RÉPUBLIQUE FRANÇAISE

Autorité de la concurrence

Only the French version is authentic and it prevails in the event of its differing from the translated version.

Decision 18-D-17 of 20 September 2018 relating to practices implemented in the infectious healthcare waste disposal sector in Corsica

The *Autorité de la concurrence* (Standing Committee),

Considering the letter of 4 July 2014, registered under number 14/0060 F, by which the French Minister of the Economy, Economic Regeneration and Digital Technologies informed the *Autorité de la concurrence* of practices implemented in the infectious healthcare waste disposal sector in Corsica;

Considering Book IV of the French Commercial Code (*Code de commerce*) and particularly Article L. 420-2;

Considering the decision of the General Rapporteur of 28 February 2018 stating that the case would be subject to a decision of the *Autorité* without a prior written report;

Considering the observations presented by SANICORSE, SAS Groupe Cesarini and the representative of the Minister of the Economy;

Considering the other evidence in the case;

The rapporteur, the Deputy General Rapporteur, the representative of the Minister of the Economy and the representatives of SANICORSE and SAS GROUPE Cesarini, having been heard at the hearing of 12 June 2018;

Adopts the following decision:

Summary[1]:

Under the terms of the following decision, the Autorité de la Concurrence *hereby fines SANICORSE (jointly with its parent company SAS Groupe Cesarini) €199,000 for having suddenly, significantly and persistently increased prices without justified reason for the disposal of infectious healthcare waste in Corsica from 2011 to 2015, in violation of Article L. 420-2 of the French Commercial Code (*code de commerce*).*

*Healthcare facilities are required by the French Public Health Code (*code de la santé publique*) to process and dispose of their infectious healthcare waste under stringent conditions and timeframes. SANICORSE is the only company in the infectious healthcare waste disposal market in Corsica, and has longstanding contractual relationships with Corsican healthcare facilities.*

Taking advantage of its monopoly on the market, in February 2011, SANICORSE imposed sudden and significant price increases on these facilities for its infectious healthcare waste disposal services, threatening to terminate contracts or abstain from responding to invitations to tender (including those covering all healthcare facilities).

The Minister of the Economy referred these practices to the Autorité de la concurrence *on 4 July 2014 following a report issued by the French Directorate General for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF).*

This decision of the Autorité *is in line with well-established national and European case law to date, which sanctions the abusive practices of undertakings in a dominant position which are bound by a specific responsibility, when they impose unfair prices constituting business abuses (see Paragraph 119 and following of the decision).*

Repression of these abuses, known as exploitative abuses, is related to the particular responsibility of undertakings in a dominant position.

*In particular, this is true when an undertaking holds a monopoly that no other undertaking can contest, and when the Government has not regulated the prices on the basis of and under the conditions set out in Article L. 410-2 of the Commercial Code (*Code de commerce*) (*Conseil de la concurrence, *Decision no. 00-D-27 of 13 June 2000 Osny detention facility; Decision no. 03-D-18 of 10 April 2003 relating to a complaint from GLEM, Section 15; Decision no. 05-D-15 of 13 April 2005 relating to a complaint from Regal Pat against Électricité de Strasbourg, Section 8;* Autorité de la concurrence, *Decision no. 09-D-24 of 28 July 2009 relating to practices implemented by France Télécom on various fixed electronic communications services markets in the French overseas departments, Section 168).*

According to the Court of Justice of the European Union (hereinafter "CJEU") case law, a practice of excessive pricing against individuals or professionals in the event of a monopoly can be established if this price is manifestly disproportionate to the value of the corresponding service (CJEU, 13 November 1975, General Motors, Case 26/75; CJEU, 11 November 1986, British Leyland, Case 226/84) or if such a manifest anomaly appears following comparison on a homogenous basis during analysis of the components of the price practiced (CJEU, 14 February 1978, United Brands, Case 27/76; CJEU, 13 July 1989, Tournier, Case C-395/87). This type of practice does not exist if the disproportion can be justified (CJEU, 8 June 1971, Deutsche Grammophon, 78/70; CJEU, 13 July 1989, abovementioned Tournier case).

[1] This summary is strictly for information purposes. Only the grounds of the decision listed below are binding

The Autorité *specified that a price increase may be anticompetitive notably when it implements a strategy to exploit captive customers by the company in a dominant position. Such a strategy can be proven through the sudden, significant and permanent nature of the price increase, and the lack of objective justification thereof with regard to market operating conditions.*

In this instance and given the circumstances of the case, the Autorité *considered that SANICORSE was guilty of a sudden, significant and permanent price increase that was not objectively justified with regard to market operating conditions, and which was meant to deter its customers from developing alternative infectious healthcare waste management solutions.*

The sudden and significant price increases implemented by SANICORSE until 2015 could not be objectively justified by any of the circumstances argued by SANICORSE, taken together or individually, mainly based on an increase in its costs and investments.

This practice resulted in an illegitimate cost increase for public healthcare institutions and also deterred all its customers from seeking an alternative to the supplier in a dominant position, for fear of retaliatory measures which might be taken by SANICORSE.

A second objections was notified to SANICORSE for discrimination against the Castelluccio Hospital, but it was not retained due to the fact that the practice was not distinct in the circumstances of the case from the practice at the origin of the first objection, and that it was included in it.

In addition to the fine imposed by the Autorité*, it ordered the company to publish a summary of the decision in the paper and online editions of three newspapers (Corse Matin, le Magazine de la Fédération Hospitalière de France and the Gazettes des communes).*

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I. Findings

A. COMPLAINT SUBMITTED BY THE MINISTRY

1. The interregional competitive investigation brigade (*Brigade interrégionale d'enquête de concurrence*, hereinafter BIEC) of Provence- Alpes-Côte d'Azur, Languedoc-Roussillon and Corsica regions issued a report (hereinafter RAE) (paragraphs 4 to 33) dated 24 January 2013 finding that SANICORSE had committed practices in violation of Article L. 420-2 of the French Commercial Code (*code de commerce*) in the infectious healthcare waste sector in Corsica.

2. The Minister of the Economy submitted the report to the General Rapporteur of the *Autorité de la concurrence* (hereinafter the *Autorité*). The rapporteur informed the Minister in a letter dated 24 May 2013 that she did not plan to recommend that the *Autorité* issue an opinion on its own initiative.

3. On 17 March 2014, the French Minister of the Economy recommended that the company in question seek a settlement pursuant to Article L. 464-9 of the Commercial Code but SANICORSE did not respond to this proposal.

4. In a letter dated 8 July 2014, the Minister of the Economy referred the practices implemented by SANICORSE to the *Autorité* pursuant to Articles L. 462-5 and L. 464-9 of the French Commercial Code.

5. The referral was recorded under number 14/0060 F.

6. In a decision of 28 February 2018, pursuant to Articles L. 463-3 and R. 463-12 of the French Commercial Code, the General Rapporteur decided that the case would be examined by the Autorité without prior drafting of a report.

7. In accordance with the provisions mentioned above, the parties and the representative of the Minister of the Economy were issued a statement of objections on 1 March 2018.

B. SECTOR AND UNDERTAKINGS CONCERNED

8. The sector concerned by the practices in question is the infectious healthcare waste disposal sector in Corsica.

1. THE INFECTIOUS HEALTHCARE WASTE DISPOSAL SECTOR

9. Under Article R. 1335-1 of the French Public Health Code (*code de la santé publique*, hereinafter the CSP), healthcare waste is "*waste from diagnostic, care and preventive, curative or palliative treatment in the human and veterinary medical fields".*

10. As far as medical waste is considered, infectious healthcare waste includes:

- waste presenting a risk of infection due to the fact that it contains viable microorganisms or toxins, which due to their nature, quantity or metabolism, are likely to cause illness in humans or other living organisms;

- or waste falling under one of the following categories, even in the absence of a risk of infection: a) sharp materials or items for disposal, whether or not they have been in contact with a biological product; b) partially used or expired therapeutic blood products; c) human anatomical waste which cannot be easily identified.

11. Infectious healthcare waste can be produced by three categories of producers:

- Infectious healthcare waste produced by healthcare facilities generally corresponding to large quantities of waste concentrated on the same premises;
- Infectious healthcare waste produced by freelance medical professionals and medical laboratories. The quantity of waste produced is small and extremely geographically disparate;
- Infectious healthcare waste from self-treating patients, which can be produced by anyone outside the intervention of a healthcare professional. For example, this comes from home diabetes tests, and patients with renal or respiratory failure. The quantity of waste produced is small and extremely geographically disparate.

2. INFECTIOUS HEALTHCARE WASTE DISPOSAL

a) The regulatory framework

At a national level

12. All waste producers or holders are required to manage or have waste managed. They are responsible for managing this waste until its final disposal or recycling, even when waste is transferred to a third party for treatment purposes. They must ensure that the party tasked with processing it is authorised to manage it (Article L. 541-2 of the French Environmental Code (*code de l'environnement*)).

13. Articles L. 1335-1 and L. 1335-2 of the CSP refer to the abovementioned provisions of the Environmental Code for the disposal of infectious healthcare waste. All infectious healthcare waste producers or holders are therefore required to manage waste and dispose of it. More specifically, any person who produces infectious healthcare waste is required to separate it from other waste as soon as it is produced and dispose of it pursuant to Articles R. 1335-2 and 1335-5 of the CSP.

14. By virtue of Article R. 1335-2 of the CSP, this obligation is incumbent upon:

- 1° the healthcare facility, teaching facility, research facility, or industrial facility if the waste is produced in such a facility;
- 2° the legal entity on whose behalf a healthcare professional exercises its waste production activity;
- 3° in other cases, the individual which exercises a waste production activity on a professional basis;

15. Infectious healthcare waste processes are clearly defined and regulated. The main legislation regulating each step of waste treatment is as follows:

- Order of 7 September 1999 of the ministers responsible for health and the environment on the regulation of infectious healthcare waste disposal processes;
- Order of 7 September 1999 of the ministers responsible for health and the environment on methods for storing infectious healthcare waste;Order of 24 November 2003 of the ministers responsible for health, ecology, social affairs and agriculture on infectious healthcare waste packaging;
- "TMD" Order of 29 May 2009 of the ministers responsible for ecology and the economy on the transport of dangerous goods by road, and

the Decree of 22 October 2010 on the incineration or sterilization of infectious healthcare waste, the provisions of which were codified in the CSP.

16. There are four steps in the disposal process:

- sorting: to separate infectious healthcare waste from regular waste.
- storage: the storage conditions and times between the actual production of waste and its incineration or pre-treatment through sterilization depend on the quantity produced. The maximum storage period under appropriate conditions varies from 72 hours for facilities producing more than 100 kg of infectious healthcare waste to 7 days for productions ranging between 15 kg/month and 100kg/week, and can be as high as 1 month for small productions between 5kg/month and 15kg/month.
- collection and transport: this may be performed using two different methods – either via a service provider subject to dangerous goods regulations, or by the producer (for limited quantities), in compliant packaging.
- disposal: this may be done through two methods – in one step via incineration or co-incineration in a household waste incineration plant, or in two steps, via sterilization pre-treatment (called autoclaving) followed by landfill disposal. The latter process cannot be used for all infectious healthcare waste, particularly waste produced by cancer treatments (cytotoxic waste) or human anatomical waste. In France, approximately 80% of infectious healthcare waste is treated through incineration.

17. Tracking documents follow these various steps. Administrative authorities oversee compliance with regulations and are responsible for regional waste management planning.

18. Regional plans for the industrial waste (*plans régionaux d'élimination des déchets industriels* spéciaux, PREDIS) are therefore drawn up by the competent authority (in Corsica's case, the Prefect) after obtaining the opinion of the consultative committee, the regional council and the regional councils bordering the planning zone, and the health committee for each *département* of the plan zone. They prepare a regional inventory of the waste to be disposed of, analyse whether treatment capacities meet treatment needs, organise transport to limit distances and volumes, and prioritise the most cost-effective processes. In 2015, the PREDIS were replaced with hazardous waste prevention and management plans *(plans de prévention et de gestion des déchets dangereux,* hereinafter PPGDD).

In Corsica

19. Infectious healthcare waste is organised by the PREDIS for the Corsica region, approved by Prefectoral Order 04-0638 of 21 September 2004 (refs. 1364 and following). This document states that all healthcare waste must be treated by the Ajaccio Hospital autoclave in accordance with the proximity principle provided for by law (Article L. 541-1 of the Environmental Code). This waste must also be incorporated into a standardised collection network. However, cytostatic products are sent to specialised units in mainland France (ref. 1379). Autoclaving is not used for human anatomical waste and animal

cadavers (ref. 1382).

20. At the request of SANICORSE, it was authorised via Prefectoral Order 08-0511 of 23 May 2008 to operate an infectious healthcare waste sterilisation system at Sarrola-Carcopino (refs. 1380 and following). Since then, Ajaccio Hospital has no longer had infectious healthcare waste disposal equipment on site.

21. In its decision of 25 November 2010, the Territorial Authority of Corsica prohibited thermal waste treatment processes in any form whatsoever. Consequently, since then, infectious healthcare waste produced in the region can only be disposed of through autoclaving before landfill disposal (refs 1389 and 1390).

22. Autoclaving is a process in which waste is shred and sterilised through heat (138°C) in order to eliminate the sharp or infectious character that gives it the status of hazardous waste. Once pre-treated, infectious healthcare waste is considered as household waste.

23. In response to a questionnaire from the investigation services dated 10 August 2017, the regional health agency of Corsica (hereinafter ARS) stated that there were currently three service providers operating autoclaves (refs 1636 and 1637):

    - the medical analysis laboratories Vigilab and Vialle, both located in Bastia, Haute Corse, which have a licence under the *département* health regulation, to dispose of their own infectious healthcare waste;
    - SANICORSE, located in Sarrola-Carcopino in Corse-du-Sud, which has a licence under the regulation on environmentally regulated facilities (ICPE), for the disposal of infectious healthcare waste from healthcare facilities and professionals.

24. In 2017, the Territorial Authority of Corsica launched a public consultation on the draft PPGDD, which is set to replace the PREDIS adopted in 2004 (refs. 2063 to 2336).

b) Infectious healthcare waste numbers

25. In 2011, there were 71 infectious healthcare waste treatment facilities across France (32 incineration facilities and 39 sterilisation facilities) (French Environment and Energy Management Agency (ADEME) study, June 2013).

26. According to the June 2013 ADEME study, approximately 170,000 tonnes of infectious healthcare waste was produced in France in 2011. When applied to the French population, this equates to a national average of 2.63 kg of waste produced per person.

27. For Corsica, the draft PPGDD indicates that approximately 1,050 tonnes of infectious healthcare waste was produced on the island in 2013 (ref. 2132). With a population of 302,966 people (excluding tourism), approximately 3.5 kg of infectious healthcare waste was produced per person. This ratio drops to around 2.7 kg when the total population is taken into account (391,849 individuals).

28. According to the 2004 PREDIS for Corsica, the majority of this waste (97%) comes from healthcare facilities (hospitals and clinics), and 3% comes from other producers (ref. 1374).

c) The cost of infectious healthcare waste disposal in France

29. A 2008 ADEME study showed that there were significant disparities in infectious healthcare waste disposal prices in France.

	Number of sites surveyed	Number of responses	Response rate	Minimum value	Maximum value	Standard deviation	Median	Mean
Sterilisation	34	20	59%	€230	€1,800	€368	€480	€609
Household waste incineration plant	29	16	55%	€200	€460	€65	€315	€314
Specific incineration	4	2	50%	€250	€1000	N/A	€325	€475

Figure 1: Analysis of disposal prices per tonne (Source: 2008 ADEME report)

30. In this study, the price analysis only takes into account infectious healthcare waste disposal operations. The cost of standardised packaging, the maintenance of collection containers and storage premises, as well as collection and transport costs were not included.

31. A PHARE study provided by the University Hospital of Bastia shows that the average cost (excluding maximum data observed) of full disposal of infectious healthcare waste (collection, processing, packaging) in France is €854 per tonne (ref. 1530).

3. THE PARTIES INVOLVED

a) SANICORSE and SAS Groupe Cesarini

32. SAS Groupe Cesarini is the holding company of a group comprising SANICORSE, TOXICORSE and LOMBRICORSE.

33. SANICORSE began operating in July 1994 (refs. 1608 to 1614). The undertaking was initially located on the site of Ajaccio Hospital but is now located in Sarrola-Carcopino, in Corse-du-Sud (around twenty kilometres from Ajaccio).

34. The undertaking collects and processes healthcare waste such as contaminated, hazardous and infectious healthcare waste. It also recovers and processes confidential waste such as archives, documents and specific packaging.

35. To manage infectious healthcare waste other than cytotoxic drug residues and human anatomical waste, SANICORSE owns two ECODAS T2000 autoclave sterilizers with a total processing capacity of 5,000 tonnes per year. With infectious healthcare waste estimated at approximately 1,050 tonnes per year, the theoretical use rate of SANICORSE's capacity is just over 20%.

36. The company collects anatomical waste and sends it to various crematoriums on the mainland.

37. Cytotoxic drug residue and radioactive products are managed exclusively by TOXI CORSE.

38. LOMBRICORSE (ref. 1598) manages sludge from wastewater treatment plants.

39. In 2017, SANICORSE recorded a turnover of €2,533,971 (ref. 2979). In the same year, SAS Groupe Cesarini recorded a combined turnover of €2,832,683 (ref. 2979).

b) Infectious healthcare waste producers in Corsica

Healthcare institutions

Corsica has 15 healthcare institutions across the island. In 2013, these facilities produced 818 tonnes of waste for a total of 945 tonnes collected (ref. 2130).

40. The same year, SANICORSE recorded a turnover of over €1.4 million from these healthcare institutions for autoclaving services alone (excluding collection, transport and packaging) (refs. 2533 to 2544).

Other producers

41. In 2013, SANICORSE disposed of 129.2 tonnes of waste from other producers, for a turnover of €196,000 for autoclaving services alone (excluding collection, transport and packaging) (ref. 2545).

C. BEHAVIOUR OF SANICORSE

1. 2007-2011: PRICE INCREASE UNDER THREAT OF TERMINATION

42. In 2007, SANICORSE gradually began terminating contracts with the following healthcare institutions: Castelluccio Hospital, Bastia Hospital and Polyclinique du Sud de la Corse, a private healthcare facility in Porto-Vecchio.

43. Furthermore, SANICORSE also abstained from responding to invitations to tender issued by some of these healthcare institutions.

44. However, during this period, SANICORSE still agreed to work with these healthcare institutions outside the framework of the contract, at price conditions higher that those stipulated in the terminated contracts.

45. With no other alternative available for collecting and disposing of waste in Corsica, these institutions were forced to accept the higher prices.

a) Case of Castelluccio Hospital

46. In a letter dated 28 August 2007, Maître X..., legal advisor for SANICORSE, informed Castelluccio Hospital that it had not submitted a bid for the invitation to tender issued by the hospital. In the letter, SANICORSE also specified that Castelluccio Hospital should replace it with its new service provider within two months (ref. 87).

47. However, with no alternative operator in Corsica to collect and dispose of waste, Castelluccio Hospital was forced to enter into a contract with SANICORSE without tender.

48. The invoices submitted by Castellucio Hospital to the Investigation Services show that the unit price excluding VAT applied in October 2007 for infectious healthcare waste treatment was €1.38 excl. VAT per kg, and €1.51 excl. VAT per kg in November 2007. On 1 January 2008, the price was €2.20 excl. VAT per kg (refs. 40 to 45 and 2450).

49. On 10 January 2011, Maître X... cited "*a late extension"* on the part of Castelluccio Hospital to renew the contract in order to justify the termination of "*its services immediately due to your administrative failure to properly manage this contract and comply with the stipulated deadlines*" (ref. 84).

50. On 8 February 2011, once again with no alternative solution, the Director of Castelluccio Hospital was forced to sign a contract with SANICORSE with immediate effect, stipulating a price of €6.60 excl. VAT per kg of treated infectious healthcare waste (ref. 69).

51. Therefore, between 2007 and 2011, Castellucio Hospital was subjected to an increase of nearly 380% for the cost of infectious healthcare waste treatment.

b) Case of Polyclinique du Sud de la Corse in Porto-Vecchio

52. In a letter dated 26 September 2011, SANICORSE notified Polyclinique du Sud de la Corse (hereinafter referred to as "Polyclinique") of the termination of the healthcare waste collection and treatment contract, effective as of 28 December 2011 (refs. 1691 and 1692). SANICORSE justified the unilateral contract termination by citing the existence of a new contract template approved by the ARS and the need to modify its prices.

53. According to SANICORSE, this need was justified by the fact that the ARS wanted healthcare institutions to become independent in processing their own infectious healthcare waste, even though it had asked SANICORSE to make numerous investments (doubling its treatment capacity and increasing its storage capacity). According to SANICORSE, the price increases allowed it to better anticipate the potential early closure of the company.

    In a letter dated 19 October 2011, the Director of Polyclinique asked SANICORSE to confirm if it truly planned to end their business relationship on 28 December 2011 and if so, to inform it of the conditions under which their relationship could continue (ref. 1690).

54. A new agreement with an increased price was sent to Polyclinique on 14 November 2011.

55. On 18 November 2011, the Director of Polyclinique reported the situation to the ARS, underlining the price increase – "*the cost of the service is to increase by over 276% for the cost of waste collection and by 404% for waste autoclaving per kg*" – and the correlation made by SANICORSE between this increase and potential ARS plans for infectious healthcare waste (ref. 1688).

56. On 20 December 2011, Polyclinique ended up accepting the agreement although it denounced the fact that it was in a "*hostage situation"* and "*a one-sided agreement*" (ref. 1687).

c) Case of Bastia Hospital

57. Bastia Hospital signed a contract with SANICORSE on 21 March 2005. This contract was signed without the use of a competitive bidding process or publication, in accordance with the decision of the members of the tender board during the meeting of 10 March 2005. The cost of the service per tonne was €1,206.33, i.e. €1.20 per kg (ref. 97).

58. On 22 February 2008, Bastia Hospital issued a new invitation to tender. However, no bids were submitted. However, an internal memo from the institution states that in a letter dated 9 April 2008, SANICORSE informed the hospital that although it would not be bidding, it would be willing to offer a price outside the framework of the contract at €1.75 excl. VAT per kg (ref. 97). In the same internal memo, Bastia Hospital indicated that the proposed price was 45.6% higher than the previous contract (ref. 97).

59. This memo also states that SANICORSE's offer was reported to the tender board, and a representative of the French Directorate General for Competition Policy, Consumer Affairs and Fraud Control (*Direction générale de la concurrence, de la consommation et de la répression des frauds* - DGCCRF). However, a letter sent by the director of Bastia Hospital to the main treasurer shows that the tender board and the representative of the DGCCRF concluded that "*Bastia Hospital must accept these temporary conditions to avoid any conflict that would create major operating problems for Bastia Hospital*" (ref. 106).

60. It should also be noted that over the course of 2014, Bastia Hospital was the coordinating facility for a regional grouping plan aimed at pooling the needs of all healthcare facilities in Corsica in order to organise a joint invitation to tender for infectious healthcare waste disposal services. SANICORSE did not submit a bid to the invitation to tender. So far, this has not prevented SANICORSE and Bastia Hospital from maintaining their contractual relationships without interruption.

2. STARTING IN 2011: A SUDDEN WIDESPREAD PRICE INCREASE FOR THE MANAGEMENT OF INFECTIOUS HEALTHCARE WASTE

61. In February 2011, SANICORSE began increasing its prices for its infectious healthcare waste management services (understood as the service including autoclaving and landfill disposal).

62. The prices imposed on healthcare institutions for processing infectious healthcare waste rose from an average of €1.10 excl. VAT per kg in 2010 to an average of €2.07 excl. VAT per kg in 2012, representing an increase of approximately 88%.

63. This general increase reflects the following individual price increases:

- Bonifacio Hospital: + 77% in 2012;
- Clinique de Maymard: + 98% in 2013;
- Sartène Hospital: + 19 % in 2011 then + 87 % in 2012 (i.e. + 123% in total);
- Corte-Tattone Hospital (CHI – regional hospital): + 65% in 2012, then + 40 % in 2013 (i.e. + 131% in total);
- Polyclinique du Sud de la Corse: + 135 % in 2012;

- Clinique de Filippi: + 34% in 2011, then + 77% in 2012 (i.e. + 137% in total);
- Castellucio Hospital: + 194% in 2011.

64. Beyond these increases based on annual averages, the documents which SANICORSE submitted to the Investigation Services showed that for some healthcare institutions, prices were increased and decreased several times in the same year.

65. For example, Ajaccio Hospital was subjected to a 69% price increase in 2012 and another increase of 65% in 2015. However, the average increase for 2015 does not reflect the different price variations that occurred throughout the year. Between December 2014 and December 2015, the price per kg invoiced fluctuated several times: €1.72 per kg in December 2014; €2.15 per kg from December 2014 to April 2015; €4.30 per kg from May to August 2015; €2.10 per kg until December 2015 and €1.75 per kg in January 2016.

66. Furthermore, beyond the average annual increases and sub-annual fluctuations, SANICORSE's pricing policy is characterised by its lack of consistency. For example, in 2011, Castellucio Hospital was charged €6.6 per kg of infectious healthcare waste processed, while different prices, all less than €1.5 per kg were applied for the other healthcare institutions. Similarly, in 2012 a price of around €2.4 per kg was applied for Sartène Hospital and around €2.7 per kg for Clinique de Filippi. However a price ranging between around €0.8 and €1.9 per kg was applied for all the other healthcare institutions (with the exception of Castelluccio Hospital). The same observation can also be made for 2015, where a price of around €1.7 per kg was applied for all healthcare institutions (with the exception of Castelluccio Hospital) while Ajaccio Hospital was charged over €2.8 per kg.

67. In 2013, after obtaining guarantees concerning the decision to abandon all reflection on competing projects, SANICORSE adopted a single rate of around €1.7 per kg. This price was applied to all healthcare institutions in 2014 (with the exception of Castelluccio Hospital). However, despite resulting in a price decrease for healthcare institutions which had already been subjected to a significant increase the two previous years, the implementation of this rate represented an increase for healthcare institutions whose rates had not yet reached this level. It is only from 2016 that price increases ceased as Ajaccio Hospital received a final significant increase in 2015.

68. In any case, despite the price decreases, the rates never returned to a similar price level as in 2011. The average price was €1.82 per kg in 2016, which represents an increase of over 60% compared to the average price in 2010.

69. Furthermore, case documents also reveal that the price of the full infectious healthcare waste disposal service, including collection, autoclaving and supplies, increased in proportions similar to the increases observed for the autoclaving service alone.

3. SANICORSE JUSTIFICATIONS FOR ITS PRICE INCREASE PLAN

70. When questioned by the DGCCRF about the reasons for the implementation of a new pricing policy, the director of SANICORSE stated "*We did not calculate the exact cost. We used as a reference the 2008 "study on the assessment of infectious healthcare waste disposal in France" (version B) carried out by the engineering firm GIRUS (69) for the ADEME, which was published in September 2010. The maximum processing price recorded in 2008 was €1.80 excl. VAT per kg (French overseas territories and departments). Since we are also on an island, we decided to apply a similar price to this to mitigate the effects of insularity"* (ref. 975).

71. Besides this statement, SANICORSE justified the sudden price increases which started being applied in 2011 by citing the threat of a new competitor supported by the ARS and some healthcare institutions. It also cited the increase of various costs.

a) The threat of a new competitor

72. On 24 March 2011, during a hearing organised by DGCCRF agents, the director of SANICORSE stated that it had implemented a new pricing policy due to the "threat" posed by certain projects of competing organisations on its business activities: "*certain public corporations are seeking to implement a parallel organisation and stop using SANICORSE services, which could potentially lead to the death of my company. In response to this event, we decided on an overall increase in our prices"* (ref. 860).

73. Several months later, in September 2011, SANICORSE terminated its contract with Polyclinique du Sud de la Corse in order to increase its rates, correlating its decision in its termination letter with the plans of the public authorities to develop alternative infectious healthcare waste management capacities: "*The ARS is seeking, via healthcare institutions to make hospitals and clinics in Corsica independent in their treatment of healthcare waste. The ARS would also like to establish a purchasing group of healthcare organisations to create new healthcare waste processing centres managed by the institutions themselves. You will understand that after investing heavily in infrastructure and equipment, we cannot allow ourselves to be placed in financial difficulty through the early closure of our company. If we stop collecting waste from the main healthcare institutions (hospitals, clinics), we will not be able to continue our activity (losing just one hospital (Ajaccio or Bastia) as a customer would be enough to put our company in danger). Please contact us to receive information on our new prices"* (refs. 1691 and 1692).

74. SANICORSE also cited these plans in June 2012 during the investigation led by the DGCCRF.

75. When questioned about the reasons justifying the price increases, SANICORSE cited "*the threat of having to close the company, which still needs to write off its real-estate investment over the next 8 years, in the light of plans to install 7 incinerators in each public healthcare institution. This project was presented to the Corsica Regional Authority in May-June 2011 by Mr S, Director of CHS de Castelluccio, with the support of the Acting Director of ARH. The ARS is still pushing this project"* (refs 914 and 915).

76. Finally, on 15 October 2012, when questioned about its reasons for the new pricing policy, SANICORSE once again cited a competing project for Castelluccio Hospital: "*Plans are currently underway by the ARS and Castelluccio Hospital to set up an infectious healthcare waste processing and disposal facility on the Castelluccio site. This would start to receive and process infectious healthcare waste from hospitals and clinics in Corsica (representing 80% of our turnover) within the next three years. We have therefore increased our rates to anticipate our impending closure and write off the investments requested by the ARS, including in real estate. The purpose of this increase of around 200% is therefore to write off our investment as quickly as possible, including for the real estate management company acting as landlord, and to provision various wind-down costs (including social security contributions)" (ref 974).*

b) Increase in various cost items

Investments requested by the ARS

77. According to SANICORSE, the ARS asked it to double its processing capacity and

increase its storage capacity.

78. On this point, in response to a questionnaire from the Investigation Services dated 11 October 2017, SANICORSE specified that this request was associated with various shredder breakdown incidents which occurred between 2002 and 2005. The ARS reminded it of the requirement to ensure service continuity and asked it to "*purchase equipment such as to prevent any interruptions that could be caused by the unavailability of the only machine in operation on the island*" (ref. 1745). SANICORSE therefore purchased a second autoclave.

79. The autoclave chosen was an Ecodas T2000, which was purchased second hand in September 2007. This purchase required the acquisition of a new site, since Ajaccio Hospital, where the first autoclave was installed, did not have the capacity required to install two autoclaves.

80. According to SANICORSE, the acquisition of an autoclave with a larger capacity than the autoclave installed in Ajaccio Hospital was justified, in particular, by the implementation of emergency plans by the French Ministry of Health in the event of a flu pandemic. In this context, the ARS apparently asked SANICORSE "*to be able to manage the higher quantity of waste due to the use of protective equipment by medical professionals, and the increase in the number of patients treated*" (ref. 1745).

81. In response to a request for information from the Investigation Services on 19 September 2017, the ARS stated that "*Sanicorse is an environmentally regulated facility, controlled by the Regional Directorate for the Environment, Town and Country Planning and Housing* (DREAL). *The ARS is not authorised to order this company to make specific investments. That said, it is possible that, during preparation for the flu pandemic of 2009 - 2010, contacts were established to encourage the company to increase its processing capacity*" (ref. 1638).

82. SANICORSE further explained that moving the autoclave from Ajaccio Hospital to the new site proved impossible, as "*it was damaged when it was dismantled, rendering it non-compliant*" (ref. 1745). A second Ecodas T2000 autoclave was therefore purchased second hand in December 2008.

83. As part of its observations in response to the statement of objections, SANICORSE specified that investing in equipment at the request of the ARS would have no impact in any case, as long as these investments were justified by compliance with applicable regulations.

84. It added that it did not have to pay a lease when its facilities were located at Ajaccio Hospital and that its prices therefore did not reflect "*a normal cost structure*" (ref. 3097).

Increase in overheads and the effects of insularity

85. SANICORSE also justifies the price increase by an increase in its overheads, particularly the cost of oil prices, electricity rates, the 500% increase in landfill rates by the Ajaccio conurbation community (*Communauté d'agglomération du pays ajaccien*, hereinafter "CAPA") and an arrears of €400,000 claimed by CAPA (refs. 914, 974, 1605, 1749 and 1750).

Director's health problems

86. In its response to the statement of objections, SANICORSE explained that the increase in its prices could also be justified by the expenses borne by the undertaking to replace its director due to serious health problems in September 2010.

87. SANICORSE stated that its director had to be replaced "*in many of his direct activities, requiring the recruitment of two full-time employees and the establishment of a provision*

of services agreement with a third party to manage technical coordination of the company's collection and logistics activities" (ref. 3099).

88. According to SANICORSE, "*the additional expense generated by this situation increased from 2011, reaching over €150,000 in additional annual costs*".

89. The documents sent by SANICORSE show that a sales director was recruited on 1 February 2013 and that an accountant was recruited on 15 July 2013.

90. Furthermore, the invoices issued by the company to whom operating management support had been outsourced came to a total of approximately €4,000 in 2012 and €5,000 in 2013.

c) Case of Castelluccio Hospital

91. With regard to the price increases to which Castelluccio Hospital was subject, SANICORSE stated during the investigation and in response to the statement of objections, that they were the result of aspects specific to this institution.

92. According to SANICORSE, the price increases for Castelluccio Hospital were intended to encourage the hospital to "seek an alternative" to SANICORSE's waste treatment services.

93. SANICORSE no longer wished to work with this hospital as it considered that it did not comply with "*sorting rules, was the cause of major breakdowns on its only machine at the time,* […] *failed to deliver a large portion of its infectious healthcare waste, and had become the mainstay and spokesperson for a project to implement an internal, pooled solution for infectious healthcare waste disposal*" (ref. 3039).

D. STATEMENT OF OBJECTIONS

94. In a letter dated 1 March 2018, the General Rapporteur of the *Autorité* notified SANICORSE and SAS Groupe Cesarini of two objections.

1. OBJECTION NO. 1

"*An objection is lodged against the SANICORSE company, located at Hameau de Coccola, Santa Lucia di Moriani (20230), as the offending party, and against the SAS Groupe Cesarini company, located at Lieu-dit Ponte Bello, Sarrola-Carcopino (20167), as parent company of the offending party, for having abused their dominant position in the infectious healthcare waste disposal market in Corsica, by imposing on their customers (healthcare professionals and institutions), for the period from February 2011 until the statement of objections, a sudden, significant, persistent and unjustified price increase for disposal and processing services for said waste.*

*The behaviour of said undertakings constitutes an abuse of dominant position as set out in Article L. 420-2 line 1 of the French Commercial Code (*Code de commerce*), which states that: "The abuse of a dominant position by an undertaking or group of undertakings on the domestic market or a substantial part of the market is prohibited, pursuant to Article L. 420-1. These abuses may include a refusal to sell, tied selling or discriminatory terms of sale…*"

The following companies shall be notified of the objections for the following periods:

- *SARL SANICORSE: from 1 February 2011 to 1 March 2018;*

- *SAS Groupe Cesarini: from 31 December 2012 to 1 March 2018.*"

2. OBJECTION NO. 2

"*An objection is lodged against the SANICORSE company, located at Hameau de Coccola, Santa Lucia di Moriani (20230), as the offending party, and against the SAS Groupe Cesarini company, located at Lieu-dit Ponte Bello, Sarrola-Carcopino (20167), as parent company of the offending party, for having abused their dominant position on the infectious healthcare waste disposal market in Corsica, for the period from 1 January 2008 until the statement of objections, by imposing on Castelluccio Hospital (CH Castelluccio), unjustified discriminatory prices for processing services for said waste*.

The behaviour of said undertakings constitutes an abuse of dominant position as set out in Article L. 420-2 line 1 of the French Commercial Code (Code de commerce), which states that: "The abuse of a dominant position by an undertaking or group of undertakings on the domestic market or a substantial part of the market is prohibited, pursuant to Article L. L.420-1. These abuses may include a refusal to sell, tied selling or discriminatory terms of sale…"

The following companies shall be notified of the objections for the following periods:

- *SARL SANICORSE: from 1 January 2008 to 1 March 2018;*
- *SAS Groupe Cesarini: from 31 December 2012 to 1 March 2018.*"

II. Discussion

A. DEFINITION OF THE RELEVANT MARKET AND THE POSITION OF SANICORSE ON THIS MARKET

1. ON THE RELEVANT MARKET

a) Product market definition

95. In its Decision 03-D-61 of 17 December 2003 relating to practices implemented in the waste trolley supply and leasing market at Nantes Hospital, the *Conseil de la concurrence*, now the *Autorité*, defined an infectious healthcare waste disposal market.

96. According to this decision, this market covers the two main infectious healthcare waste disposal processes, i.e. incineration and autoclaving (sterilisation).

97. Furthermore, according to Opinion 10-A-21 of 19 November 2010 relating to the management of sharp infectious healthcare waste produced by self-treating patients, the infectious healthcare waste disposal service must be differentiated from the infectious healthcare waste collection service.

98. Collection consists of removing waste from the producers and transporting it to a treatment facility, potentially via a centralised location if the volume of waste collected is small.

99. As stated in the aforementioned opinion, infectious healthcare waste collection and disposal are "*different professions and are generally performed by different companies.*"

100. From a supply perspective, the operators are generally not the same: collection may be provided by a number of small service providers specialised in this activity or by the producers themselves (for small quantities), whereas infectious healthcare waste treatment companies are owned by groups in the environmental and cement industries, or are companies specialised in this activity.

101. In addition, these different services may be invoiced separately, which SANICORSE has done for its customers since 2012 (ref. 1599).

102. From a demand perspective, invitations to tender for infectious healthcare waste treatment issued by healthcare institutions do not systematically mention collection services, as outlined, in particular, in the aforementioned Decision 03-D-61.

103. This shows that the relevant market can be defined as the infectious healthcare waste disposal market, including both incineration and autoclaving services.

b) Geographical market definition

104. The aforementioned Opinion 10-A-21 of 19 November 2010 reveals that for undertakings responsible for the collection and transport of infectious healthcare waste, the infectious healthcare waste disposal provider is chosen on the basis of three factors: the instructions given in the Regional plans for the industrial waste (PREDIS), transport costs and the specifications of the invitations to tender (which may limit the carbon budget of transport). This opinion reveals that, based on these various factors, the infectious healthcare waste treatment activity has a regional scope.

105. Furthermore, the PREDIS for Corsica states that "*All healthcare waste must be processed in the Ajaccio Hospital autoclave*" (ref. 1377). If the Ajaccio autoclave is no longer in service, the principle by which infectious healthcare waste produced in Corsica must be processed in Corsica, shall continue to apply.

106. The PREDIS also states that "*Article L. 541-15 of the French Environmental Code specifies that in the zones in which the plans described in Article L. 541-13 (PREDIS) apply, the decisions made by the legal entities under public law and their concessionaries in the waste disposal sector and, in particular, the decisions made in application of Title I of Book V of the Environmental Code, must be compatible with these plans.*"

107. Public healthcare institutions, as legal entities under public law (Article L. 6141-1 of the French Public Health Code - CSP), are thereby bound by the provisions of the PREDIS, which in accordance with the principle of proximity, state that infectious healthcare waste produced in Corsica must be processed in Corsica.

108. With regard to the transport costs, the aforementioned Opinion 10-A-21 reveals that "*infectious healthcare waste represents a large volume and little weight: the cost per tonne transported is therefore very high, and it is often in the interest of collection and transport companies to take the waste to the closest facility.*"

109. In its observations in response to the statement of objections, SANICORSE nevertheless maintained that sending infectious healthcare waste to the mainland is possible from a technical, regulatory and economic perspective. In this sense, SANICORSE produced an invoice in its name dating from 2013 for the treatment of infectious healthcare waste containing prions, issued by a treatment facility in the Isère *département*. This invoice gives a treatment price of €1.2 per kg, which, according to SANICORSE, is well below the price of €1.68 per kg that it charges. SANICORSE added that the cost of transport by truck and then boat would not absorb the price difference.

110. However, the investigation demonstrated that first, no undertakings located on the mainland submitted a bid for any of the invitations to tender issued by the healthcare institutions, and second, none of the producers questioned stated that it had considered sending infectious healthcare waste to the mainland, including when the prices applied by SANICORSE were subject to the significant increases that they contested. Sending infectious healthcare waste to the mainland would risk non-compliance with the waste treatment timeframes imposed by the French Public Health Code (*Code de la santé publique*), especially due to the major logistical constraints involved.

111. This information shows that the relevant market in the case is the infectious healthcare waste disposal market in Corsica.

2. ON THE POSITION OF SANICORSE

112. The Corsica PREDIS, approved by Prefectural Order no. 04-0638 of 21 September 2004, revealed that "*Since July 1997, healthcare waste produced by Ajaccio and Bastia hospitals has been processed in an autoclaving unit operated by SANICORSE at Ajaccio Hospital. The autoclaving facility also receives the waste from all clinics and laboratories in the region. Only waste generated by other producers (laboratories, nurses, doctors, veterinarians, emergency response centres, dentists), estimated at 3%, is partially excluded from this process.*"

113. This situation - with the exception of the location of the autoclaving units - has remained unchanged since then, as stated in the draft PPGDD for Corsica: "*In Corsica, there is just one service provider for the collection and treatment of infectious healthcare waste, which sterilises infectious healthcare waste using two ECODAS T2000 pre-treatment units via autoclave sterilisation at 138°c and 3.8 bars*."

114. This document also shows that 90% of infectious healthcare waste produced on the island is collected and treated by SANICORSE: "*The Corsica ARS estimates infectious healthcare waste at approximately 1,047 tonnes, 90.2% of which is collected then processed by a local company*." This document specifies that the 10% of infectious healthcare waste not treated by SANICORSE (representing approximately 80 tonnes) must be attributed to the failure of private healthcare practitioners and veterinarians to comply with regulations.

115. Furthermore, when questioned by the Investigation Services, the producers of infectious healthcare waste in Corsica and SANICORSE stated that there was no other operator active on the infectious healthcare waste disposal market in Corsica.

116. The aforementioned information demonstrates that SANICORSE has had a *de facto* monopoly on the infectious healthcare waste disposal market in Corsica since 1997. Furthermore, the existence of significant barriers to entry into the market, particularly associated with the scale of investments required due to the need to comply with regulated environmental facility standards and the implementation of a logistics network suited to an island context, make it difficult for new operators to enter the market.

B. ON THE VALIDITY OF THE OBJECTIONS

1. ON THE OBJECTION RELATING TO THE SUDDEN, SIGNIFICANT, PERSISTENT AND UNJUSTIFIED INCREASE IN THE PRICE OF INFECTIOUS HEALTHCARE WASTE DISPOSAL SERVICES

a) Applicable principles

117. Paragraph 1 of Article L. 410-2 of the French Commercial Code (*Code de commerce*) sets out the general principle whereby "*except in cases where the law specifies otherwise, the prices of goods, products and services (...) shall be determined by the free play of competition.*" The existence of competitive pressure, or at least potential pressure, is the corollary of the freedom of undertakings to set prices.

118. Article L. 420-2 of the French Commercial Code lists a number of practices that are prohibited because they constitute abuse: "*The abuse of a dominant position by an undertaking or group of undertakings on the domestic market or a substantial part of the market is prohibited, pursuant to Article L. 420-1. This abuse may include a refusal to sell, a tie-in of sales or discriminatory terms of sale as well as the termination of established commercial relationships, for the sole reason that the partner is refusing to accept unjustified commercial terms*."

119. However, this list is not exhaustive. French and European case law to date has also sanctioned other types of abusive practices implemented on a market by dominant undertakings, such as exclusionary pricing or libel. In application of Article L. 420-2 of the French Commercial Code,it has also confirmed the prohibition of abusive practices explicitly set out in Article 102 of the TFEU, including the imposition of unfair selling prices or trading conditions, which are often presented as "exploitative" abuse as opposed to "exclusionary" abuse.

120. Article 102 of the TFEU states that abusive practices prohibited for undertakings in a dominant position include, in particular "*a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions*."

121. As the CJEU ruled: "*The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (Case 85/76 Hoffman-La Roche v Commission [1979] ECR 461, paragraph 91, and Case C-62/86 AKZO v Commission [1991] ECR I-3359, paragraph 69).*
Although the fact that an undertaking is in a dominant position cannot deprive it of its right to protect its own commercial interests if they are attacked, and such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect those interests, such behaviour cannot be accepted if its purpose is specifically to strengthen that dominant position and abuse it (see, Case 27/76 United Brands and United Brands Continentaal v Commission [1978] ECR 207, paragraph 189, and Joined Cases C-468/06 to C-478/06 Sot. Lélos kai Sia and Others [2008] ECR I-0000, paragraph 50). In that context, it is advisable therefore to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition (United Brands and United Brands Continentaal v Commission, paragraph 249). According to the case-law of the Court, such an abuse might lie in the imposition of a price which is excessive in relation to the economic value of the service provided (see Case 26/75 General Motors Continental v Commission [1975] ECR 1367, paragraph 12, and United Brands and United Brands Continentaal v Commission, paragraph 250)" (CJEU, 11 December 2008, Kanal 5 Ltd and TV 4 AB, Case C-52/07, paragraphs 25 to 28).

122. Therefore, if, generally, the abuses of dominant position controlled by the *Autorité* consist of the undertaking in question preventing competitors from breaking into the market or disrupting the activity of those on the market, the *Autorité* may, under certain circumstances, pursuant to Article L. 420-2 of the French Commercial Code,ensure that the commercial conditions applied by a dominant undertaking are not manifestly abusive, and particularly, that the prices applied by the dominant undertaking are not unfair.

123. This is particularly true when an undertaking holds a monopoly that no other undertaking can contest and when the Government has not regulated the prices on the basis of and under the conditions set out in Article L. 410-2 of the French Commercial Code (*Conseil de la concurrence*, Decision 00-D-27 of 13 June 2000 Osny detention facility; Decision 03-D-18 of 10 April 2003 relating to a complaint from GLEM, Section 15; Decision 05-D-15 of 13 April 2005 relating to a complaint from Regal Pat against Électricité de Strasbourg, Section 8; *Autorité de la concurrence*, Decision 09-D-24 of 28 July 2009 relating to practices implemented by France Télécom on various fixed electronic communications services markets in the French overseas departments, Section 168).

124. Furthermore, based again on consistent European and French case law, although the existence of a dominant position is not in itself a recrimination, but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market (Decisions of the Court of Justice of 13 February 1979, Hoffmann-La Roche & Co. AG/Commission, Case 85/76, Report p. 461; 9 November 1983, Michelin/Commission, Case 322/81, Report p. 3461, paragraph 57, of

2 April 2009, France Télécom/Commission, Case C-202/07 P, Report p. I-2369, paragraph 105, and of the Court of 7 October 1999, Irish Sugar/Commission, Case T-228/97, Report p. II-2969, paragraph 112; *Conseil de la concurrence*, Decision 09-D-24 of 28 July 2009 relating to practices implemented by France Télécom on various fixed electronic communications services markets in the French overseas departments, Section 207; *Autorité de la concurrence*, Decision 14-D-02 of 20 February 2014 relating to practices implemented in the sporting information press sector, Section 208, confirmed by the Decision of the Court of Appeal of 15 May 2015, Les éditions P. Amaury S.A, no. 2014/05554, p. 8).

125. According to the case law to date of the Court of Justice of the European Union (hereinafter "CJEU"), a practice of abusive pricing against individuals or professionals in the event of a monopoly can be established if this price is manifestly disproportionate to the value of the corresponding service (CJEU, 13 November 1975, General Motors, Case 26/75; CJEU, 11 November 1986, British Leyland, Case 226/84) or if such a manifest anomaly appears following comparison on a homogenous basis as part of analysis of the components of the price applied (CJEU, 14 February 1978, United Brands, Case 27/76; CJEU, 13 July 1989, Tournier, Case C-395/87). This is also true if the operator in a dominant position demands payment without any service in return (see the case of a German packaging waste recycling and collection system, CJEU, 16 July 2009, Der Grüne Punkt - Duales System Deutschland GmbH, Case C-385/07, EU:C:2009:456), or if the charges demanded by a fees management company with a monopoly have no reasonable relation to the economic value of the service provided (CJEU, 11 December 2008, Kanal 5 Ltd and TV 4 AB, Case C-52/07). However, the price shall not be considered excessive if the observed disproportion can be justified (CJEU, 8 June 1971, Deutsche Grammophon, 78/70; CJEU, 13 July 1989, Tournier, aforementioned).

126. In the United Brands case, the CJEU stated that a price is unfair if it has "*no reasonable relation to the economic value of the product supplied*" (CJEU, 14 February 1978, United Brands, aforementioned, paragraph 250). In this case, the CJEU stated that unfairness can be demonstrated "*if the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative,* [by assessing] *whether a price has been imposed which is either unfair in itself or when compared to competing products*" (CJEU, 14 February 1978, United Brands, aforementioned, paragraph 252). In the Helsingborg Port case on the level of port fees charged to a port agent by the port management company, the European Commission used this methodology to conclude that there was no excessive pricing in this case (European Commission, 23 July 2004, Helsingborg Port, COMP/A.36.568/D3, Section 99 and following).

127. Very recently in the "AKKA/LAA" case, when questioned on the conditions under which a price could be considered unfair with regard to the United Brands case, the CJEU stated that "*There is in fact no minimum threshold above which a rate must be regarded as 'appreciably higher', given that the circumstances specific to each case are decisive in that regard. Thus, a difference between rates may be qualified as 'appreciable' if it is both significant and persistent on the facts, with respect, in particular, to the market in question, this being a matter for the referring court to verify*" (paragraph 55) and explained that "*this difference must persist for a certain length of time and must not be temporary or episodic*" (CJEU, 14 September 2017, Autortiesību un komunicēšanās konsultāciju aģentūra - Latvijas Autoru apvienība c/ Konkurences padome, Case C-177/16, paragraph 56).

128. In this same case, the CJEU specified the means for establishing the fairness of the "*appreciably higher*" price, by specifying the obligations incumbent on the dominant undertaking in the event of a sign of an abusive price difference: "*the difference between*

the rates compared must be regarded as appreciable if that difference is significant and persistent. Such a difference is indicative of abuse of a dominant position and it is for the copyright management organisation holding a dominant position to show that its prices are fair by reference to objective factors that have an impact on management expenses or the remuneration of rightholders" (paragraph 61).

129. This position of the CJEU excludes all interpretation of case law that assesses the unfairness of a price by reasoning on the basis of a pre-determined threshold, which decision-making practice should consider to be the limit of an excessive price applicable in all cases. The price level in itself is not the sole determining factor, but rather all of the information on the case, and particularly the objective means used by a dominant undertaking to set the price, in the specific situation of the market in question.

130. In this sense, it is useful to state that the very definition of market power is the capacity of the dominant undertaking "*to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers*" (CJEU, 13 February 1979, Hoffmann-La Roche & Co. AG/Com., Case 85/76, paragraph 38; CJEU, 6 December 2012, AstraZeneca e.a./Com., C-457/10 P, paragraph 175). As the CJEU stated in the aforementioned United Brands case (paragraph 249): *"it is advisable therefore to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition."* Identifying exploitative abuse therefore requires demonstration of an abusive use of this power by the dominant undertaking.

131. Under these conditions, although the role of a competition authority is first and foremost to protect the competition conditions for market players to freely set prices, and not to regulate prices and their increases, under certain circumstances, in the absence of pricing regulation or rules, when a dominant undertaking has sufficient scope to impose unfair trading conditions with regard to the legal and economic framework in which they are implemented, it may assess, and sanction where applicable, said undertaking's pricing policy, with regard to controlling abuses of dominant position.

132. It may therefore, as in this case, consider a price increase abusive if it implements a strategy to exploit captive customers. Such a strategy can be proven through the sudden, significant and permanent nature of the price increase, and the lack of objective and relevant justification thereof with regard to the market operating conditions.

b) Application in this case

On the sudden, significant and permanent nature of the price increases

On the sudden nature of increases

133. The sudden nature of increases is primarily demonstrated by the conditions under which they were imposed. The investigation demonstrated that they occurred without warning, in the context of an implicit threat of termination or non-renewal of contracts, as SANICORSE systematically withheld from responding to invitations to tender issued by healthcare institutions at the end of the contract term binding them to this undertaking.

134. By terminating contracts and not responding to invitations to tender (to which no other operator responded, since there was no alternative operator on the island), SANICORSE implicitly showed healthcare institutions that they had no other choice than to enter into a contract with it under the conditions that it set.

135. Healthcare institutions, subject to the legal obligation of processing infectious healthcare waste within very restrictive time frames, were therefore required to sign real adhesion

contracts.

136. SANICORSE seeks to challenge this analysis, stating that "*the normal timeframe of public procurement contracts was complied with*" and that "*the termination provision set out in* [the] *agreements was used*." (ref. 3111). However, this argument is not convincing, since SANICORSE had implemented a sales strategy that sought to systematically impose its conditions on all its customer healthcare institutions. By refusing to respond to invitations to tender and by terminating certain agreements, just before agreeing to enter into over-the-counter agreements, SANICORSE proved that it in no way intended to terminate its business relationships with the healthcare institutions, but only to show them that the agreements entered into were not the result of negotiation but of a unilateral decision imposed upon them, if they wished to meet their legal obligations.

On the significant nature of increases

137. There is no pre-defined intangible threshold above which an increase is necessarily considered to be significant. In this case, annual price increases of over 60% must be considered to be very significant, as they relate to mandatory services. As outlined above, the significant nature of these increases does not mean that they should automatically be considered abusive because they are applied by an operator with a monopoly. All circumstances of the case, and particularly the justifications presented as the basis for price increases of this significance, must be considered to determine whether or not they are abusive.

138. In this case, the investigation demonstrated that the prices applied with regard to healthcare institutions for processing infectious healthcare waste rose from an average of €1.10 excl. VAT per kg in 2010 to an average of €2.07 excl. VAT per kg in 2012, representing an increase of approximately 88%. Furthermore, in 2016, the average price was €1.82 per kg, which represents an increase of over 60% compared to the average price in 2010.

139. SANICORSE challenges the significant nature of the increases implemented in this case on the grounds that it has been demonstrated using "*particularly unsuitable*" arithmetic means, instead of weighted averages taking into account the quantities of infectious healthcare waste subject to pricing.

140. In this case, the arithmetic methods considered were: the mean price in 2010, 2012 and 2016 and the increases over the 2010-2012 and 2010-2016 periods.

141. The choice of arithmetic means to assess the significant nature of the price increases implemented is justified by the fact that it helps consider the price increases from the complainants' perspective. In an arithmetic mean, each customer is counted equally, and each increase is considered in an equivalent manner to calculate the increase borne by the customer, independently of the volumes it generates. This method therefore accounts for the significant price increases borne by small customers, whereas this impact would have been reduced in the event of a weighted average taking into account the volume from each customer.

142. Furthermore, the individual increases borne by each healthcare institution also demonstrates the very significant increases imposed between 2011 and 2015 (+ 135% in 2012 for Polyclinique du Sud de la Corse, + 137% for the 2011/2012 period for Clinique Filippi, + 194% in 2011 for Castelluccio Hospital). Data relating to these price increases cannot be challenged by SANICORSE, since it comes from information that it submitted to the investigation services itself (refs. 2535 - 2545).

On the permanent nature of increases

143. The case documents show that the increases implemented were not temporary in nature,

particularly with regard to the duration for which SANICORSE implemented this price increase policy.

144. As stated above, SANICORSE first increased its rates very significantly for infectious healthcare waste disposal services from February 2011. Then, from 2013 to 2014, SANICORSE implemented a single rate of approximately €1.7 per kg (which only Castelluccio Hospital did not receive). The implementation of this rate led to a price decrease for hospitals which had already been subject to a consequential increase over the two previous years, but represented an increase for hospitals whose rates had not yet reached this level. Price increases only stopped from 2016, after Ajaccio Hospital received a final consequential increase in 2015. It may therefore be considered that SANICORSE implemented its commercial policy of price increases for over 4 years.

145. SANICORSE also contests the permanent nature of its pricing policy. It considers that although price increases can be observed from 2011, it adopted a single rate of €1.7 per kg from 2013. It considers that this single rate adopted from 2013 cannot be considered excessive. It believes that it could only be considered excessive by reference to the previous price, without taking into account information justifying these increases. However SANICORSE omits several facts in this regard.

146. Firstly, the documents available in the case show that SANICORSE did not consider this pricing policy to be temporary. On 5 June 2012, Mr Y… informed agents at the DGCCRF that "*the price increase plan for infectious healthcare waste processing is still ongoing*."

147. Secondly, information collected during the investigation demonstrates that this price increase policy lasted for more than 4 years: rates increased significantly in 2011 and 2012; in 2013, implementation of the single rate generated very appreciable increases for certain healthcare institutions (+ 98% for Clinique de Maymard); finally, in 2015, Ajaccio Hospital was once again subject to a consequential price increase.

148. The aforementioned information shows that the commercial policy implemented by SANICORSE from February 2011 led to imposing sudden, significant and persistent price increases on healthcare institutions.

149. However, this observation alone is insufficient to demonstrate the existence of a breach of Article L. 420-2 of the French Commercial Code, and it is also necessary to check whether the price increases could be objectively justified by SANICORSE as it maintained.

On the justifications provided by SANICORSE

150. First, it is important to mention that the justifications put forward by SANICORSE changed between the investigation carried out by the DGCCRF and the investigation carried out by the *Autorité*.

151. In June 2012, during investigations carried out by the DGCCRF, SANICORSE justified price increases by the 500% increase in the cost of landfill, a €400,000 arrears claimed by CAPA, increased energy costs (electricity and fuel), overdue payments by hospitals, and the risk of closure associated with the arrival of a competitor supported by the ARS and certain healthcare institutions.

152. A few months later, in October 2012, SANICORSE added to this list the increase in real-estate prices and its maintenance contracts, and specified that, in the context of the imminent arrival of a competitor, it needed to anticipate its closure and write off the investments made at the request of the ARS as quickly as possible: "*The purpose of this increase of around 200% is therefore to write off investments as quickly as possible, including for the real estate management company acting as landlord, and to provision various wind-down costs (including social security contributions). Furthermore, our*

rates have not increased since 2009. We have not implemented an annual price revision despite a considerable increase in our overheads and energy costs. Increased costs are primarily due to a spike in prices (oil, real estate) and waste processing by CAPA. Our servicing and maintenance contracts also increase every year by application of a price revision formula based on the cost of living or materials" (ref. 974).

153. Finally, in response to the statement of objections, SANICORSE mentioned three series of justifications: the threat represented by the arrival of a competitor, the need to move premises and create an environmentally regulated facility (ICPE), and the increase in various cost items.

154. Furthermore, in more specific reference to Castelluccio Hospital, to which the most consequential price increases were applied, SANICORSE mainly put forward past litigation associated with a broken shredder caused by poor waste sorting by the hospital: "*this price is not representative of the pricing policy implemented by Sanicorse with regard to healthcare institutions in Corsica, as due to the troubled history briefly outlined above, Castelluccio is a specific and unique case that can easily be identified as such*" (ref. 3093).

155. These various justifications will now be investigated.

On the arrival of a competitor supported by the ARS and healthcare institutions

156. From the start of the investigation conducted by the DGCCRF, SANICORSE justified its pricing policy by the risk represented by the potential arrival of a competitor and the need to write off its various investments as quickly as possible.

157. In March 2011, SANICORSE informed the DGCCRF that: "*certain public corporations are seeking to implement a parallel organisation and stop using SANICORSE services, which could potentially lead to the death of my company. In response to this event, we have decided on an overall increase in our prices*" (ref. 860).

158. Similarly, in September 2011, in the termination letter sent to Polyclinique du Sud de la Corse, SANICORSE justified the termination by the risk of the emergence of a competitor for the company: "*The ARS is seeking, via healthcare institutions, to make hospitals and clinics in Corsica independent in their treatment of healthcare waste. The ARS would also like to establish a purchasing group of healthcare organisations to create new healthcare waste processing centres managed by the institutions themselves. You will understand that after investing heavily in infrastructure and equipment, we cannot allow ourselves to be placed in financial difficulty through the early closure of our company. If we stop collecting waste from the main healthcare institutions (hospitals, clinics), we will not be able to continue our activity (losing just one hospital (Ajaccio or Bastia) as a customer would be enough to put our company in danger). Please contact us to receive information on our new prices*" (refs. 1691 and 1692).

159. In June 2012, when questioned by the DGCCRF, SANICORSE clearly linked its price increase with the need to quickly write off its investments, given its potential closure. "*the threat of having to close the company, when it still needs to write off its real-estate investment over the next 8 years, in the light of plans to install 7 incinerators in each public healthcare institution. This project was presented to the Corsica Regional Authority in May-June 2011 by Mr S, Director of Castelluccio Hospital, with the support of the Acting Director of the ARH. The ARS is still pushing this project*" (refs. 914 and 915).

160. In October 2012, SANICORSE once again presented its fears and the expected objectives of these price increases: "*Plans are currently underway by the ARS and Castelluccio Hospital to set up an infectious healthcare waste processing and disposal facility on the*

Castelluccio site. This would start to receive and process infectious healthcare waste from hospitals and clinics in Corsica (representing 80% of our turnover) within the next three years. We have therefore increased our rates to anticipate our impending closure and write off the investments requested by the ARS, including in real estate. The purpose of this increase of around 200% is therefore to write off our investment as quickly as possible, including for the real estate management company acting as landlord, and to provision various wind-down costs (including social security contributions)" (ref. 974).

161. This information demonstrates that SANICORSE, by its own admission, increased its prices in response to the emergence of competing projects.

162. Furthermore, the use of pricing leverage to dissuade healthcare institutions from developing or seeking an alternative is clearly asserted by SANICORSE, whose director stated in 2012 that, "*since the CTC took a stand on incinerator projects and demonstrated its clear opposition, we have reviewed our pricing policy, which will return to €1.68 per kilogram as contracts are renewed*" (ref. 915).

163. There is no need to determine whether the fears of SANICORSE with regard to the emergence of alternative solutions and competitors were founded to consider that, under no circumstances, may the argument presented in this case justify a practice of sudden and significant price increases with the aim of excluding potential competitors, which is of an anticompetitive nature.

On the investments carried out under the move from Ajaccio hospital to new premises

164. SANICORSE also justifies the price increases imposed on healthcare institutions by the investments it had to make as part of the move from Ajaccio hospital and the installation of a new site in compliance with regulations on environmentally regulated facilities.

165. Although SANICORSE attributed these investments to an ARS request during the investigation conducted by the DGCCRF in October 2012, which the investigation was unable to confirm, in observations made in its defence, SANICORSE maintained that said investments were the result of an internal company decision.

166. In any case, the question is not to whom the decision to make these investments should be attributed or even whether they were justified, but whether they can provide objective and relevant justification for the sudden price increases from 2011.

167. Nevertheless, it is important to mention that on this point as well, the explanations provided by SANICORSE changed, both with regard to who made the investment decision and the total sum of investments carried out for installation of the new infectious healthcare waste site.

168. In October 2017, in response to a questionnaire from the Investigation Services, SANICORSE provided the invoices for the autoclaves used for infectious healthcare waste disposal. The first, dated 6 September 2007, was for a second-hand Ecodas T2000 machine, purchased for €60,000 excl. VAT (ref. 2547). The second, dated 10 December 2008, was also a second-hand autoclave, purchased for €46,000 excl. VAT (ref. 2549). In addition to these invoices, SANICORSE sent the depreciation schedule for the two machines, showing that the first was fully written off in 2012 and the second in 2013 (ref. 2552).

169. When presenting its observations in defence, SANICORSE stated that the investments relating to the move from Ajaccio hospital came to around €830,000, and that the corresponding expenses would have been made between 2007 and 2010.

170. Once again, the information provided by SANICORSE does not explain the price increases implemented. In addition to the fact that the expenses in question cannot be substantiated by an invoice attesting to their link to the treatment of infectious healthcare

waste, they were incurred around four years before the disputed price increase.

171. Furthermore, the price increase occurred in 2011. The summary of its investments broken down by category from 2006 to 2016 shows that 2011 is one of the years where SANICORSE invested the least. After 2011, investments in infectious healthcare waste were more limited, and the company made significant investments in other activities (over €1 million between 2012 and 2015 (refs. 1771 and 1772)).

172. In addition, the investigation demonstrated that the cumulated cash flow between 2006 and 2011 was sufficient to cover the cumulated sum of investments attributable to infectious healthcare waste between 2006 and 2011 as of 31 December 2011.

173. The aforementioned information demonstrates that the significant price increases implemented from 2011 were not justified by the need to invest in the infectious healthcare waste activity or write off the investments it required.

On the increase of various cost items

174. SANICORSE stated that waste landfill rates were subject to a 500% increase by CAPA in 2004. Its representatives also explained during the hearing that it had contested the price increase in 2004, and that it had therefore refused to pay the difference between the pre-2004 price and post-2004 price.

175. While awaiting the result of litigation relating to these landfill costs, SANICORSE refused to pay CAPA the sums corresponding to the new rate. It continued to apply the old rate, and did not provision the difference corresponding to the new rate in case that their dispute was unsuccessful.

176. This payment default by SANICORSE of a sum of around €400,000 led to notification of garnishment dated 7 June 2011.

177. A price increase in 2004 cannot justify the increased rates imposed by SANICORSE on its customers from 2011. Nor can the circumstance under which SANICORSE had to pay these sums in 2011 justify price increases, as the sums in question were payable from 2004 and should have been entered into the accounts at that time.

178. In any case, in 2011, the year of issue of the garnishment claimed by SANICORSE, no significant increase in costs and no significant decline in revenue can be observed.

179. SANICORSE also mentioned a 19% increase in landfill costs between 2006 and 2016. Costs relating to waste disposal in landfill represented less than 10% of SANICORSE operating costs in 2013. In any case, this price increase cannot be compared with those applied by SANICORSE to healthcare institutions.

180. With regard to the impact of the director's state of health, as stated above, SANICORSE explained that its director needed to be replaced, requiring the recruitment of two employees and the outsourcing of technical coordination of the company's collection and logistics activities to a third-party company. These expenses were said to come to €150,000 of additional annual costs.

181. The documents sent by SANICORSE show that the Sales Director was recruited on 1 February 2013 and the accountant on 15 July 2013, i.e. after implementation of the price increase policy in 2011. Similarly, the invoices issued by the company to whom operating management support had been outsourced came to approximately €4,000 in 2012 and €5,000 in 2013.

182. The aforementioned information shows that all these expenses came well after 2011, the year the SANICORSE pricing policy was implemented with the sudden and significant price increase. They therefore cannot be the cause.

183. Finally, the increase of other expenses (electricity, fuel and increased transport costs

associated with the delivery of equipment from mainland France), was also cited by SANICORSE as a reason for the significant increase in its rates.

184. For electricity rates, without specifying the rate applicable or even producing invoices, SANICORSE provided a table that it claims to show that "*Blue, yellow and green rates for professionals and companies were regularly subject to an annual increase between 2008 and 2013*". The increases in question were all well below 10% and cannot justify the increases of over 100% imposed on healthcare institutions.

185. With regard to the increased cost of fuel in Corsica, and particularly diesel (fuel oil only appeared in the company accounts from 2015), three observations can be made from the investigation: (i) between 2006 and 2011, diesel represented less than 7% of SANICORSE operating expenses, (ii) only four years are affected by increased fuel expenditure (2008, 2010, 2011 and 2012), (iii) increased fuel expenditure in these years are primarily related to an increase in the volumes used rather than an increase in prices (which actually fell in 2011 and 2012).

186. The aforementioned information shows that the price increases applied by SANICORSE from 2011 cannot, in principle, be attributed to increased fuel prices, nor can their amounts be justified. The fact that the significant drop in fuel costs from 2014 was not passed on in the rates invoiced to healthcare institutions from this date makes this correlation even less plausible.

187. With regard to the extra cost associated with the "transport of equipment from the mainland" – over and above the fact that this claim appears to contradict the fact that SANICORSE maintains elsewhere that healthcare institutions were free to have their infectious healthcare waste processed on the mainland at no extra cost -, it is not substantiated by any invoices. Furthermore, expenses associated with equipment were analysed above as part of the study into investments associated with the site transfer, and if this extra cost did exist, it did not occur in 2011. Therefore, it cannot justify the significant price increases that occurred from 2011.

188. Therefore, taken separately, these various cost increases cannot explain the price increases occurring between 2011 and 2015. SANICORSE maintains that its pricing policy is justified by the cumulation of these increases. But, in addition to the fact that it has produced no accounting information to assess this overall increase in costs, and that the alleged increases occurred over a very long time period, sometimes several years apart, it must be observed that changes to the company's financial position from 2011 contradict the claim that the price increases were simply covering costs.

On the financial position of SANICORSE and the Cesarini group

189. With regard to the company accounts, the financial position of SANICORSE in 2009 and 2010 was healthy, with a net profit of €188,000 and €140,000 respectively for a turnover of around €1.8 million, positive cash flow, almost no banking debt and stable equity in excess of €1 million.

190. If, as maintained by the company, the price increases it decided to implement in 2011 were justified by an increase in relevant costs, its holdings should not have been significantly modified, particularly as, during the hearing, it confirmed that during the period of price increases between 2011 and 2015, there was no change in its commercial relationships with suppliers and customers. Payment periods, particularly for the invoicing of outsourcing within the group, remained the same, as did its working capital requirement.

191. However, there is a very significant improvement to its financial position in the period corresponding to the disputed price increases, with a 40% increase in equity between

2010 and 2015, and cash flow at €620,000 in 2014 and over €1 million in 2015. These gains were accompanied by an active dividend distribution policy, worth a total of €1.2 million between 2012 and 2016.

192. Furthermore, during the same period, the company partially used this financial ease to incur new expenses with no link to waste autoclaving costs, such as the purchase of two top-of-the-range company cars, and the appearance of a recurring sponsorship budget, which, according to the explanations provided during the hearing, corresponded to the subsidisation of a local football club for a total of €300,000 between 2012 and 2016.

193. Therefore, it is not increases in waste processing costs that were passed on via the service prices invoiced to health institutions, but instead unjustified price increases applied between 2011 and 2015 that allowed new expenses to be incurred while also distributing very high earnings to the company owners.

Case of Castelluccio Hospital

194. SANICORSE stated that the price increases applied to Castelluccio Hospital were not justified by the same causes as those presented above.

195. In other words, these price increases were not linked to increased operating costs and investments, but to the fact that SANICORSE no longer wished to work with this hospital for two reasons: (i) non-compliance by the hospital with waste sorting rules, leading to major machine breakdowns, and (ii) the hospital's involvement in seeking an alternative to SANICORSE, in particular by implementing a pooled, internal infectious healthcare waste disposal service.

196. SANICORSE also stated that its supervisory authorities required it to maintain its contractual relationship with Castelluccio Hospital.

197. However, SANICORSE's observations in response to the statement of objections mention that the sorting problems leading to breakdowns, which involved Castelluccio Hospital, had also occurred with Bastia Hospital. SANICORSE brought litigation against these two hospitals on these grounds. While Castelluccio Hospital was subject to a price of €3.3 to €6.6 per kg between 2012 and 2016, the price invoiced to Bastia Hospital never exceeded €1.7 per kg over the same period.

198. The very significant and much higher price increases imposed on Castelluccio Hospital can therefore only be analysed as retaliation measures designed to sanction this hospital's involvement in seeking an alternative to SANICORSE.

199. On the one hand, SANICORSE had identified it as the "leader" of a movement seeking to allow hospitals to move away from its services, and on the other hand, this hospital had alerted the DGCCRF in February 2011 of the price increases applied by SANICORSE against it.

200. The aforementioned information demonstrates that SANICORSE deliberately implemented a strategy of imposing sudden, significant and prolonged price increases justified by the existence of projects to develop infectious healthcare waste treatment alternatives, and designed to discipline its customers and dissuade them from implementing such projects, without providing any objective and relevant justification for said price increases, particularly with regard to its investments, the costs it incurred, or the situation arising from its director's health problems.

Analysis of the real or potential effects of the practice

201. The real or potential effects of this practice are two-fold. A practice of a sudden, significant, persistent and unjustified price increases generally constitutes an abuse seeking to exploit customers of the product or service in question. In this case, the

increases applied by SANICORSE also had the clear objective of dissuading its healthcare institution customers from considering any alternative solution. This pricing policy was therefore also an effective obstacle to the emergence of competition.

202. The practice implemented by SANICORSE led to an unjustified increase in costs for Corsican healthcare institutions, who had no choice but to accept it, given the absence of any alternative. It therefore led to the abusive exploitation of healthcare institutions.

203. The fact that Corsican hospitals are experiencing great financial difficulties, as outlined by the French Court of Auditors (*Cour des comptes*, 2017 annual public report), and that the sums unduly invoiced by SANICORSE were unable to be used in other products or services contributing to the quality of public or private healthcare services, makes the impact of this additional cost even more significant.

204. Furthermore, the practice implemented by SANICORSE also had an effect on the structure of competition, as it achieved its goal of preventing healthcare institutions from considering internal or external alternatives to SANICORSE.

205. The price increases, used as retaliation tools against hospitals which considered to stop using SANICORSE services, were successful in "disciplining" healthcare institutions, which then abandoned their research into potentially internalising pooled or other forms of internal infectious healthcare waste treatment.

On the duration of the practice

206. The case documents show that the infringement began on 8 February 2011, when the Director of Castelluccio Hospital signed a contract with SANICORSE, with immediate effect, which set out a rate of €6.60 excl. VAT per kg of infectious healthcare waste treated, representing an increase of 194%.

207. With regard to the end of practices, the available case documents show that the last year in which a significant increase is observed was 2015. This increase affected Ajaccio Hospital. Nevertheless, the documents sent by SANICORSE to the Investigation Services show that the rates applied to this hospital fell from September 2015 (ref. 2533).

The date of 31 August 2015 shall therefore be selected as the date of the end of the practices in question.

Conclusion on the objection

208. The aforementioned information demonstrates that SANICORSE, an undertaking with a monopoly on the infectious healthcare waste disposal market in Corsica, increased its rates in a sudden, significant and persistent manner between 2011 and 2015. These price increases, applied in a non-uniform and erratic manner with the threat of contract termination or not responding to an invitation to tender, could not be justified by any objective information, such as a correlated increase of specific and significant costs.

209. On the contrary, the case evidence demonstrates a total lack of consistency in the company's behaviour. Whereas SANICORSE justifies its practices by fear of the emergence of a competitor and the need to write off its investments as quickly as possible, it repeatedly refrained from responding to invitations to tender (including those grouping all Corsican healthcare institutions), with no fear of losing contracts, due to the lack of alternative operator in Corsica.

210. It has therefore been demonstrated that SANICORSE only intended to profit from the scope provided by its position of an uncontested monopoly on the market, going so far as to take retaliatory measures against healthcare institutions that were seeking to find an alternative to its services.

211. This practice generated an illegitimate additional cost for healthcare institutions with a public service mission, while discouraging all customers from seeking an alternative, thereby further consolidating SANICORSE's position on the market.

212. Such behaviour constitutes abuse of dominant position pursuant to Article L. 420-2 of the French Commercial Code (*Code de commerce*).

2. ON THE OBJECTION OF PRICE DISCRIMINATION

213. The statement of objections lists a second objection of abuse of dominant position relating to the application of unjustified discriminatory prices to Castelluccio Hospital for the infectious healthcare waste disposal service.

214. Investigation of the facts provided to support the objection of a sudden, significant, persistent and unjustified increase in infectious healthcare waste disposal prices demonstrated that the application of non-uniform price increases to different healthcare institutions in general, and to Castelluccio Hospital in particular, was one of the components of the pricing policy implemented by SANICORSE between 2011 and 2015, which was found to be abusive as part of the first objection.

215. There is therefore no need to retain this practice in support of a specific objection separate from the first objection.

C. ON LIABILITY FOR THE PRACTICES

a) Applicable principles

216. Based on consistent case law to date, when the existence of an infringement has been established, the individual or legal person responsible for operations at the undertaking under investigation at the time of the infringement must be determined in order to answer for the infringement. A legal entity must be held liable for the infringement, and the penalty must be applied to said entity.

217. Furthermore, in French and European law, within a group of companies, the parent company may be held liable for the behaviour of a subsidiary, particularly when, although the subsidiary has a separate legal personality, it is not autonomous in determining its behaviour on the market, but primarily applies the instructions given by the parent company, particularly with a view to the economic, organisational and legal ties between these two legal entities.

218. European Union case law to date has defined a system of specific evidence to ascertain the autonomy of a subsidiary with regard to its parent company, concerning its behaviour on the market. In the specific case where a parent company directly, or indirectly via an intermediate company, owns all or almost all of the capital of its subsidiary, which is the offending party, it is simply assumed that the parent company has a decisive influence on the behaviour of its subsidiary. It is down to the parent company to overturn this assumption by providing evidence to demonstrate that its subsidiary is autonomous in determining its line of action on the market. If the assumption is not overturned, the Commission shall be able to hold the parent company jointly and severally liable for payment of the fine imposed on its subsidiary (aforementioned Akzo Nobel Decision, paragraphs 60 and 61, solution adopted by the Court of Appeal of Paris, Decision of 29 March 2012, Lacroix Signalisation e. a no. 2011/01228, pp. 18 and 19).

219. These principles, and particularly the system of proof instituted by European case law, apply to the *Autorité de la concurrence* when it applies the provisions contained in Articles 101 and 102 of the TFEU. Furthermore, as a basic rule, it is important to ensure the implementation of uniform liability rules and, particularly, a single standard of evidence, when the *Autorité* applies internal competition law alone or simultaneously applies internal law and European law (see Decision. 13-D-09 of 17 April 2013 relating to practices implemented in the watchtower reconstruction market at Centre Pénitentiaire de Perpignan, Section 121).

220. Therefore, even when applying the provisions of French law alone, when a parent company owns all or almost all of the capital of its subsidiary, which is the offending party, the *Autorité* has grounds to assume the exercise of decisive influence by the parent company on the commercial policy of its subsidiary, and to hold it jointly and severally liable for payment of the fine imposed on its subsidiary.

b) Application in this case

221. Notification of the objection of a sudden, significant, persistent and unjustified increase in prices was issued to SANICORSE as perpetrator of the practices, and to SAS Groupe Cesarini, as parent company of SANICORSE.

222. Information on the structure of the SANICORSE group shows that from the date of its creation on 31 December 2012, SAS Groupe Césarini has held the entire capital of SANICORSE. It is therefore assumed that since this date, SAS Groupe Césarini has exercised a decisive influence on the commercial policy of this subsidiary, which the interested party does not contest.

223. In view of this information, SANICORSE shall be held liable as perpetrator of the practices and SAS Groupe Césarini as parent company of the perpetrator of the practices.

III. On the setting of financial penalties

224. Part I of Article L. 464-2 of the French Commercial Code (*Code de commerce*) gives the *Autorité* the right to impose financial penalties on companies and bodies engaged in anticompetitive practices forbidden under Article L. 420-2 of the French Commercial Code.

225. The third paragraph of Part I of Article L. 464-2 of the French Commercial Code states that "*The financial penalties are proportionate to the seriousness of the charges brought, to the scale of the damage caused to the economy, to the financial situation of the body or company penalised or to the group to which the latter belongs, and to the likelihood of any repetition of practices prohibited by [title VI of Book IV of the Commercial Code]. They are individually determined for each company or body penalised, with reasons given for each penalty*."

226. Furthermore, the fourth paragraph of Part I of Article L. 464-2 of the French Commercial Code provides that "*The maximum amount of the penalty for a company is 10% of the highest worldwide turnover, net of tax, achieved in one of the financial years ended after the financial year preceding that in which the practices were implemented. If the financial statements of the company concerned have been consolidated or combined by virtue of the texts applicable to its legal form, the turnover taken into account is that shown in the consolidated or combined accounts of the consolidating or combining company*."

227. Article L. 464-5 of the French Commercial Code provides that when implementing the simplified procedure set out in Article 463-3 of the French Commercial Code, the *Autorité* may order the measures specified by Part I of Article 464-2 of said code. However, the financial penalty may not exceed €750,000 for each of the perpetrators of prohibited practices.

228. In this case, the *Autorité* shall assess the legal criteria in the third paragraph of Part I of Article L. 464-2 of the French Commercial Code according to the methods described in its Notice of 16 May 2011 on the Method Relating to the Setting of Financial Penalties (hereinafter "the Penalties Notice").

229. The undertakings implicated in this case were given the opportunity to make observations on the main legal and factual aspects of the case, which the Investigation Services considered likely to influence the determination of the penalty that can be imposed.

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230. The presentation of these various aspects by the Investigation Services is without prejudice to the assessment of the Board (*Collège*) on the determining factors of the penalty, which shall be determined by its deliberation alone.

A. ON THE BASIC AMOUNT

231. The Penalties Notice provides that "*The basic amount is set for each undertaking or entity in view of the appraisal made by the* Autorité *of the seriousness of the facts and of the importance of the harm done to the economy (...)*" (paragraph 22).

232. The duration of practices is a relevant factor for determining the seriousness of the facts and the extent of damage to the economy. It shall be taken into account separately, from both perspectives, according to the practices and methods set out in the aforementioned Penalties Notice.

a) On the value of sales

Reminder of principles

233. In application of paragraph 23 of the Penalties Notice, the *Autorité* calculates the base of the basic amount by using the value of sales made by the undertaking in question for the products or services to which the infringement relates.

234. More precisely, the Penalties Notice shows that the sales in question are all those made in France, and that their value corresponds to the turnover of the undertaking or entity at stake in relation to the products or services in question.

235. According to paragraph 33 of the Penalties Notice, the value of sales to take into account shall be that of the last full accounting year during which the practices were implemented. Nevertheless, following paragraph 37 of said notice, when this last year is "*manifestly not a representative reference, the* Autorité *opts for an accounting year that it considers more appropriate, or for an average of accounting years. It sets out the reasons for its choice*."

Application in this case

236. In this case, the practice was implemented on the infectious healthcare waste disposal market, including autoclaving and landfill services. Therefore, the sales value shall be calculated using the turnover obtained by SANICORSE for autoclaving and landfill

services.

237. This approach is not contested by SANICORSE.

238. However, contrary to statements made by SANICORSE, the fact that the infringement considered only applies to relationships between SANICORSE and the healthcare institutions, and that there is no proof that the infringement was committed for other types of clients, shall have no impact on determining the value of sales to serve as a basis for calculating the total financial penalty.

239. According to Sections 33 and 34 of the Penalties Notice, the sales to consider are "*all those made in France*" and in "*categories of products or services to which the infringement(s) relate(s)*" and not only the sales effectively affected by the infringement. The *Autorité* therefore does not need to prove that each sale was directly affected by the infringement when determining the value of sales (Decision no. 16-D-11 of 6 June 2016 relating to practices implemented in the terrestrial television broadcasting sector).

240. This approach was recently confirmed by the Court of Appeal of Paris, which specified that "*the interpretation contrary* [to the one adopted by the *Autorité*] *would mean that, to determine the basic amount of the penalties to impose, the* Autorité *would be required to establish which individual sales were affected by the practice in each case. Such a requirement would most often be unrealistic and would prevent the* Autorité *from effectively enforcing and sanctioning infringements of competition law*"

241. The sales value must therefore be calculated as all turnover made in France by SANICORSE for autoclaving and landfill services. The final full accounting year during which the disputed practice was implemented was 2014, such that on the basis of this reference year, the total value of sales to take into account is €1,447,484.

b) On the proportion of the value of sales

On the seriousness of the facts

242. When assessing the seriousness of an infringement, the *Autorité* particularly takes into account the sector in question, the nature of the infringement and its objective features, such as its degree of refinement (see paragraph 26 of the Penalties Notice).

243. In this case, the infringement is a case of exploitative abuse committed by an undertaking with a monopoly. SANICORSE increased rates for infectious healthcare waste autoclaving services in a sudden manner, sometimes under the threat of termination or by simply refraining from responding to an invitation to tender, among a captive clientele, particularly taking into account the island context.

244. Furthermore, the investigation has shown that these price increases were not in correlation with any specific or especially significant increase in costs. They can therefore only be explained by a desire to maximise profits and, according to the statements of the undertaking itself, preserve its monopoly.

245. In this regard, the practice is even more serious, as it pursued, and furthermore achieved, an objective of putting a stop to any alternative project that could lead to emergence of a competitor on this market.

246. In addition, this abuse occurred on the infectious healthcare waste disposal market in Corsica. For public health reasons, hospitals are subject to strict obligations to dispose of infectious healthcare waste within restrictive time frames. The *Autorité* has already had the opportunity to decide that practices occurring on markets involving public health must be considered serious (Decision 03-D-61 relating to practices implemented in the waste trolley supply and leasing market at Nantes Hospital).

247. With regard to the nature of the people likely to be affected by the practice, the abusive practice was primarily committed against healthcare institutions with a public service mission. The *Autorité* has already had the opportunity to decide that practices occurring against hospitals should be considered serious (Decision 07-D-09 of 14 March 2007 relating to practices implemented by the GlaxoSmithKline France laboratory).

On damage caused to the economy

248. In order to assess the damage caused to the economy by this practice, it is important to investigate the scale of the infringement in question, the economic characteristics of the activities at stake and the short- and long-term consequences of the practice.

249. In this case, the practice was implemented by an operator with a monopoly on the infectious healthcare waste disposal market in Corsica, which is an island territory. It therefore affected all Corsican healthcare institutions.

250. The undertaking under investigation is attempting to downplay the scale of the practice by stating that the statement of objections only refers to relationships between SANICORSE and 12 health institutions, and not all producers of infectious healthcare waste. It is true that the statement of objections does not refer to other producers and self-treating patients, but case documents show that they only represent 15% of infectious healthcare waste in Corsica (ref. 2133).

251. With regard to the economic characteristics of the activity under investigation, the services sold by SANICORSE are purchased by operators in order to perform a legal obligation, which has been put in place to prevent health risks. In this context, and given SANICORSE's monopoly, price elasticity of demand from institutions is limited.

252. With regard to the short-term consequences of the practice, in addition to the direct additional cost caused by the significant price increases for SANICORSE's healthcare institution customers, in a context of chronic hospital budget deficits, the practice also generated undue public spending. Furthermore, in this regard, it can be reported that Bastia and Ajaccio Hospitals received exceptional funding from the French State between 2011 and 2015 in order to manage increased expenses, although this increase was obviously not exclusively linked to infectious healthcare waste disposal expenses.

253. In addition to these short-term consequences, the practices potentially had an exclusionary effect. The director's statements reveal that the price increases were justified by the potential emergence of a competitor. In reality, they were closer to retaliation measures against healthcare institutions considering the implementation of alternatives to SANICORSE. They therefore discouraged competing initiatives, particularly from the healthcare institutions subject to these price increases

254. In its defence, the undertaking under investigation challenges the existence of damage to the economy, mentioning the "sluggishness" of the hospitals with regard to seeking alternatives and that their "poor management" is demonstrated by their financial position. This argument is irrelevant since SANICORSE holds a monopoly on the infectious healthcare waste disposal market in Corsica and the abusive price increases constituted retaliation measures against hospitals seeking to find alternatives to SANICORSE.

Conclusion on the proportion of the value of sales to take into account

255. Given the above assessment of the seriousness of the facts and the extent of the damage caused to the economy, a proportion of 5% of the value of the sales defined above shall be adopted for determining the basic amount of penalties.

On the duration of the infringement

256. The *Autorité* has undertaken to consider the duration of infringements exceeding one year according to the following practices and methods: to translate its appraisal of the seriousness of the facts and of the importance of the harm done to the economy into a figure, the proportion determined is applied once, for the first full year of individual participation in the practices of each undertaking under investigation, to the value of its sales during the reference financial year, then to half of this value for each full year of participation that follows. Beyond the final full year, the remaining period is taken into account to the nearest month, providing that the case documents allow it.

257. In each case, this method results in a multiplying factor, which is defined in proportion to the individual duration of each undertaking's participation in the practices and applied to the proportion of the sales value made by each of them during the reference financial year.

258. In this case, the infringement began on 8 February 2011, when the Director of Castelluccio Hospital signed a contract with SANICORSE, with immediate effect, which set out a rate of €6.60 excl. VAT per kg of infectious healthcare waste treated, representing an increase of 194%. With regard to the end of practices, the available documents in the case show that the last year in which an increase is observed is in 2015. This increase affected Ajaccio Hospital. Nevertheless, SANICORSE's statements reveal a decrease in rates for this hospital from September 2015 (ref. 2533). This practice can therefore be considered to have ended on 31 August 2015.

259. The duration of the practices committed by SANICORSE is consequently 4 years and 6 months, representing a multiplying factor of 2.75.

c) Conclusion on determining the basic amount of the penalty

260. With regard to the seriousness of the case and the extent of damage caused to the economy by the practices under investigation, the basic amount of the financial penalty determined as a proportion of SANICORSE sales related to the infringement and the duration of the infringement shall be €199,029.

B. ON INDIVIDUALISATION OF THE PENALTY

261. In this case, no case document establishes mitigating or aggravating circumstances with regard to SANICORSE, as stated in paragraphs 44 and following of the Penalties Notice.

262. Similarly, no case documents establish any other factor of individualisation of the penalty.

263. None of these points are contested by SANICORSE.

C. ON THE TOTAL AMOUNT OF THE PENALTY AND FINAL ADJUSTMENTS

a) Conclusion on the final amount of the financial penalty

264. With regard to all information presented above, the amount of the financial penalty imposed on SANICORSE shall be the rounded sum of €199,000.

b) On the joint and several liability of the parent company

265. SAS Groupe Cesarini, as parent company of SANICORSE, shall be held jointly and severally liable for payment of the financial penalty, but only for the proportion corresponding to the duration of the infringement during which it owned the subsidiary.

c) Comparison with the legal maximum

266. The highest known worldwide combined turnover excluding VAT of SANICORSE, which combines its turnover with SAS Groupe Cesarini, was €2,896,297 in 2015 (ref. 2980). The maximum penalty is therefore €289,629.

267. The financial penalty mentioned above is both below this ceiling and the €750,000 ceiling mentioned in Article L. 464-5 of the French Commercial Code.

ON THE INJUNCTION OF PUBLICATION

268. Pursuant to the terms of Part I of Article L. 464-2, paragraph 5, of the French Commercial Code, the *Autorité* may order the publication, distribution or posting of its decision or an extract thereof according to methods it sets. The costs shall be borne by the party concerned.

269. In this case, to inform SANICORSE customers in general, and healthcare institutions in particular, of this decision, given the facts reported herein and the infringement, SANICORSE has been ordered to publish, at its own expense, the following summary of this decision in a paper edition and on the website of the Corse Matin newspaper, the Fédération Hospitalière de France magazine and the Gazette des communes:

The Autorité de la concurrence *has imposed a financial penalty of a total of €199,000 on SANICORSE (with joint and several liability of its parent company SAS Groupe Cesarini), for having implemented a practice of sudden, significant, persistent and unjustified price increases for infectious healthcare waste disposal in Corsica, from 2011 to 2015, in infringement of Article L. 420-2 of the French Commercial Code.*

From February 2011, SANICORSE used its market monopoly to impose sudden and significant price increases on Corsican healthcare institutions for infectious healthcare waste disposal.

These price increases were observed from 2011 to 2015 and could not be explained by any of the justifications presented by SANICORSE, which primarily concerned its increased costs and investments.

This practice generated an illegitimate additional cost for healthcare institutions with a public service mission, and also had the effect of discouraging all customers from seeking an alternative, for fear of price retaliation measures that could be taken by SANICORSE.

DECISION

Article 1: It is hereby established that SANICORSE as perpetrator and SAS Groupe Cesarini as parent company infringed the provisions of Article L. 420-2 of the French Commercial Code (*Code de commerce*).

Article 2: It is not established that SANICORSE as perpetrator and SAS Groupe Cesarini as parent company committed a practice of discrimination against Castelluccio Hospital in infringement of Article L. 420-2 of the French Commercial Code (*Code de commerce*).

Article 3: Pursuant to the infringement stated in Article 1, a financial penalty of €199,000 shall be imposed on SANICORSE, including €116,275 for which SAS Groupe Cesarini shall be held jointly and severally liable.

Article 4: SANICORSE shall bear the costs of publishing the text set out in Paragraph 269 hereof in the paper edition of the "*Corse Matin*" newspaper, the Fédération Hospitalière de France magazine and the Gazette des communes. The publication shall comply with the specified formatting: it shall be presented in a box in black lettering at least three millimetres in size, on a white background, below the following title, in bold lettering of the same size: "*Decision of the* Autorité de la concurrence *18-D-17 of 20 September 2018 relating to practices implemented in the infectious healthcare waste disposal sector in Corsica*". It may be followed by a note stating that the decision has been appealed before the Court of Appeal of Paris, should such an appeal be made. The undertaking sanctioned shall send a copy of these publications by registered letter to the Registry, as soon as they are published and no later than 20 November 2018.

Article 5: SANICORSE shall publish, at its own expense, the text set out in Section 269 hereof, on a page that can be accessed by the public from an announcement on the homepage of the websites of the "*Corse Matin*" newspaper, the Fédération Hospitalière de France magazine and the Gazette des communes. The homepage announcement shall state "*By Decision of 20 September 2018, the* Autorité de la Concurrence *fined SANICORSE and Groupe Cesarini for implementing anticompetitive practices in the infectious healthcare waste disposal sector in Corsica*" in bold lettering and font size 14. The publication accessible from the advertisement on the first page shall appear in a box with the title "*Decision of the* Autorité de la concurrence *18-D-17 of 20 September 2018 relating to practices implemented in the infectious healthcare waste disposal sector in Corsica*" in bold lettering and font size 14, for a duration of 30 consecutive days. It may be followed by a note stating that the decision has been appealed before the Court of Appeal of Paris, should such an appeal be made. The undertaking sanctioned shall send a copy of these publications by registered letter to the Registry, as soon as they are published and no later than 20 November 2018.

The oral report of Mr Pierre Larcher, rapporteur, and the oral intervention of Mrs Sarah Subremon, Deputy General Rapporteur, having been deliberated on by Mrs Isabelle de Silva, President, Mrs Fabienne Siredey-Garnier and Mr Thierry Dahan, Vice-Presidents.

Hearing Secretary, Chair,

Armelle Hillion Isabelle de Silva