



Supplier terms and pricing issues under French competition law

Introduction

Supplier terms and pricing issues are regularly scrutinised by French competition authorities – i.e. the French Competition Authority (*Autorité de la concurrence*) (the "FCA") and the Competition, Consumer and Fraud Directorate of the Minister of Economy (*DGCCRF*) – and challenged in litigation before commercial courts. Recent enforcement in France focuses on pricing restrictions in the e-commerce sector and restrictions on online sales.

What is the basic position under French competition law regarding resale price maintenance (RPM)?

The basic position under French competition law regarding RPM is the same as under EU law. The imposition of a minimum or fixed resale price by a supplier on its distributors constitutes a hardcore

restriction falling under the prohibition of anticompetitive arrangements.

In addition, the direct or indirect imposition of minimum resale prices or margins in relation to a contract for the sale of goods or services constitutes a criminal offence under French law, which is punishable by a criminal fine of EUR15,000 under Article L. 442-5 of the Commercial Code.

What do recent cases and investigations tell us about the French competition authority's position on RPM?

In line with the findings of the EU Commission in its e-commerce sector inquiry report, the FCA has recently focussed its enforcement on RPM practices imposed by suppliers to online resellers. For example, on 26 January 2017, the FCA fined a supplier of wine tasting accessories for a vertical agreement with its

online resellers fixing resale prices (FCA decision No 17-D-01). The FCA has made it clear that it will continue to focus on the pricing conduct of suppliers in the e-commerce sector in the coming years.

How are online sales restrictions treated?

Are Platform restrictions permitted?

In October 2018 the FCA imposed a fine of €7 million on chainsaw manufacturer Stihl for imposing online sales restrictions on its distributors. The FCA accepted that the nature of the products, chainsaws and other cutters, justified a selective online distribution model, in order to preserve the quality of the product and ensure their proper use. In line with the Court of Justice of the EU's ruling in the *Coty* case, the FCA also accepted that a ban on sales on online marketplaces was also permitted. The requirement for the products to be hand delivered by the retailer however was seen as disproportionate and equivalent to a de facto online sales ban. It removed the main benefit of online shopping, not having to go to a physical store. No such requirement was imposed under any national or European safety regulations and Stihl enforced the requirement by sending reminders to its distributors that its products were only available in stores. The FCA concluded that

the requirement was a restriction by object, a serious infringement of the competition rules, which was reflected in the level of the fine imposed.

The issue of a ban on online marketplaces in the context of a selective distribution system was also addressed on previous occasions:

- In September 2017, the French Supreme Court upheld a decision of the FCA of March 2007 which held that a prohibition on resale via third-party online marketplaces does not in itself constitute a hardcore restriction excluded from the benefit of the vertical block exemption Regulation. The prohibition was imposed by Caudalie, a supplier of cosmetics and hygiene products, on its authorised distributors.
- In November 2015, the FCA closed a probe into Adidas' online sales practices after it removed the ban on sales via online platform from its contracts.
- The FCA issued two decisions, in July 2014 (FCA decision 14-D-07) and June 2015 (FCA decision 15-D-11) dismissing a claimant's request for interim measures, while continuing its investigation into Samsung's selective distribution network under which online sales via unauthorised platforms were prohibited.

What about online pricing restrictions?

The French approach to dual pricing for online and off-line resellers has tended to be more flexible than the approach under EU law. This issue was addressed in the report issued by the FCA in September 2012 following its e-commerce sector inquiry (FCA report 12-A-20). The FCA took the view that applying different prices to bricks and mortar retailers and online retailers amounts to an anticompetitive practice only if (i) the level of the price differential is likely to have anticompetitive effects by limiting the competitive pressure from online retailers in the market in question and (ii) the price difference is not objectively justified. Dual pricing for online and offline retailers is therefore not regarded as a restriction by object.

What is the approach to discounts and rebates under French competition law?

French competition law is similar to EU competition law on rebates. Suppliers in a dominant position need to carefully review how they structure any discount or rebate schemes to avoid a breach of Article L.420-2 of the Commercial Code on abuse of dominance.



Have there been any recent developments in this area of competition law?

In June 2016, the FCA fined TDF, the former State-owned monopoly in TV broadcasting for abuse of a dominant position in the market for digital terrestrial television broadcasting in France. TDF, amongst other practices, set up a loyalty rebate system by geographic areas which created a strong incentive for channel publishers to use TDF's services for the majority of their broadcasting requirements (FCA decision 16-D-11).

The same month, the FCA fined Belgian group Umicore, the leading supplier of rolled zinc in France, for abuse of a dominant position by implementing over a period of nine years a trade policy aimed at inducing its distributors to obtain supplies exclusively from Umicore. This trade policy was accompanied by surveillance, threats and retaliation measures aimed at enforcing the exclusive supply (FCA decision 16-D-14).

In December 2015, the FCA fined Orange €350 million for abuse of dominance on the markets for fixed and mobile telecommunications services to corporate clients. Regarding mobile telecommunications services, the FCA found that Orange had implemented, in a systematic and widespread fashion over an extended period of time, various mechanisms aimed at ensuring the loyalty of its clients, through the use of marketing programmes and anticompetitive pricing discounts. According to the FCA, these loyalty practices, which were applied in a cumulative fashion and were conditional on commitments in terms of contract duration or consumption volume, might have prevented clients from subscribing to other operators, and deterred them from entrusting a part of their business to another operator (FCA decision of 17 December 2015).



Key contacts

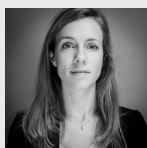


Sergio Sorinas

Partner

T +33 1 53 57 76 77

sergio.sorinas@hsf.com



Marie Louvet

Avocat

T +33 1 53 57 70 75

marie.louvet@hsf.com

HERBERTSMITHFREEHILLS.COM

BANGKOK

Herbert Smith Freehills (Thailand) Ltd

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Herbert Smith Freehills

JAKARTA

Hiswara Bunjamin and Tandjung
Herbert Smith Freehills LLP associated firm

JOHANNESBURG

Herbert Smith Freehills South Africa LLP

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Herbert Smith Freehills

RIYADH

The Law Office of Mohammed Altammami
Herbert Smith Freehills LLP associated firm

SEOUL

Herbert Smith Freehills LLP
Foreign Legal Consultant Office

SHANGHAI

Herbert Smith Freehills LLP
Shanghai Representative Office (UK)

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