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Proportionality: The Paris Court of Appeal nuances the consideration of the damage to the economy to preserve the proportionality of the penalty and by its ruling suggest to mind of this criterion in the light of the new article L. 464-2 I of the Commercial Code modified in the light of the ECN+ Directive (*Distillerie Dillon et a. / Autorité de la Concurrence*)

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Paris Court of appeal, June 9th, 2022, Distillerie Dillon et a. c/ Autorité de la Concurrence, RG n° 20/16288

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Facts. The case deals with the practice of exclusive import agreements in ultra marine territories, prohibited by Article L. 420-2-1 C. com. from the Law "Lurel" of November 20, 2012. The Court of Appeal ruled on an appeal by the wholesaler-importer in Martinique of a Champagne with a well-known brand, against a decision of the ADLC having sanctioned the above-mentioned practice (decision n° 20-D-16 of October 29, 2020). In summary, the Court confirms the decision of the Authority, in particular with regard to the assessment of the seriousness of the practices, but reforms it with regard to the importance of the damage to the economy. The fine of 421,000 euros imposed on the distributor is reduced to 300,000 euros. Beyond the specific circumstances of this case concerning the application of a specific regulation in overseas territories, the reported judgment invites to make some observations.

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Problem. First, there is the main problem of the relative consideration given to the importance of the damage to the economy, the second legal criterion in the list of those set out in article L. 464-2 I C. com. in its then applicable version, and the translation of the nuance on the amount of the fine. It is then the question, incidental and not dealt with in the judgment, of the scope of this solution, when the new article L. 464-2 I no longer expressly refers to the above-mentioned criterion, in particular alongside that of seriousness, for the assessment of the proportionality of the financial penalty. Does this mean that this approach to the sanction from the point of view of the importance of the damage to the economy is of historical interest only?

Solution. On the nuance brought by the Court as to the importance of the damage to the economy and after the statement of the general solution (pts 201 and 202), it is judged that: " *203. The fact remains that while competition is generally attenuated in Martinique, it appears in this case that there is strong inter-brand competition in the case of champagnes, as well as a significant practice of promotions, champagne being in this case a product of appeal, which the Authority recognizes (contested decision, § 161 to 164). 204. It follows that in the case of champagne, it is not possible to conclude that there is no competitive pressure, notwithstanding the absence of intra-brand competition in Martinique. 205. It should be concluded that the damage to the economy, which is certain in principle, remains very limited, and not just limited as the Authority has held, which justifies reforming the penalty imposed in order to preserve its proportionality.* As mentioned above, this solution raises the question of how to take into account the importance of the damage to the economy - here of primary importance for the adjustment of the sanction - in current and future cases, in particular on the basis of the new article L. 464-2 I.

Observations. The " *very limited"* rather than " *limited"* nature of the damage to the economy affects the level of the sanction. This is necessary since the then article L. 464-2 I refers to the proportionality of the sanction, which the Court wanted to " *preserve"* . The consequences of this were drawn by the Court of Appeal in terms of the amount of the fine. We will not say more about this, except to point out the determinants of the case, such as the nature of " *loss leader* " of Champagne and the " *strong inter-brand competition"* , which led the Court to a more moderate approach of the sanction.

There remains a second-tier problem, but one that is essential in practice: is taking into account the importance of the damage to the economy still relevant, despite the letter of the new article L. 464-2 I, which no longer mentions it, as amended by Order no. 2021-649 of 26 May 2021 (relating to the transposition of the "ECN+" directive (EU) 2019/1)? This disengagement - at least formal in terms of the text - between the proportionality of the sanction and the importance of the damage to the economy had not gone unnoticed by observers (cf. Medef's Observation on the public consultation of the DGGCRF, February 2021, page 5; PAOC's Observation of February 5, 2021 on the public consultation on the transposition of the EU Directive n° 2019/1 - ECN+, pts 24 to 26), who were able to question the formal removal of the criterion. The content of the Report to the President of the Republic on the aforementioned ordinance then opportunely indicated that " *With regard to the criteria for determining the penalty : (...) The criterion of the importance of the damage to the economy present in positive law is neither required nor prohibited by the Directive; in order to remove any ambiguity with respect to the notion of compensation for damage suffered by a victim of an anticompetitive practice, the Ordinance proceeds to its deletion;"* thus explaining the reasons for the evolution of the text of Article L. 464-2 I, which was not to prohibit the taking into account of the importance of the damage to the economy (cf. pt 4 of the Report to the President of the Republic relating to Ordinance n° 2021-649). The disappearance of the statement of the criterion in itself does not therefore mean that it has been banished. Hence the appreciable precision of Mrs. de Silva, then President of the Authority, for whom the reference to damage to the economy " *is intended to be integrated, as is the case at the European level, into that of gravity"* (Une réforme en deux volets pour rationaliser et renforcer l'application du droit de la concurrence en France, Rev. Concurrences 1-2021, point 76). The concept, as approached by the Paris Court of Appeal in the case reported here, must therefore remain part of the assessment grid for the proportionality of the sanction and not - obviously in this matter - be relegated to a history manual of " *sentencing* " in competition law.

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