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French Supreme Court confirms that Stihl cannot prohibit its distributors from selling its dangerous products online

In its judgment of 26 January 2022, the French Supreme Court (Cour de cassation, case n° 1 9-24.464) validates the reasoning of the Paris Court of Appeals, considering that Stihl could not prohibit the online sale of certain products such as chainsaws, brush cutters, pole saws or electric pruners on its distributors' websites.

As a reminder, Stihl was fined by the French Competition Authority for having effectively prohibited its distributors to sell these products on their websites if they were not able to deliver them physically and consequently, ensure the "*safety*" of the customer (Decision n° 18-D-23 of 24 October 2018).

The French Competition Authority did not accept the "safety argument" put forward by Stihl to justify its practice and qualified the prohibition of resale on the internet as a restriction of competition by object, in line with *Pierre Fabre* case law.

The non-proportionate and unnecessary nature of the restrictions imposed by Stihl on online sales according to the French judges

In its appeal, Stihl again put forward the argument that its products were dangerous in order to challenge its ban. However, even if the Court of Appeals considers the safety's goal as legitimate – "*based on an analysis of the regulatory context, the online sales policy of competitors and the uniformity of the imposition of this policy on authorised distributors"* – the judges nevertheless confirm the "*restriction of competition by object*".

To justify this position, the Court of Appeals reminds that a restriction must be appropriate and necessary to be exempted, which is not the case for Stihl's measures.

Indeed, the Court of Appeals highlights the fact that Stihl's measure was applied in the same way to laymen and professionals, whereas competitors make a distinction, which makes Stihl's measure disproportionate. It adopted the same reasoning about the obligation of Stihl's distributors to ensure "*a hand delivery*", whereas the delivery could be subcontracted or dematerialised.

The Court of Appeals finally rules that the proportionality test was not satisfied and concluded like the French Competition Authority before it, that the restriction put in place by Stihl goes beyond what was necessary.

In conclusion, for the Court of Appeals, Stihl's infringement of its distributors' freedom to sell on the internet was

not proportionate and went beyond what was necessary.

Following this judgment, Stihl made a cassation complaint to the French Supreme Court. The French Supreme Court confirms the decision of the Court of Appeals in full.

Commentary

The position of the French Supreme Court and the Paris Court of Appeals can be questioned.

Firstly, the position of the Court of Appeals, followed by the Supreme Court, appears to be very strict, even though "*a hand delivery*" makes it easier to verify that the customer is indeed fit to handle potentially dangerous motorised machinery (in particular brush cutters and chainsaws).

The specificity of Stihl's products was recognised by the French Competition Authority when it validated the implementation of its selective distribution network (Decision n° 18-D-23 of 24 October 2018).

The dangerousness of the products concerned should certainly have been considered to a greater extent in assessing the proportionality and necessity of Stihl's measure.

If tools as dangerous as Stihl's are not considered sufficient to justify a restriction on online sales, what kind of products could be?

Secondly, the disputed practice was also examined by the Swedish, German and Swiss competition authorities. None of these authorities has initiated proceedings against Stihl. They thus considered that there were no competition concerns.

The Paris Court of Appeals and the French Supreme Court refuse to draw on the approach of these other authorities. This position questions the principle of protection of legitimate expectations, applicable within the European Union. The Stihl case illustrates, at the very least, a certain heterogeneity in the approach of competition authorities to this kind of practice. These apparent differences in assessment lead to a form of legal uncertainty for companies.