18th October : Rise in "back margins*" paid to large-scale retailers, inflation and competition

Published on October 27, 2004

> Version française

In an opinion handed down to the consumers association UFC-Que Choisir on 18th October 2004, the* Conseil de la concurrence *emphasizes the effects of such a rise on increases in consumer products and the risks of anticompetitive behaviour

The *Conseil de la concurrence* was contacted by the consumers association *Union Fédérale des Consommateurs* (UFC-Que Choisir), which requested an opinion on the state of competition in the non-specialist large-scale retail sector. In particular, the association wished to know whether rises in "back margins" (*marges arrière*) could serve to restrict the free play of price competition, to the detriment of consumers' interests.

As an introductory observation, the *Conseil de la concurrence* notes that a commission of experts was appointed by the Government during the summer of 2004. Chaired by Mr Guy Canivet, the commission is "*tasked with establishing a report on existing legislation and proposing suitable measures aimed at facilitating relations between suppliers and distributors […]*". To do this, it takes into account broader public interests than those which fall within the jurisdiction of the *Conseil de la concurrence*. Consequently, the opinion issued by the *Conseil* is in no way intended to supplant the work carried out by the commission. It does, however, set out the competition authority's understanding of the issue, which it feels constitutes a useful contribution to the debate.

The* Conseil *considers that the current threshold for below-cost selling has a conventional character, rather than a purely economic limit

Recent years have seen standard sales margins fall, whilst back margins have risen steadily, despite the fact that there has been no equivalent growth in the promotional services provided to suppliers by retailers. This phenomenon reflects the purchasing power that major retailers have with respect to their suppliers, due to the high degree of concentration in the retail distribution market, which is itself made all the more acute by legislation aimed at restricting the creation of new large retail outlets.

Furthermore, public authorities and consumer associations appear to have reached the same conclusion, namely that the retail prices charged for consumer products have risen over the same period.

In the course of its litigation activities, the *Conseil* has observed that the excessive development of back margins may serve to encourage certain anticompetitive practices. Such practices include the imposition of minimum retail prices, collusion between two competing brands or, conversely, the eviction of competitors by a company in a dominant position that chooses to saturate supermarket shelves. By restricting competition within or between brands, this type of behaviour promotes price rises.

The *Conseil* accepts that the Galland Law is not the only factor responsible for the behaviour observed, which has doubtless also been encouraged by the provisions of the law on commercial equipment. However, it does believe that the introduction of a threshold for below-cost selling, as defined by the Galland law, results in an artificial distinction between two types of margin: those that can lead to reductions in consumer retail prices, and those that cannot. The rule used to distinguish between these two types of margin was chosen for the ease with which it can be legally applied and interpreted, but has no economic justification. Consequently, the current threshold for below-cost selling appears to have a conventional character which, since it is not based on economic realities, not only prevents it from fulfilling its purpose, but also facilitates potential anticompetitive practices.

The *Conseil* was also asked by UFC-Que Choisir to appraise an agreement aimed at fixing back margins, from a competition law viewpoint. The *Conseil*

indicates that, where it is consulted as part of a request for an opinion, it may only give its verdict on general competition issues and must refrain from any appraisal that might prejudge a ruling on litigation.

In response to the question posed by UFC-Que Choisir, it indicates the conditions that must be met by any agreement restricting market actors' ability to set prices freely, before it can be judged. What should be examined is whether or not such an agreement contributes to economic progress that benefits the consumer, and if it is compatible with national and European competition law.

* Rebates paid to retailers by suppliers in return for marketing services such as beneficial shelf locations or promotional material.