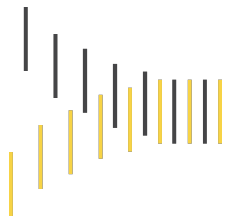




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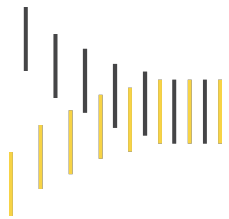
INTRODUCTION

❖ **Principle: freedom of prices / free play of market**

❖ **However, some practices or behaviors may lead to severe sanctions:**

- Substantial fines
- Criminal sanctions in many jurisdictions
- Damages actions / class actions
- Reputational harm





INTRODUCTION

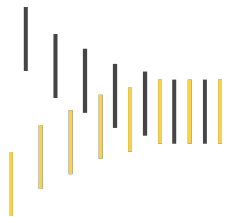
Illicit behaviors in **price determination** can be twofold:

- ❖ Price fixing as a result of **horizontal agreements** (with competitors) or **vertical agreements** (between a supplier and its distributors) (**Part I**)
- ❖ A price level resulting from a **unilateral behavior** (**Part II**)

New forms of price fixing have recently emerged – particularly **dynamic pricing** – which may raise issues under competition law (**Part III**)

1.

ANTICOMPETITIVE AGREEMENTS



HORIZONTAL AGREEMENTS

Parallel conduct is considered lawful so long as an **alignment of prices** results from individual behaviors and not from collusions or concerted practices.

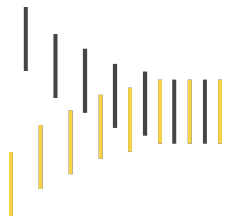
Agreements and concerted practices which have as their object or effect the restriction of competition are prohibited (save exceptions).

Regarding pricing, are prohibited collusions which notably:

- directly or indirectly fix purchase or selling prices or any other trading conditions (Article 101-1 TFUE)
- prevent the fixing of prices by the free play of competition, artificially favoring price increase or decrease (Article L.420,1 Commercial code)

Most obvious case scenarios :

- ❖ **Cartels** (restriction of competition by object)
- ❖ **Freezing of prices** (CJEU, 4th June 2009, aff. C-8/08, T-Mobile Netherlands ; CJCE, 8th July 1999, *Anic c. Commission* on the Polypropylene cartel)
- ❖ **Uniformisation of rebate rates/policies**
- ❖ **Floor prices**
- ❖ **Purchase and sale price coordination**



HORIZONTAL AGREEMENTS

Other types of illicit collusions who have (at least) an indirect anticompetitive effect on prices:

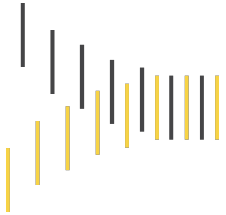
❖ **Market sharing and customer allocation**

Ex: freezing the market by stabilising the suppliers' market shares in order to facilitate price increases and stimulate profitability (North Sea shrimps traders fined by EU Commission €28.7 million)

❖ **Limiting the supply of a product on the market**

❖ **Exchange of sensitive information**

- commercially sensitive, strategic market information
- individualised information
- non-public information

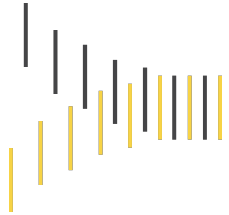


HORIZONTAL AGREEMENTS

Recommendations:

- **Do not engage in any discussion on prices - and more generally on any commercially sensitive information - with your competitors**
- **Keep your pricing policy / strategy secret**





VERTICAL AGREEMENTS

RESALE PRICE MAINTENANCE

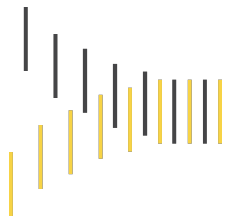
A supplier may lawfully:

- Impose a maximum resale price
- Recommend a resale price

A supplier may not:

- Fix or impose a resale price
- Fix a minimum resale price to its distributors (by contract or concerted practices)

Ex: European Commission €111 million fine in July 2018 to Asus, Denon & Marantz, Philips and Pioneer for imposing fixed or minimum resale prices on their online retailers

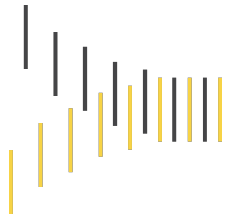


RESALE PRICE MAINTENANCE

- **Resale price maintenance** is usually considered a **hardcore restriction** by competition authorities: EU regulation 330/2010 on vertical agreements + Article L. 442-5 French Commercial code.

- **Resale price maintenance through indirect means:**
 - ❖ Fixing the **distribution margin**
 - ❖ Fixing the **maximum level of discount** the distributor may grant
 - ❖ Making the **supplier's rebates** or its **reimbursement of promotional costs** subject to the observance of a given resale price level

 - ❖ **Making pressure** on the retailer such as threats, warnings, sanctions against a dealer who does not respect a certain resale price level (e.g., penalties, delay or suspension of deliveries or termination of contract)

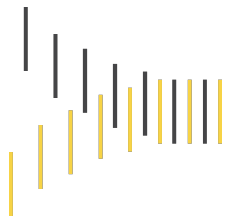


RESALE PRICE MAINTENANCE

- **Other prohibited attempts to maintain high retail prices:**
 - Preventing parallel imports
 - Prohibiting passive sales outside a distributor's territory

2.

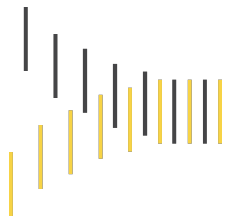
UNILATERAL BEHAVIOR



Unilateral behavior

Under French law, pricing policies may raise issues if they lead to:

- ❖ **Abusive clauses:** clause whereby a professional reserves the right to unilaterally modify the price
- ❖ **An abusive commercial practice:** where a price leads to a “*significant unbalance*” in the rights and obligations of the parties (L.442-1 Commercial code)
- ❖ **Price abusively low by reference to production / transformation or commercialisation costs,** provided that may have for effect to eliminate a competitor or prevent it from entering the market (L. 420-5 Commercial code).
- ❖ **Resale below effective purchase price** (L442-5 Commercial code)
- ❖ **Imposing a minimum resale price or commercial margin** (L.442-6 Commercial code)



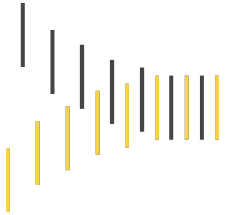
Unilateral behavior in a dominant position

Holding a dominant position is not prohibited. What is prohibited is abusing such dominant position.

Abuse of dominance, according article 102 TFEU, may consist, *inter alia*, in:

- ❖ “*directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions*” - **(abusive prices)**
- ❖ “*applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*” - **(discriminatory prices)**

Article L.420-2 of the French commercial code refers to, *inter alia*, “*discriminatory conditions of sales*”



Abusive prices – Predatory or below cost pricing

- deliberate loss in the short term
- **targeted prices at loss-making level** with an attempt of:
 - driving one or several competitors out of the market
 - preventing potential competitors from entering the market, and...
 - rising prices thereafter






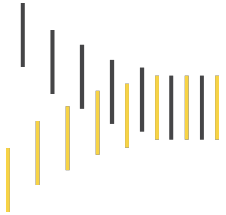
Abusive prices – Excessive prices

Exceptional cases:

- Price imposed is “*excessive in relation to the **economic value** of the service provided*” Economic value relates to production costs and process of competing products (CJEU, 13th November 1997, Case 26-75, *General Motors Continental NV v Commission of the European Community*, CJEC, 14th February 1978, Case 27/76, *United Brands Continental B.V v. Commission*).
- Only **disproportionate or exorbitant prices** fall under that prohibition (CJCE, 5th October 1994, Case 323/93, *Société civile agricole du Centre d’insémination de la Crespelle v. Coopérative d’élevage et d’insémination artificielle du département de la Mayenne*)

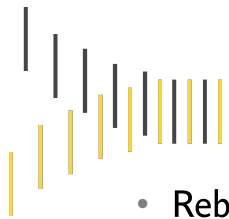
Recent example: company handling copyright for musical works holding a monopoly on the market selling licenses at an unfair price (ECJ, September 14th 2017, Case C–177/16, *Autortiesību un komunikēšanās konsultāciju aģentūra/Latvijas Autoru apvienība v Konkurences padome*)





Abusive prices – Discriminatory prices

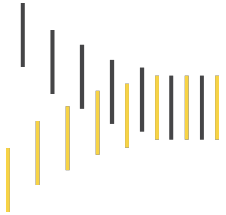
- ❖ **Discriminatory prices** consist in **applying dissimilar prices/conditions to equivalent transactions** with other trading parties or **applying similar conditions to unequal transactions**
- ❖ **Price discrimination is not *per se* abusive.** Abuse when the price difference is not objectively justified (TPICE, 7th October 1999, Case 228/97, *Irish Sugar*).
 - Where customer is a competitor (in a downstream market): **margin squeeze**
 - Where customer is not a competitor:
 - Abuse only if discriminatory prices **are capable of distorting competition** between trade partners on the downstream market
 - Case-by-case analysis: factors leading to 'an effect on the costs, profits or any other relevant interest' of trade partners (ECJ, April 2018 19th, Case C-525/16, *MEO v GDA*)



Abusive prices – Rebates

- Rebates schemes can be beneficial to customers and improve competition where there is no potential for exclusion
- Rebates solely based on the **quantity** of products/services purchased do not generally raise issues
- **Loyalty rebates** – based for example on the duration of a customer contract – may possibly raise issues where they deter a customer from purchasing competing products
- **Exclusivity rebates** – which reward customers for purchasing all or a significant proportion of their needs from the dominant operator – do generally have exclusionary effects
- Criteria used to assess legality of rebates are :
 - extent of the company's dominance in the relevant market
 - proportion of the market covered by these rebates
 - terms and conditions of the rebates
 - duration and level of the rebates
 - existence of a strategy aiming at excluding competitors





Dynamic Pricing

Increasing collection and use of digital data :

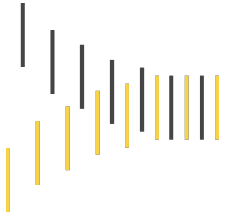
- considerably **facilitates comparison** of prices and conditions of competitors
- leads to an unprecedented level of **market transparency**
- prices are known in **real time** / monitoring tool
- **competitors' reactions** may be more easily anticipated

Competitions authorities have raised concerns about:

- Possible collusions where prices are fixed through the use of algorithms (sustainable supra-competitive price)
- Consequences of the use of same or similar pricing algorithms
- Use of algorithms in resale price maintenance monitoring (Asus, Denon& Marantz, Philips and Pioneer 2018 case)

Also, **personalised pricing** can be seen as a *'form of price discrimination in which individual consumers are charged different prices based on their personal characteristics and conduct'* leading to a *"perfect price discrimination"* (OECD).





Dynamic Pricing

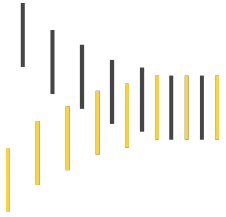
As any pricing policy, dynamic pricing must:

- **not mislead consumers**
- **not be used as a tool for illegal price fixing** (ex: RPM)
- **not lead to ‘passive’ collusive behaviors between competitors through the use of algorithms** (joint study by the *Autorité de la concurrence* and the *Bundeskartellamt*)

“It is a hypothesis that not all algorithms will have been to law school.

So, maybe there is a few out there who may get the idea that they should collude with another algorithm who haven’t been to law school either.”

(Margrethe Vestager, European Competition Commissioner)



THANK YOU

