23 juin 2016 : Roofing and rain gutters made of rolled zinc

Published on June 23, 2016

The *Autorité de la concurrence* fines UMICORE, one of the global leaders in zinc, €69 million for abuse of dominant position towards its competitors by practicing during 9 years a trade policy aiming at constraining its distributors to supply themselves exclusively from the company.

> Version française

In brief

The *Autorité de la concurrence* fines the belgian group Umicore (parent company as well as its French subsidiary), main supplier of rolled zinc in France, for implementing, between 1999 and 2007, a trade policy constraining its ditributors-retailers among which some important specialized companies (Point P, Asturienne, Larivière), to supply themselves exclusively from Umicore. This trade policy was accompanied by surveillance, threats and retaliation system aimed at taming the retailers and at ensuring they solely obtain supply from the Umicore's company.

This foreclosure policy enabled for 9 years Umicore to limit the access to the market of zinc distribution to its competitors and thus contributed to freeze the competition, and to create of an uncommon situation on the French territory (contrary to the situation in Germany for instance) : the competing rolling mills specialists could not develop and were abusively forced out of the market. The *Autorité* fined Umicore €69.2 million.

THE ROLLED ZINC SECTOR

Zinc is used a lot in the construction sector, notably for roofing, facades and rain gutters. It is therefore transformed into metal sheets, strips and leaves, as well as in rainwater evacuation products (*EEP* in French).

The belgian group Umicore is one of the main global suppliers of rolled zinc, with the German Rheinzink.

In France, Umicore, which sells its products under the brand VM Zinc, is the numer 1 of the sector with 70% of the market shares. Other rolling mills specialists can be found in France but they represent minor market shares : the German Rheinzink, the Dutch Nedzink, the American Altrista and the Italian Simar. Suppliers offer their products to dealers, generalists or specialized, who resell them to construction professionals, in particular roofers.

Umicore has selected a network of independent distributors, to which it granted the « VM Zinc » center status. These retailers, who represent the biggest zinc material tonnage, comprise brands from the groups Point P-St Gobain (Point P and Asturienne) and Larivière.

UMICORE HAS IMPLEMENTED A TRADE POLICY AIMED AT FORCING ITS REGISTERED RETAILERS TO SUPPLY THEMSELVES EXCLUSIVELY FROM PRODUCTS OF ITS OWN BRAND, VM ZINC

With the use of both a contractual and commercial system, Umicore has exerted pressure on its distributors in order for them to severely limit – if not exclude – supplying from competing suppliers.

- **Exclusivity through a « promotion » clause**

Since 1999, Umicore has introduced in its retailers' contract a promotion clause under which the latter committed to ensuring "promotion of Umicore's products and brands to the exclusion of products and brands from competitors". This exclusive promotion clause, effective until 2004, was then replaced by a less explicit one.

Several elements of the case (notes and e-mails seized at Umicore, statements of distributors and competing manufacturers) show however that, on the one hand, Umicore has used this clause in an ambiguous way, in order to constraint its distributors to supply themselves only with its products, and that, on the other hand, the latter also read into that clause in a very compelling way.

Thus for instance:

> A distributor's representative stated during a hearing: *« (…) Il m'a été demandé très clairement de ne plus faire de marque concurrente et ce au regard des termes du contrat, qui certes n'indique pas formellement de ne vendre que la marque Umicore, mais qui, dans l'esprit et la demande des commerciaux Umicore voulait bien dire de ne pas vendre de produits concurrents »* § 768

The Director General of a distributor stated during a hearing: *« (…) la vente de zinc concurrent n'est pas compatible avec le statut de centre VM Zinc »* §746

Local representatives also testified in this direction such as this former agency Director: *« (…) Pour moi, le contrat Umicore est un contrat d'exclusivité. Il n'y avait pas de dérogation possible »* § 748

- **Surveillance through stock and unilateral purchase review clauses.**

The stock clause

The VM Zinc centers had to have permanently available in their stocks the entirety of the VM Zinc products. But the elements of the case show a clear distortion of the purpose of this clause.
Indeed, according to statements collected, unscheduled stock visits were practiced in order to detect the presence of competitor's products at the distributors', rather than to verify the volume of the stock or the conditions of storage of VM Zinc products.

Thus for instance:

A distributor's former executive stated: *« j'ai pu constater les visites de façon impromptue du directeur régional d'Umicore (…) et du responsable commercial. Ces visites avaient pour but de vérifier l'absence dans les stocks de produits concurrents à Vieille Montagne (...). Ce type de comportement était coutumier de la part des commerciaux de Vieille Montagne au point que certains distributeurs étaient amenés à cacher les produits en provenance de fournisseurs autres que Vieille Montagne »* (cotes 6770-6771).

In a similar fashion, these methods were also pointed out by the former Director of a distribution agency, which highlighted that: *« Le responsable régional d'Umicore, était plus présent et avait une attitude d'inquisiteur, notamment sur la présence éventuelle de produits concurrents.»* § 792

The unilateral tonnage review clause

A unilateral tonnage review clause, supposed to allow Umicore to make forecasts for its manufacture, was also used to detect the potential selling of competitor's products by the VM Zinc centers. Unusually low sales or decline in order were followed by explanation requests addressed to the concerned distributors to discipline them.

Thus for instance:

> Umicore has blamed an agency for declining results while being in an increasing market, and accuse it of continuously selling zinc from competitor's brands: *« Nous avions évoqué lors de notre dernier entretien vos résultats en baisse sur la famille laminés alors que le marché est en progression. Ayant évoqué la possibilité d'une substitution de nos produits par une marque concurrente, vous aviez répondu que ceci s'était effectivement produit une fois à travers la vente de 3 palettes de feuilles ».* § 816

A SYSTEM BASED ON THREATS AND RETALIATION PERMITTED UMICORE TO ENSURE THAT THE RETAILERS WERE COMPLYING WITH THE EXCLUSIVE PURCHASE OBLIGATION AS WELL

To ensure the compliance with the exclusivity clause, Umicore exerted threats and retaliation aimed at encouraging the VM Zinc centers to stay faithful to its brand. Several types of retaliation were implemented against VM Zinc distributors which had distributed zinc from competitors: reduction or suppression of bonuses (discounts) for faulty distributors; suspension of their "VM Zinc" status depriving them of preferential conditions (special supplier rates, attractive payments and delivery conditions).

Thus for instance:

> A ditributor received threats for promoting and selling competitor's products *:« Étant entendu que vous n'avez pas respecté les engagements qui nous lient contractuellement, nous considérons les critères de BFAE 2005 non réalisés pour cette agence. »* §827 Threats which have come true. (§ 830).
>
> In the same way, Umicore has made reproaches to a distributor in 2004 for supplying in slovenian zinc. During a hearing, he explained that these

> threats were followed by retaliatory measures from Umicore which suppressed its quality bonus, and then proceeded to the withdrawal of its VM Zinc center status in 2007: *« J'ai commencé à m'approvisionner auprès de Roba en zinc slovène plus compétitif (…). J'ai eu très rapidement des réactions de VM Zinc marque commerciale d'Umicore. Les commerciaux de Bagnolet sont venus avec des copies de nos propositions commerciales et j'ai eu des menaces de retrait de centre Vieille Montagne. Leurs informations pouvaient venir des représentants régionaux (site d'Auby dans le département du Nord. Les menaces de VM Zinc ont été effectives à partir de 2005 puisque j'ai perdu les bonifications liées à la promotion (BFAE) soit 3,5 % et j'ai conservé celles liées au tonnage (BTS).Le 30 janvier 2007, j'ai reçu un courrier m'informant que je ne pouvais plus prétendre au statut de centre VM Zinc et de ce fait, je perds toutes les bonifications ».* (§832)

These threats and retaliation measures, if they concerned a limited number of distributors considering the fact that the majority of VM Zinc centers have spontaneously complied with Umicore's requirements, allowed Umicore, through a signaling effect, to tame the market.

This deterrent effect comes out of many statements collected during the investigation. For example:

> A competing supplier […] brought into light that: *« Le distributeur a peur de perdre une partie de son chiffre d'affaires ou une partie de sa clientèle s'il tente de distribuer du Rheinzink ou un autre concurrent d'Umicore. Le critère n'est plus seulement la qualité du produit, le prix ou le service. Les distributeurs ont peur du changement car ils craignent la réaction d'Umicore »* (§375)

> Similarly, the Italian […] stated: *« Les portes m'étaient clairement fermées pour les enseignes Larivière, Asturienne et certaines agences Descours et Cabaud, avec qui la conversation tournait court en ce qui concerne les possibilités de vente du zinc Simar. Chaque enseigne brandissait avec fermeté le fait qu'[elle] soit centre VM et qu'[elle] devait en contre partie ne proposer à ses clients que du VM, faute de quoi [elle] s'exposait à des sanctions pécuniaires (perte de BFA en particulier). Partant de ce postulat il m'était difficile de contre argumenter »* (§378).

> In a similar way, the Commercial Director of […] company stated: *« Les points VM Zinc vendent en exclusivité du zinc VM. (…) Les revendeurs ont peur de perdre le label VM. C'est très important pour un distributeur, car il bénéficie des*

prescriptions faites par VM en amont. VM lui garantit des commandes grâce à ses liens avec les prescripteurs »

SERIOUS PRACTICES WHICH HAD HARMFUL EFFECTS ON COMPETING SUPPLIERS' DEVELOPMENT

These practices, which lasted for 9 years, have had important consequences on the sector.

The commercial policy implemented continuously between 1999 and 2007 towards the distributors made the access to the main distributors of zinc construction products harder and more expensive for competing suppliers. Indeed, the VM Zinc centers that represented almost 70% of zinc construction products' sales were a compulsory step to distribute efficiently these products.

While preventing the development of competitors on the French market, the practices sanctioned have reduced the competition intensity and, as a matter of fact, conducted to supra-competitive prices: distributors, during their procurement of zinc, could not capitalize on a competition between Umicore and other suppliers. These high prices (from 5 to 15% more expensive) then had consequences on the retail prices.

A €69,2 million sanction

When fixing the amount of the sanction, the *Autorité* took into account the seriousness of the practices, of the damage caused to the economy as well as the duration of the practices. Concerning the latter, the duration that was considered is 9 years, while the objections initially notified to Umicore concerned a 15 years period. Furthermore, the *Autorité* has applied a 10% increase – Umicore pertaining to a worldwide size group (€9,7 billions in 2015) – while ensuring that the company was able to pay it without being in difficulty. Thus, the amount of the sanction is set to €69.2 million.

Furthermore, the *Autorité* has considered that the existence of parallel importation practices, which were reproached to Umicore by instruction

services, had not been proved.

> For further details, see full decision 16-D-14 of 23 June 2016 regarding practices in the zinc sector and manufactured zinc products dedicated to the building and civil engineering sector.

> Press contact: Aurore GIOVANNINI / Tel.: 01 55 04 01 81 / Email



> See decision of the Paris court of appeal (17 May 2018) and decision of 5th July 2018

> This Judgement was appealed before the Court of cassation/Supreme court of Appeal