a "*practice that was characteristic of the relevant period (…) and common to the two manufacturers*": Lafarge had granted such rebates only once and not at the same time as Vicat. Further, such rebates were, in practice, granted to all wholesalers, including those that imported cement from foreign countries. The Court of Appeals, however, upheld the fines imposed upon Lafarge and Vicat in the judgment of May 6, 2008 as it considered that the anticompetitive practices actually caused a damage to the economy, as evaluated, and it was not possible to separate the specific damage caused by the alleged abuse of a collective dominant market position from this economic damage.

The outcome of the Corsican cement legal saga is therefore favorable to Lafarge and Vicat. This however, is not sufficient to make Lafarge forget that, pursuant to a judgment rendered on July 8, 2008 by the Court of First Instance of the European Communities, it was ordered to pay a EUR 249.6 million fine in a cartel case[7]. Lafarge appealed this decision on September 22, 2008. And the saga continues…

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[1] For information, since the entry into force of the Treaty on the Functioning of the European Union (TFEU) on December 1, 2009, articles 81 and 82 of the Treaty establishing the European Community (TEC) have become Articles 101 and 102 of the TFEU. However, for clarity purposes, this article will refer to the former numbering which may be more familiar to the readers.

[2] CJEC March 16, 2000, Compagnie maritime belge; CFI October 7, 1999, Irish Sugar ; *Cour de cassation* March 5, 1996 Total Réunion Comores.

[3] CJEC, March 31, 1998, joined cases C-68/94 and C-30/95 Kali & Saltz; CFI March 25, 1999, case T-102/96 Gencor.

[4] This saga started with decision n°07-D08 of the French Competition Council, followed by a judgment of the Paris Court of Appeals on May 6, 2008 and a decision of the *Cour de cassation* on July 7, 2009.

[5] *Groupement d'intérêt économique*: Economic Interest Group, i.e. a consortium of related businesses that formally pool their efforts for competitive advantage

[6] Decision n°07-D-08 of March 12, 2007 relating to practices implemented in the framework of the supply and distribution of cement in Corsica.

[7] CFI, cases T-50/03, T-52/03, T-53/03, T-54/03

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