Aggregates sector in Wallis and Futuna: the Autorité de la concurrence sanctions BTP Sud for imposing unfair trading conditions on the Administration supérieure du Territoire

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Background

Following a complaint filed by the Prefect of the Territory of the Wallis and Futuna Islands, the *Autorité de la concurrence* has sanctioned BTP Sud for abusing its dominant position in the aggregates supply market.

In particular, the *Autorité* found that BTP Sud, which holds a dominant position in this market, had refused, in the context of public procurement, to sell to the *Administration Supérieure du Territoire* (Superior Administration of the Territory; hereinafter "the Administration") and had imposed substantial and unjustified price increases.

These practices, which constituted an abuse of a dominant position, were intended to obtain concessions from the Administration in connection with an earlier commercial dispute.

The *Autorité* has therefore imposed a fine of €148,094 (17,672,351 CFP) on BTP Sud.

Trade relations between BTP Sud and the Administration

BTP Sud's market position

BTP Sud holds a dominant position in the Territory's aggregates supply market, operating the only quarry capable of meeting local demand. As a result, BTP Sud is an essential trading partner for all parties seeking to source quarry materials and, in particular, for the Administration, which is responsible for public works in the Territory.

BTP Sud halts all aggregate deliveries in June 2021 amid a dispute with the Administration over a previous public procurement contract

In 2018, the Administration launched a call for tenders for the construction of territorial roads in Wallis and Futuna. Lot 1, awarded to BTP Sud, was valid for one year and renewable three times until July 2022. Shortly afterwards, a dispute arose between BTP Sud and the Administration concerning late payments by the Administration under a coastal protection contract concluded in February 2015.

In June 2021, BTP Sud abruptly requested the termination of the contract concluded in 2018 and the cancellation of purchase orders issued by the Administration, citing the closure of the company due to the COVID-19 epidemic. BTP Sud made no further deliveries to the Administration until the end of 2021.

The significant increase in BTP Sud's rates under a new contract rushed through by the Administration in February 2022

This behaviour led to delays in the execution of major road works, and the Administration was forced to urgently organise a new contract for the supply of aggregates. At this time, BTP Sud implemented significant price increases ((averaging 75%), which the Administration was forced to accept in the absence of any competing offer. This new contract was awarded to BTP Sud in February 2022.

The conclusion of a common position in June 2022 and a memorandum of understanding in July 2023 between the parties

Following the conclusion of this new contract in February 2022, BTP Sud and the Administration adopted a common position in June 2022 providing for a reduction in BTP Sud's rates in exchange for concessions from the Administration, including payment of the sums claimed under the coastal

protection contract concluded in 2015. This common position, which largely incorporated a proposal by BTP Sud, led to the conclusion of a memorandum of understanding in 2023, which was made enforceable by Decree 2023-450 of 18 August 2023.

The practices in question

The *Autorité* accuses BTP Sud of having used its dominant position in the aggregates supply market to obtain certain concessions from the Administration. The evidence indicates that the unilateral termination of the contract concluded in 2018, which constituted a breach of its contractual obligations, enabled BTP Sud to implement significant price increases aimed at obtaining concessions from the Administration in exchange for a reduction in its prices.

BTP Sud's failure to perform under the contract concluded in 2018, a prelude to the rate increase imposed in 2022

The *Autorité* found that there was no justification for BTP Sud's refusals to sell under the 2018 contract.

In particular, the investigation established that the interruption of BTP Sud's operations due to the COVID-19 epidemic lasted only seven weeks (6 March – 27 April 2021) and did not prevent the company from resuming deliveries to private customers from July 2021.

As a result, the significant price increases imposed by BTP Sud in February 2022 were made possible by the early and wrongful unilateral termination of the framework agreement concluded in 2018.

Lack of economic justification for price increases

The *Autorité* found that there was no economic justification for the increases, and the limited financial information provided by BTP Sud did not explain the approximately 75% increase in rates applied in 2022. The Administration

indicated that it is currently paying prices significantly higher than those applied to private customers. This situation in itself confirms the absence of any economic justification for the prices charged to the Administration, given that the Administration is by far BTP Sud's largest purchaser.

Evidence of a strategy aimed at obtaining certain concessions from the Administration

In addition, the evidence indicates that the main purpose of the 2022 increases was to force the Administration to pay the sums due under the 2015 contract.

In this regard, BTP Sud's letter notifying the Administration of its rate increase is revealing. BTP Sud indicated that it was prepared to reverse these increases in return for certain concessions, including the payment of the sums due under the 2015 contract. This proposal led to the adoption of a common position to this effect between the parties in June 2022 and the conclusion of a memorandum of understanding in July 2023.

This conduct constitutes an abuse of a dominant position through the imposition of unfair trading conditions, in breach of Article L. 420-2 of the French Commercial Code (*Code de commerce*). It is particularly egregious as it was committed by a company that deliberately exploited its dominant position to avoid its contractual obligations to the Administration and to force the latter, outside the legal channels available to it, to grant certain advantages that BTP Sud considered it was owed.

Consequently, the *Autorité* has sanctioned BTP Sud for having abused its dominant position between 21 June 2021 and 30 September 2023, and imposed a fine of €148,094 (17,672,351 CFP).

Futuna Islands

See the full text of the decision (in French)

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