

Association recommendations in a regulatory context: French BPA case highlights red lines

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The French competition authority, the *Autorité de la Concurrence*, has published a cartel decision (see [► here](#)), which is of particular relevance for associations as it clarifies the red lines drawn by antitrust law and the potential risks associated with sector relevant regulatory changes.



1 Background

In 2012, the French legislator adopted a ban for use of “Bisphenol A (BPA)” in all food containers, which came into force as of 01 January 2015. There was a long transitional phase (to allow stocks to be used up), during which food containers with and without BPA could simultaneously be placed on the market. The ban of BPA was highly debated *inter alia* in France at the time, not only among experts but also in the broader public. Accordingly, the relevant associations were involved in the legislative process and engaged with their members during the implementing period.

2 Findings of the *Autorité de la Concurrence* in the BPA case

The *Autorité* has found that, from 2010 to mid-2015, three professional canning associations and a can manufacturer's trade union implemented practices intended to prevent competition on the presence, or absence, of BPA in food containers in the transitional phase. The sanctioned practices were part of an overall plan to neutralise the competitive risks arising from the introduction of BPA-free food containers on the market. In short, the authority identified two infringements:

- Preventing manufacturers from communicating on the absence of BPA in their food containers (thus, eliminating the competition on one element of the product quality),
- Encouraging manufacturers to refuse to supply BPA-free cans before 01 January 2015 and then to refuse to stop selling cans with BPA after this date, despite the demands of the mass retail distribution sector to this effect.

The *Autorité* considers that these practices, which concern essential parameters of competition, namely information on the composition of products (first strand) and the quality of products (second strand), are anticompetitive by object, due to their nature, purpose, and context. The justifications put forward by the respondents (notably that the sector would be "destabilised") were not sufficient to exonerate them.

The *Autorité* identified eleven companies who, in their capacity as members of the three professional canning associations, participated to the cartel. The four associations and eleven of their member companies were fined a total of 19.553.400 EUR.

3 Relevance for advocacy work of associations

The French BPA case exemplifies the challenges of associations to, on the one hand, advocate the interests of their sector and, on the other hand, not coordinate the competitive behaviour of their members by illicit recommendations or alike.

This balance is particularly challenging in times of high regulatory pressure, e.g., when a change in law puts a vast majority of a sector under pressure to adhere to the new legal framework. Nevertheless, any measures to "relieve" pressure from the competition or otherwise align the member companies must comply with antitrust law.

Therefore, associations must be particularly careful when discussing and publishing "position papers" and "recommendations" to their members.

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