

# Competition and Distribution

## Newsletter

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## Competition

### Conseil de la Concurrence Decision n° 09-D-05 of 2nd February 2009 relating to certain practices applied in the temporary employment sector

Under Decision n° 09-D-05, the *Conseil de la Concurrence* (Competition Council) has ordered heavy penalties against the main temporary employment agencies: Manpower, Adecco France, Adia and VediorBis, amounting to a total of 94.4 million Euro.

Such companies were accused of having consulted with one another with a view to coordinating their sales policies in relation to their "Major Account" customers which include, in particular, La Poste, EDF, Alstom, Eiffage, Alcan and Les Galeries Lafayette, etc. The *Conseil* even believed that if the coordination had been to a greater extent and more systematic, it would have constituted an actual cartel. In the case in point, the *Conseil de la Concurrence* noted certain price-related concerted practices in connection with certain bids given on invitations to tender as well as certain exchanges of information relating to the amount of end-of-year discounts, terms and conditions of retroceding, to customers of social security contribution reliefs and even relating to invoicing coefficients applied to temporary workers.

It is interesting to note the factors taken into account in calculating the level of the penalties.

In order to arrive at this high penalty amount, the *Conseil de la Concurrence* relied on the seriousness of the practices implemented and the harm that such practices were able to cause to the economy on the understanding that Manpower, Adecco and Vedior covered 70% of the French temporary employment market, as well as on the repetition of certain practices by the business undertakings concerned that had already been punished by the *Conseil de la Concurrence* in 1997. The repeated practices led in this case to a 25% increase in the amount of the penalty. It is also pointed out that the pressure exerted by one of the business undertakings over one of its former employees who had reported the practices having given rise to this case, was a factor capable of further increasing the amount of the penalty.

In favour of a reduction in the amount of the fine ordered, the *Conseil de la Concurrence* relied on the non-disputing of the grounds for complaint combined with the giving of major undertakings by some of the implicated business undertakings, excluding Manpower. The relevant business undertakings therefore undertook to set up certain in-house awareness and training programmes for the members of their staff concerned and a professional whistle-blowing system notably via the appointment of a "competition compliance officer". Furthermore, such business undertakings undertook to design a scheme for overseeing bids given on invitation to tender procedures (retention of documents relating to invitations to tender, drawing up on a quarterly basis of a list

recording invitations to tender in which the companies had participated, appointment of an independent consultant). On the contrary, the voluntary setting up of an in-house training programme, that is not falling within a legally binding undertakings procedure (*procédure d'engagement*), would not appear to result in a reduction in the amount of the penalty.

### **The Paris *Cour d'Appel* confirms the *Conseil de la Concurrence*'s decision requiring the suspension of Orange's exclusive rights over Apple's iPhone (CA of Paris, 4th February 2009)**

On 18th September 2008, Bouygues Telecom referred a matter before the *Conseil de la Concurrence* regarding certain restrictive trade practices implemented in connection with the distribution of the iPhone on the French market, by requesting the ordering of certain interim measures. On 17th December 2008, the *Conseil de la Concurrence* ordered Apple and France Télécom to suspend the application of certain provisions in their contracts that made Orange the exclusive operator for iPhone products (Decision n° 08-MC-01). In a ruling of 4th February 2009, the Paris *Cour d'Appel* (Court of Appeal) confirmed such interim measures and adopted the *Conseil's* analysis.

The *Conseil de la Concurrence* singled out several markets likely to have been affected by the reported practices: the wireless telephony services market (on which it was not argued that Orange held a dominant position); the upstream terminals market putting terminal manufacturers in contact with terminal distributors (on which it is very unlikely that Apple holds a dominant position); the downstream terminals market putting terminal distributors in contact with consumers and within which a distinction must be made between the smartphone market and the networked PDA (personal digital assistants) market (on such market, France Télécom's market share cannot be estimated); the digital personal stereo market and the market for chargeable on-line music downloads (on these last two markets, it cannot be excluded that France Télécom holds a dominant position).

The *Conseil* noted that the agreements entered into between Apple and Orange combined several vertical restrictions which affected the reselling of iPhones to consumers: exclusive distribution at wholesale trade level; exclusive supply which only enabled a single network operator to link its services to the terminal concerned; selective distribution of the product at retail trade level, and a prohibition against cross sales between authorized wholesalers and between authorized retailers.

The *Conseil* considered that the exemption by category regulation n°2790/1999 relating to vertical restrictions did not apply to such agreements, since Orange's market share exceeded 30% (where there is an agreement containing an exclusive supply obligation, the 30% threshold below which there is a presumption of legality, must be assessed on the basis of the purchaser's and not the supplier's market share) and since the restriction against cross deliveries was a hardcore restriction (*clause noire*) which prevented the entire agreement from benefiting from the block exemption.

The *Conseil* found that the exclusive rights obtained by Orange were likely, owing to their duration (exclusive rights for 5 years instead of the 3 to 6 months more customarily granted) and their extent (consumers wishing to unlock their iPhones before the end of a 6 month period have to pay 100 Euro), as well as the iPhone's appeal, to strengthen Orange's pre-eminent position on the wireless telephony services market and to directly weaken the competition created between operators on such market. The *Conseil* has deduced from such fact, in a somewhat criticizable manner, that the wireless telephony services market has been seriously undermined and that consumers' rights have consequently been seriously violated.

Although the *Conseil's* analysis has been criticized in numerous commentaries by legal writers, its decision ruling on an application for interim measures has been confirmed by the *Cour d'Appel*. We shall have to wait for a decision on the merits in order to see what other lessons are to be learned from this case.

### **Conseil de la Concurrence Decision n° 09-D-06 of 5th February 2009 relating to certain practices applied by the SNCF and Expedia Inc. in the on-line travel sales sector**

The *Conseil de la Concurrence*, in a case referred to it by three on-line travel agencies, and by applying domestic and European Community competition law, has punished five abuses of a dominant position by the SNCF and one concerted practice between the latter and Expedia.

#### **1. The practices punished**

The *Conseil* has considered that the partnership between the SNCF and Expedia, the purpose of which was to promote their joint subsidiary on the on-line travel agency services market, constituted a concerted restraint of trade. The parties have been accused of having caused their joint subsidiary to enjoy certain advantages in relation to the sharing of the “voyages-sncf.com” Internet website, notably the directing of on-line train ticket purchasers towards travel agency services, joint newsletters and the benefit of the trademark containing the “SNCF” acronym.

The *Conseil de la Concurrence* also accused the SNCF of the following practices:

- (i) the setting up of barriers to entry to the train ticket distribution market:
  - other on-line travel agencies were required to purchase the Ravel interface, characterized by the *Conseil* as an “essential facility”, at a particularly high price,
  - discriminatory treatment of the other on-line travel agencies (the companies operating the “voyages-sncf.com” website were exempted from using the Ravel system),
  - unfavourable rates of commission were applied to other on-line travel agencies for the distribution of train tickets,
  - the joint subsidiary was the only on-line travel agency able to distribute the “*Offres de Dernière Minute (ODM)*” (last minute bargains) in their entirety, from April 2003 to the beginning of 2006,
- (ii) the refusal to grant other on-line travel agencies the possibility of using the “*Billet Imprimé*” (printed ticket) function.

#### **2. The SNCF's undertakings**

Within the framework of the non dispute of the objections procedure, the SNCF undertook (i) to no longer solicit railway customers from the “voyages-sncf.com” website for the purpose of promoting, via newsletters, any non-railway products on the website, (ii) to significantly reduce the price of the Ravel licence and any dues (*redevances*) per trip, (iii) to allow agencies to use the “*Billet Imprimé*” (printed ticket) function, and (iv) to negotiate remuneration terms and conditions that are not discriminatory as between the joint subsidiary and the other travel agencies.

#### **3. Comments**

The low amount of penalties ordered against the SNCF and Expedia, respectively 5 million and 500,000 Euro, is explained by the substantial nature of the undertakings given by the SNCF with a view to treating the joint subsidiary in the same manner as the other on-line travel agencies.

The SNCF has also furnished guarantees for the future by undertaking to make the same functions available to all agencies when train tickets will be dematerialized and to negotiate with third party intermediaries for the purpose of the latter developing an alternative tool to the Ravel licence for use by the on-line travel agencies.

## Distribution

### **Copying of general on-line sale terms and conditions punished on the ground of parasitism (CA of Paris, 24th Sept. 2008, n° 07/03336)**

The ruling under discussion concerns a case between two on-line sales companies: one of the main French players in on-line sales, Vente privée.com, and Kalypso, a new competitor in the on-line sales of children's clothing market.

The first company accused the second of having quite simply reproduced and broadcasted via its Internet website its general terms and conditions of sale and had filed proceedings against it for infringement of copyright, unfair competition and parasitism. It is on the basis of this last ground that the Paris *Cour d'Appel* (Court of Appeal) ordered Kalypso to pay Vente Privée 10,000 Euro.

Firstly, the Paris *Cour d'Appel* set aside the action for infringement of copyright by considering that Vente Privée's general terms and conditions of sale did not constitute a work containing the type of original material capable of protection under copyright. In such respect, the Court noted that although such terms and conditions of sale are the product of intellectual work which denotes technical skill and know-how, such work does not show its author's creative endeavours to mark it with the stamp of his/her own personality. In the case in point, the Court considered that Vente Privée's general terms and conditions of sale did not present, either in their form, or in their content, "*any particular singularity likely to distinguish them instantly from other legal wording*".

Secondly, the argument based on unfair competition was also dismissed. In such respect, the *Cour d'Appel* considered that the copying under dispute was not likely, in the mind of the customers, to create any confusion between the competing businesses, nor to create a risk of seeing such customers switch from one business to the other. In such connection, the Court noted and clarified the fact that the copying only concerned the general terms and conditions and did not relate to the products intended for sale.

It was finally on the grounds of parasitism that the judges on the merits recorded the particularity of Vente Privée's general terms and conditions of sale. The Paris *Cour d'Appel* acknowledged that the success and recognition obtained by Vente Privée were the fruits of human, intellectual and financial investments. The general terms and conditions of sale proposed by Vente Privée formed part of such investments which, by virtue of their "*purpose to guarantee customers legal security*" contributed to the success of the business relationship offered. This was why Kalypso, which, for financial gain and in an unjustified manner copied a "*distinctive economic asset, that was the result of certain know-how, intellectual work and investment*", was ordered to pay Vente Privée 10,000 Euro in damages.

### **Invitation to tender procedure: a curb on the exponential development of Article L.442-6 I 5° of the French Code de Commerce (CA of Versailles, 18th Sept. 2008, n° 07/07891)**

Although the legislator's intention at the time of drafting Article L.442-6 I 5° of the *Code de Commerce* (French Commercial Code) was essentially to fight against improper product delisting (*déréférencement abusif*), in practice, since then, such initial purpose has been vastly

overtaken. Such provisions have thus been applied both to the abrupt severance of an intellectual service (*Cass. Com.*, 16th Dec. 2008, n°07-18.050) and to a case of abrupt severance of industrial relations (CA of Lyon, 15th March 2002, *Juris-Data* n° 2002-237206).

The scope of Article L.442-6 I 5° of the French *Code de Commerce* is nevertheless limited by the requirement to show the established nature of the business relationship in question. Where this cannot be proved, liability based on an abrupt severance of business relations cannot be brought into play (*Cass. Com.*, 16th Dec. 2008, n° 07-15.589: relating to a juxtaposition of autonomous contracts hindering the established nature of business relations).

In a ruling of 18th September 2008, the *Cour d'Appel* of Versailles applied such principle by ruling out, in that case, the established nature of business relations between Monoprix and a service providing company, ESGII, chosen in connection with an invitation to tender. In such respect, ESGII, a specialist in electricity services, had filed a vicarious liability suit against Monoprix for having abruptly severed their business relations, which, according to the service provider, had been ongoing for twelve years.

The *Cour d'Appel* emphasized that, although the provisions of Article L.442-6 I 5° can be applied even where there is no written contract and despite no formalism being required in connection with business relations, “*proof of the stable, sustained and regular nature of the relations must be established*”. Yet, in the case in point, Monoprix systematically used invitation to tender procedures before any starting of an assignment, and in preference chose the lowest bids. ESGII was thus made to compete with other service providers on a regular basis. Its business relations with Monoprix were consequently, in the Court’s opinion, deprived of all and any guaranteed permanence and were of an obviously precarious nature.

The Court therefore came to the conclusion that, being of an essentially uncertain nature, the invitation to tender procedure necessarily excluded any possibility of the co-contracting party placed in an insecure position to rely on the provisions of Article L.442-6 I 5° of the French *Code de Commerce*.

The judges had previously stated that the notification informing a co-contracting party of recourse being taken to an invitation to tender procedure would start time running with regard to the notice period for severance of business relations. They had consequently ruled out the abrupt nature of the severance (*Cass. Com.*, 6th June 2001: *RJDA* 10/01, n° 936. - *Trib. Com. Paris*, 22nd May 2000: *Juris-Data* n° 2000-116926). From now on, we know that systematic recourse to such a procedure will also enable the courts to rule out the established nature of business relations.

## Consumer Matters

### The new regulations governing bargain and clearance sales

The *Loi de Modernisation de l'Économie* (the “*LME*” or French modernisation of the economy act) of 4th August 2008 reforms the regulations governing bargain and clearance sales (i.e.: “*soldes*”) by revising Article L.310-3 of the *Code de Commerce* (French Commercial Code). It amends such regulations by creating the principle of “floating” sales periods and by deregulating the practice of decreasing inventory which can take place at any time in the year. The publication of the two French Decrees of 18th December 2008 and the Order of 8th January 2009 completes the provisions.

With regard to the definition of bargain and clearance sales, the *LME* adds to the three existing cumulative conditions for the selling of sales items (i.e. an accelerated disposal of products in stock, a price reduction and advertising), the fact that the items must be sold

during a sales period (seasonal sales or additional sales periods). Products declared to be in the sales must have been on sale and have been paid for for at least one month prior to the start date of the given sales period.

In addition to shortening the traditional period for end-of-season sales from six to five weeks for both the Summer and Winter sales, the *LME* henceforth allows each trader and/or shopkeeper to freely chose two further weeks for sales in the year.

This additional sales period has been fixed at a maximum duration of two weeks or at two periods lasting for a maximum of one week each and must end no later than one month prior to the start of the two traditional sales periods. On the other hand, according to the *DGCCRF* (French government agency responsible for competition, consumer matters and fraud), a trader and/or shopkeeper can choose to begin their additional sales periods on the day immediately following the end of the national sales periods.

The *DGCCRF* has indicated on its Internet website that in the event a trader and/or shopkeeper holds an initial additional sales period lasting for more than 7 days, said trader and/or shopkeeper will not be entitled to hold a second additional sales period in the same year. Conversely, in the event a trader and/or shopkeeper holds an initial additional sales period lasting less than 7 days, the second additional sales period may only be held for a maximum of 7 days. Lastly, the *DGCCRF* has added that the additional sales period is to be calculated as consecutive days (*e.g.* from Wednesday 4th March to Tuesday 10th March inclusive without taking into account any days in the week on which the business is closed, as the case may be, during such period). The additional sales periods must be declared in advance to the *Préfet* of the *Département* (French administrative region) in which the sales are to take place, or of the *Département* in which the business undertaking has its registered office for business undertakings engaged in distance selling, in the format set out as a schedule to the French Order dated 8th January 2009. Said declaration is to be sent by the trader and/or shopkeeper by way of registered letter with return receipt requested or via electronic means with an electronic acknowledgement of receipt, at least one month prior to the scheduled date for the start of the sale.

With regard to inventory reducing sales promotions which take place during the month preceding the start date for the Summer or Winter sales, the trader and/or shopkeeper must take into account the prices applied during such promotional period for the purpose of establishing their list prices during the sales period, pursuant to the provisions of the French Order of 31st December 2008 (replacing French Order 77-105/P).

The second French Decree of 18th December 2008 fixes the dates and times for the start of the Summer and Winter sales at national level, and no longer, as was previously the case, at the level of each French *Département*. Different dates are scheduled in certain French *Départements* in order to take into account any selling strongly affected by seasonality, or certain commercial transactions conducted in frontier regions.

### **The French Order of 31st December 2008 replaces French Order n° 77-105/P of 2nd September 1977 relating to the advertising of prices to consumers**

The new Order of 31st December 2008 - published in the *Journal Officiel* of 13th January 2009 (i.e. the French legal gazette)- relating to price reduction advertising aimed at consumers annuls French Order n° 77-105/P of 2nd September 1977.

Certain regulations provided under the French Order of 2nd September 1977 effectively no longer proved to be adapted to commercial trends, especially with the growing of the on-line trading and with the raising of the factory outlets and stock clearance shops.

The new Order distinguishes between the conditions to be satisfied by price reduction advertisements made, on the one hand, away from the place of sale **or on non e-commerce sites**, and on the other hand, at the place of sale or **on e-commerce sites**.

Away from the place of sale or on non e-commerce sites, as previously with French Order n° 77-105/P, the advertising must specify the extent of the reduction as an absolute value or as a percentage, the products or services concerned and the terms and conditions under which the advertised benefits are to be granted, notably the period during which the product or service is to be on offer at the reduced price. **The new Order breaks new ground by adding that the indication of the above-specified period can be replaced by “the start date of the operation accompanied by the quantities on offer at the beginning of the sales promotion or the wording ‘jusqu’à épuisement des stocks’ (for as long as stocks last). In such event, the advertising must stop when stocks have sold out.”** The French Order of 31st December 2008 has thus drawn inferences from the French *Loi de Modernisation de l’Economie* which, since 1st January 2009, has authorized traders and/or shopkeepers to carry out inventory reducing sales promotions at any time.

Where the price reduction advertisement is made at the place of sale or on e-commerce sites, the labelling must indicate, in addition to the reduced price advertised, a list price, which price cannot be greater than the lowest price actually applied by the advertiser for a similar item or service, in the same retail sales establishment or, as stated in the new Order, the same distance selling site, during the last thirty days preceding the date on which the advertising commenced. **The French Order of 31st December 2008 adds that “the list price thus determined can be retained in the event of price reductions advertised in a successive manner during the course of one and the same commercial operation, subject to not exceeding a period of one month commencing from the first price reduction advertisement, or during the course of one and the same sales period or clearance period”.**

This would be the case, for example, in relation to prices crossed out several times over.

As previously with French Order n° 77-105/P, the new Order continues to allow the advertiser to use, as the list price, the price recommended by the manufacturer or importer of the product or the maximum price resulting from a provision under the economic regulations.

Lastly, the Order introduces a new manner of advertising price reductions aimed, in particular, at factory outlets and private sales sites. In such respect, where an item has not been previously sold in the same retail sales establishment or on the same distance selling site, **and** where such item is no longer the subject of a manufacturer’s or importer’s recommended price, they may, henceforth, advertise reductions in price as compared to a price recommended by the manufacturer or importer in previous years.

Nevertheless, three conditions must be respected in order to ensure a protection to consumers:

- the recommended price cannot date back more than three years;
- the price reduction advertisement shall include, next to the list price, the wording “*prix conseillé*” (recommended price) together with the year to which such price relates;
- the advertiser must be able to provide evidence of such recommended price having actually existed and the fact that said price has been applied.

The authors of the new French Order also wanted consumers to be better informed as to the preferential pricing terms and conditions which are granted selectively by professionals (price reductions linked to age or possession of a loyalty card, for example) by notices

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displayed at the place of sale. By ensuring total transparency with regard to prices, consumers will henceforth be able to take advantage of such price reductions more systematically and will not be misled as to the potential beneficiaries of the special offer.

As no implementation circular for the new French Order of 31st December 2008 has yet been published (providing such is to be the case), the officers of the *DGCCRF* have advised that, for the time being, reference should be made to the circulars of 4th March 1978 and of 26th February 1981 concerning the interpretation of the concepts of the French Order n° 77-105/P which remain active.

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