

ARTICLE



CARTEL AGAINST DENTAL CARE NETWORK: THE FRENCH COMPETITION AUTHORITY SEEKS AND FINDS EVIDENCE ON FACEBOOK

Competition, Retail and Consumer Law Commercial and International Contracts | 20/11/20 |

By decision n°20-D-17 of 12 November 2020 relating to practices implemented in the dental surgery sector[1] (the “**Decision**”), the French Competition Authority (the “**FCA**”) sanctioned with a 4 million euros fine the National Council of dental surgeons (the “**CNOCD**”) and several County Councils (the “**CDOCDs**”), the Federation of liberal dental unions (the “**FSDL**”) and the French Dental Surgeons (the “**CDF**”), another union, for participating in an anti-competitive cartel designed to prevent the development of dental networks, between 2013 and 2018.

Dental medical care represents a very important expense for the French. They are only partially covered by compulsory health insurance (up to 33% in 2017), which has led the supplementary health insurance to become their main sources of funding. These insurances have set up healthcare networks to control costs and risks (especially by capping health service fees).

The practices condemned by the Decision are relatively classic boycott behaviors: the FSDL, supported by the CDOCD and the CNOCDs, encouraged dental surgeons to seek disciplinary proceedings against their colleagues who were also members of healthcare networks, in particular the Santéclair group, with the purpose of forcing them to leave these networks. This concerted “*complaints campaign*”[2] was followed by additional measures implemented by each organization individually.

These actions have produced concrete effects on the market, on the activity of Santéclair and other healthcare networks as well as their partners. Many dental surgeons have left the network they belonged to[3], as a direct reaction to the disinformation and denigration campaign mentioned above. Other decided not to join. Some of the networks' partners, who have been discredited, saw their turnover fall significantly and Assurances du Crédit Mutuel was deterred from entering the market and offering more accessible fees.

The method used by the FCA to collect evidence on these practices is much less typical.

In order to gather evidence of anti-competitive practices, the FCA may carry out a “simple” administrative competition investigation[4] and/or an “in-depth” investigation[5]. In the first case, it has no coercive power and generally involves requests for information that makes it possible to gather signs of anti-competitive practices. The “in-depth” survey is more constraining since it implies that dawn raids may be carried out within the suspected companies. The decision to conduct this type of investigation is the responsibility of the FCA's general rapporteur and can only be carried out after obtaining an authorization order from a liberties and custody judge.

In the Decision, the FCA went beyond these traditional methods. For the first time it collected evidence on social media, in particular on Facebook.

Social media and the tools they offer are no longer limited to personal communications. Their use by businesses and other market players (such as professional bodies) have become common. This is the case with chats or Facebook groups, on which many members of the same profession can express themselves, perhaps more freely with regard to the media, than they would within their company or during official meetings.

The FCA is aware of this evolution and states in the Decision that the FSDL is “*particularly active on social media (Facebook pages and groups, Twitter)*”[6]. It also mentions that the CDF have “*a website and is active on Facebook and Twitter*”[7].

It is clear from this paragraphs that the FCA monitors social media as part of its enquiries. It may collect information from these platforms if it constitutes evidence likely to establish the materiality of the suspected practices.

The Decision is an example of this possibility. The FCA quotes several private messages written on Facebook:

“I was assured 6 months ago by C... that he will do everything in his power to destroy SantéClair it starts there”[8] ;

“by the way when do you fire away???? The notorious Schindler's list Nico”, “in any case, you don't know anything, you are stunned, but I'm counting on you to promote the initiative, hoping that it will lead to vocations”[9].

The FCA also used messages posted on public Facebook groups. The Decision quotes one of these posts on the group “*dental surgeons are not fools, and even less sheep*” which contained a message and a model of letter to the councils regarding Santéclair[10].

All these different publications have been used as elements of proof of the alleged practices.



The use of social media as evidence is fully in line with the FCA's digital strategy, which led it in January 2020 to set up a "digital economy unit".

In the press release regarding this unit^[11], the FCA explained that it "*will take part in the [FCA] discussions and sector-specific inquiries on new issues related to the development of digital technology*", but also that it will be in charge of "*developing new digital investigation tools, based in particular on algorithmic technology, big data and artificial intelligence*".

The message is clear: wherever they occur, anti-competitive practices can be identified and sanctioned by the FCA.

[1] https://www.autoritedelaconurrence.fr/sites/default/files/integral_texts/2020-11/20d17.pdf

[2] Decision, § 605.

[3] At least 44 according to the Decision (§ 692).

[4] Article L. 450-3 of the French commercial code.

[5] Article L. 450-4 of the French commercial code.

[6] Decision, § 91.

[7] Decision, § 95.

[8] Decision, § 136: messages exchanged on Facebook with a member of the FSDL about a complaint project

[9] Decision, § 235: reproduction of the conversation on Facebook between the president of the FSDL and a third party.

[10] Decision, § 251.

[11] <https://www.autoritedelaconurrence.fr/en/press-release/autorite-creates-digital-economy-unit>
