The Fleury Michon group is fined 100,000 euros for obstructing an investigation

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The Fleury Michon group is fined 100,000 euros for having obstructed the conduct of the investigation carried out by the Autorité in the case of the ham and cold meat sector cartel.

Background

On 16 July 2020, by decision 20-D-09[1] (see press release), the *Autorité* handed out fines worth 93 million euros a cartel in the ham and cold meat (charcuterie) sector. The manufacturers involved (the "cold meat manufacturers") worked in concert to buy the pieces of ham at a lower price from the slaughterers and / or also agreed on the price increases for the pork products that they intended to practice with the brands of mass-market retailers, for their retailers' brand or "economy products".

Among the offending companies was the Fleury Michon group, fined 14.7 million euros, including 8 million euros for the company Fleury Michon Charcuterie, author of the obstruction practice. During the investigation, it appeared that the group had not informed the investigation services of an internal restructuring operation and the removal of the company Fleury Michon Charcuterie, one of the authors of the practices, to whom the grievances had been addressed.

By its behaviour, the Fleury Michon group could have compromised the effectiveness of the investigation services' action, by preventing them from identifying and monitoring with precision the development of legal persons to whom it was appropriate to impute and notify grievances.

As a result, the *Autorité* imposed handed out a fine worth 100,000 euros.

[1]*The decision is being appealed to the Paris Court of Appeal.*

Fleury Michon did not inform the investigation services of an internal restructuring operation

As part of the investigation of the so-called cold meat cartel case, the Fleury Michon group carried out an internal restructuring by carrying out a merger-absorption transaction of Fleury Michon Charcuterie, one of the authors of the practices, by Fleury Michon Traiteur (now Fleury Michon LS), more than a month before the statement of objections was sent.

However, the Fleury Michon group did not keep the investigation services informed of this internal restructuring, even though they had expressly requested it to notify them of any change in the structure of the group to which Fleury Michon Charcuterie belonged.

The Fleury Michon group not only did not report this transaction to the investigation services, but actively contributed to misleading them after the statement of objections was sent, by filing, through its lawyers, writings in the name and on behalf of the company Fleury Michon Charcuterie, when this company no longer existed.

Finally, the Fleury Michon group attempted to rely on its own failings, by arguing, in the context of the procedure which gave rise to the adoption of decision 20-D-09, that the company Fleury Michon LS had to be exonerated, for lack of having been personally recipient of the statement of objections.

Serious practices that could have compromised the investigation

By its behaviour, the Fleury Michon group could have compromised the effectiveness of the investigation services' action, by preventing them from identifying and monitoring with precision the development of legal persons to whom it was appropriate to impute and notify grievances.

Obstruction provisions are of crucial importance in ensuring the effectiveness of the *Autorité*'s investigative powers. The company that is the subject of an investigative measure is thus subject to an obligation of active and loyal collaboration, which implies in particular on its part that it informs the *Autorité* of any change that may have a bearing on the progress of the investigation, notably changes in its social structure.

This obstruction practice was not contested by the Fleury Michon group, which wished to benefit from the settlement procedure. The *Autorité* granted its request and, taking into account all of these elements, handed out a fine worth 100,000 euros.

The application of Article L. 464-2 in the light of the decision of the Conseil constitutionnel in the Akka case

The *Autorité* took into account the decision 2021-892 QPC of 26 March 2021 of the *Conseil constitutionnel*, which declared the second subparagraph of paragraph V of article L. 464-2 of the French Commercial Code against the Constitution, in its wording resulting from Ordinance No. 2017-303 of 9 March 2017, in that it disregarded the principle of non-cumulative sanctions.

The Conseil was therefore referred only to Article L. 464-2 in its wording in force since the Ordinance of 9 March 2017 until the entry into force of the law of 3 December 2020.

In its decision, the *Conseil constitutionnel* noted that the provisions declared contrary to the Constitution, in their contested wording, are no longer in force. Indeed, Article L. 464-2 of the French Commercial Code has been amended, since the Ordinance of 9 March 2017, by Law No. 2020-1508 of 3 December 2020 on various provisions for adaptation to the law of European Union in economic and financial matters.

The *Autorité* then applied paragraph 27 of the decision of the *Conseil constitutionnel* which specifies the conditions under which the declaration of unconstitutionality can be invoked. The *Autorité* found in this case that Fleury Michon had not previously been the subject of legal proceedings on the basis of Article L. 450-8 of the French Commercial Code. Therefore, the company in question could be fined on the basis of Article L. 464-2 of the French Commercial Code.

Two other decisions were issued by the Autorité for obstructing the investigation

By decision 19-D-09[2], the Akka Technologies group was fined 900,000 euros for obstructing the conduct of dawn raids carried out by the *Autorité* by breaking seals and tampering with the operation of a messaging system (see press release of 22 May 2019).

By decision 17-D-27[3], the *Autorité* fined the Brenntag company 30 million euros for having transmitted incomplete, imprecise and out of time information before refusing to communicate the information and material elements (in particular invoices and account statements) which had been requested on several occasions by the investigation services (see press release of 21 December 2017).

[2] The decision has been appealed. An appeal is currently pending before the Court of Cassation.

[3] An appeal has been lodged against the decision. The appeal is currently pending before the Paris Court of Appeal.



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