Autorité de la concurrence

Better understanding competition rules

Guide for SMEs

EDITORIAL

Is your SME a perpetrator or a victim of anticompetitive practices? Take control of your fate!

When it comes to competition, all companies, whatever their size, are subject to the same rules of play, as set out in competition law. It is therefore essential that the 4 million SMEs that make up the lifeblood of our economy are fully aware of this and able, where necessary, to assert their rights when they believe that they are a victim of anticompetitive practices.

Without always knowing it, an SME may contravene competition law, for example, by entering into a cartel with local competitors in a call for tender to determine the winner in advance. Similarly, it may have imposed the resale price of its products on its authorised retailers or prohibited them from marketing them on the Internet.

In the event of a breach, SMEs, like any other company, are exposed to the risk of financial penalties, which can be substantial. It is therefore indispensable that they have a perfect understanding of the rules. One of the objectives of this guide is precisely to help them to do so, even though they may not always have the internal resources necessary to raise awareness among their employees in this area. This guide explains in a practical and informative way what constitutes cartel behaviour – whether between competitors or between a supplier and its retailers – and practices involving abuses of a dominant position. It also clarifies the lines that must not be crossed and the excuses that companies cannot hide behind to avoid liability.

But an SME can also be the victim of anticompetitive practices, without necessarily being aware of it. In particular, libel, denial of access to critical infrastructure and predatory pricing are forms of abuse of a dominant position that restrict the commercial development of an SME or marginalise it. An SME may also be prevented from entering a new geographic market because of a collective boycott by established competitors. It may be the victim of a cartel on the intermediate products that it buys, which leads to an increase in its production costs and undermines its competitiveness.

This guide, consisting of 17 practical sheets, will enable SMEs to better prevent breaches from occurring, particularly through negligence or unfamiliarity with competition rules. Similarly, if they have crossed the red line of competition law, they will be more familiar with the different procedures that they can use, such as leniency or settlement. Finally, if they are victims of anticompetitive practices, they will be better able to exercise their rights, either by bringing a case before the Autorité de la concurrence or by claiming compensation for harm suffered.

Emmanuel Combe
Vice President of the
Autorité de la concurrence

What is the purpose of competition?

What is competition?

Competition is not a walk in the park: it is a permanent contest in which companies try to outdo their competitors, such as by launching new products, lowering costs and prices, and inventing new economic models.

The benefits of competition

Competition leads to competitive prices

Competition often leads to lower prices as each company tries to take market shares from its competitors. It not only lowers prices for consumers but also for companies, who buy intermediate products at advantageous prices and therefore become more competitive.

The impact of competition on price is often underestimated: a small price decrease may seem anecdotal at the level of a single consumer, but when considered in terms of an entire economy, the monetary gain may be significant. For instance, in 2012, the arrival onto the market of a fourth mobile telephone operator led to a monthly saving per customer of 5 euros at the end of 2013, or a total of 60 euros over the entire year. But when all subscribers are considered together, however, this amounts to a total gain of over €4 billion for 2013 alone!

Moreover, competition lowers prices across the market, with competitors adjusting their prices downwards in response to the arrival of a new player. To take the same example of the mobile telephone sector, the emergence of a fourth operator led to a drop in prices on the whole market of around 11%. Over the 2012-2013 period, the price of mobile telephone bills fell by 30%, a large part of which is the result of heightened competition.

Competition causes markets to expand

When prices drop, new customers, who didn't previously buy, can access the market: competition therefore makes markets more accessible and enables companies to attract new customers. For example, since late 2015, the development of long-distance coach transport has resulted in the emergence of a very attractive alternative means of transport in terms of price compared to a train ticket for a similar journey: according to a survey by the ARAFER, the rail and road regulatory body, 17% of coach users reported that they would not have travelled if this mode of transport had not been available, which would represent around 900,000 journeys per year.

Competition leads to greater product variety

Thanks to competition, companies can also position themselves in market niches that were not previously capitalised on by competitors. It widens the range of products available: each customer, whether a consumer or producer, can therefore find products closer to what they are looking for. For example, international competition in the automotive industry enables each consumer to choose the model that best suits them from a wide range of cars, from entry-level to luxury vehicles.

Competition encourages efficiency and innovation

Competition encourages companies to always give their best, so as not to lose market shares to their competitors. Competition thus has an effect on productivity, which is the primary lever for economic growth. Beyond productivity, competition also incites companies to distinguish themselves from one another through different forms of innovation: R&D, marketing, product quality, services, etc.

Competition is not the enemy of employment

A common misconception is that competition, despite lowering prices, destroys jobs in return. That competition is ultimately a fool's game: what consumers gain is lost in employee salaries.

However, experience shows that measures restricting competition have a negative effect on employment, as seen with retail sales in France. By the same token, sectors open to competition, such as air passenger travel in Europe in the 1990s, have not shown any overall drop in employment.

These results can be explained by the fact that, by lowering prices, competition increases the size of markets. Moreover, gains in purchasing power will extend to other products and other sectors: in the air transport sector, the arrival of low-cost companies resulted in the creation of more than 100,000 regional jobs, primarily in the hotel and restaurant industry.

Competition policy: who does what? And what for?

Competition doesn't always sustain itself and certain companies may be tempted to stifle it by colluding with competitors or abusing their market power. There have to be rules: competition law – and an arbitrator: a competition authority. Competition is neither the law of jungle nor the survival of the fittest; it is the law of the most deserving. The role of a competition authority is to enforce the rules of play.

What rules of play? Who does what?

In France, competition is regulated in three ways:

- **Through the law of anticompetitive practices** that harm the economy in general. This law, most often referred to as 'competition policy', is the responsibility of the Autorité de la concurrence, the French Directorate General for Competition Policy, Consumer Affairs and Fraud Control (Direction générale de la concurrence, de la consommation et de la répression des fraudes, DGCCRF) and, where necessary, for cases of particular European interest, the European Commission. Once one of these three institutions has issued a decision sanctioning and/or substantiating an anticompetitive practice, the victims of this practice may claim damages before civil courts.

- **Through the law on restrictive competitive practices**, which is concerned with offences committed within the framework of commercial relations between companies, such as parasitic commercial practices, unfair competition or below-cost selling. Commercial courts have jurisdiction over such matters, such as the Tribunal de commerce.

- **Through criminal law** for the most serious practices, such as price-fixing agreements. Article L 420-6 of the French Commercial Code (Code de Commerce) provides for the prosecution of individuals who have "fraudulently taken a personal and decisive part in designing, organising or implementing" anticompetitive practices. Criminal courts have jurisdiction over such matters, such as the Tribunal correctionnel.

This guide is concerned with the first type of law.

What is the scope of competition policy?

Competition policy is primarily concerned with two main types of anticompetitive practice: cartels and abuses of a dominant position.

Agreements

While agreements as such are not prohibited, particularly when they contribute to progress, they may be prohibited when their sole intention is to freeze the market, raise prices or share out customers (sheets 1, 2, 3 and 5). In particular, agreements consisting in fixing prices with competitors or imposing resale prices on retailers are, in practice, always prohibited (sheets 2, 3, 5, 7 and 8). Conversely, exchanging information between competitors, while not prohibited in principle, may become anticompetitive in certain circumstances (sheet 6).

Abuse of a dominant position

Similarly, if a company finds itself in a dominant position, it must not abuse that power by seeking to exclude competitors from the market by artificial means, such as by disparaging competitors or setting up exclusivity agreements (sheets 6 and 9).

In addition, in very specific circumstances, abuse of economic dependence may also be sanctioned.

In addition to this role of cracking down on abuse, competition policy serves to control company mergers, before they are carried out, in order to ensure that the formation of the new entity does not lead to a restriction of competition.

Finally, it includes an advisory function that consists in issuing opinions to public authorities and economic stakeholders on general competition issues or conducting sector inquiries on its own initiative.

What are the instruments of competition policy?

Competition policy has various tools at its disposal to prevent and repress anticompetitive practices. Firstly, in the case of abuse of a dominant position, the commitment procedure enables companies whose practices are problematic to fully comply with competition rules without incurring any sanctions (see sheet 14).

When a company has committed a breach, the Autorité will impose a financial penalty which will be calculated according to various factors such as the size of the market, the seriousness and the duration of the practices (sheet 10). Specific circumstances to each company, may also be taken into account. A company may also choose to enter into a settlement procedure: if it does not contest the breach, the Autorité will be able to grant it a reduction of the penalty (sheet 11).

A company may even, in the case of a cartel (i.e. between competing companies on the same market) avoid all or part of the penalty if it helps to substantiate the prohibited practice in which it participated and identify the perpetrators (sheet 13).

Finally, companies can set up certain internal programmes, such as training courses, to instil a sound understanding of competition rules in their employees in order to minimise the risk of fines (sheet 15).

Incorporate competition rules into the strategy of your SME!

Know the rules

What should I do if I am a victim or an offender?

1 Agreements: what is and what isn't permitted

Marie P.'s company is about to launch a range of high-end perfumes. She hopes to establish partnerships with competitors as well as with retailers. Marie wonders what she is allowed to do in terms of agreements: what are the lines that should not be crossed? Under what conditions are agreements legal?

What Marie P. can do with her competitors

✓ Marie P. may, under certain conditions, come to an agreement with her competitors, provided that the agreement promotes innovation, product distribution or economic efficiency and does not hinder competition. As this is a case-by-case approach, Marie P. would be well advised to seek advice on the lawfulness of her plan, for example from a specialist lawyer.

✓ Marie P. can also exchange information with her competitors, as long as the information is not strategic. Care should be taken, however, to have a legal adviser approve the list and type of information exchanged!

Example

In the case involving car rental companies, the Autorité de la concurrence did not sanction exchanges between competitors because they were about public and non-strategic information.
Decision 17-D-03 of 27 February 2017

What Marie P. cannot do with her competitors

✗ Marie P. cannot set prices with her competitors: this practice is completely prohibited! Nor can she organise with them the sharing of markets or customers. Similarly, setting production quotas is prohibited, as is collectively boycotting a recent arrival onto the market.

✗ Marie P. cannot come to an agreement with her competitors in a call for tender, for instance by determining who will win the contract in advance!

✗ Marie P. cannot exchange strategic information with her competitors, in particular on future prices or future commercial strategies.

Example

In the case involving removal companies in Martinique (2014), the Autorité de la concurrence fined local removal companies for issuing bogus quotations to ensure that one of them would definitely secure the contract for the move of the customer in question.
Decision 14-D-16 of 18 November 2014

What Marie P. can do with her retailers

Given the characteristics of her product (luxury product, for example), Marie P. can select her retailers by imposing qualitative criteria: presentation of the products in the store, services offered to customers, etc. The criteria for selecting retailers must, however, be objective, transparent and applied to all in a uniform way. Marie P. may also set up a network of exclusive retailers or grant a retailer an exclusive area.

What Marie P. cannot do with her retailers

While Marie P. can advise resale prices, she cannot impose them on her retailers, if they are independent. Imposing resale prices is always prohibited, regardless of the size of the market or the company!

As part of its selective distribution network, Marie P. also cannot prohibit her authorised retailers from selling her perfumes online or reserve online sales for her own benefit.

“Reach an agreement? Why not, but never at the expense of... customers!”

Check out the video at:
autoritedelaconcurrence.fr

2 Cartels are prohibited

Guillaume H. runs a driving school. He was contacted by his two local competitors to jointly set the price of driving lesson packages. This practice constitutes a price-fixing agreement and is strictly prohibited!

What is a cartel?

The term 'cartel' does not only refer to drug trafficking! It is also a term used by competition specialists to refer to an illegal, usually secret, arrangement between competitors whose sole purpose is to eliminate competition in the market: companies behave as if they were a single entity. The cartel may have the aim of raising prices (an 'offensive' cartel) or of preventing them from falling following the arrival of a new competitor (a 'defensive' cartel).

In the case of Guillaume H., the aim of a cartel would be to set the price of driving lesson packages with competitors at a higher level than that which would result from fair competition.

Why are cartels always prohibited?

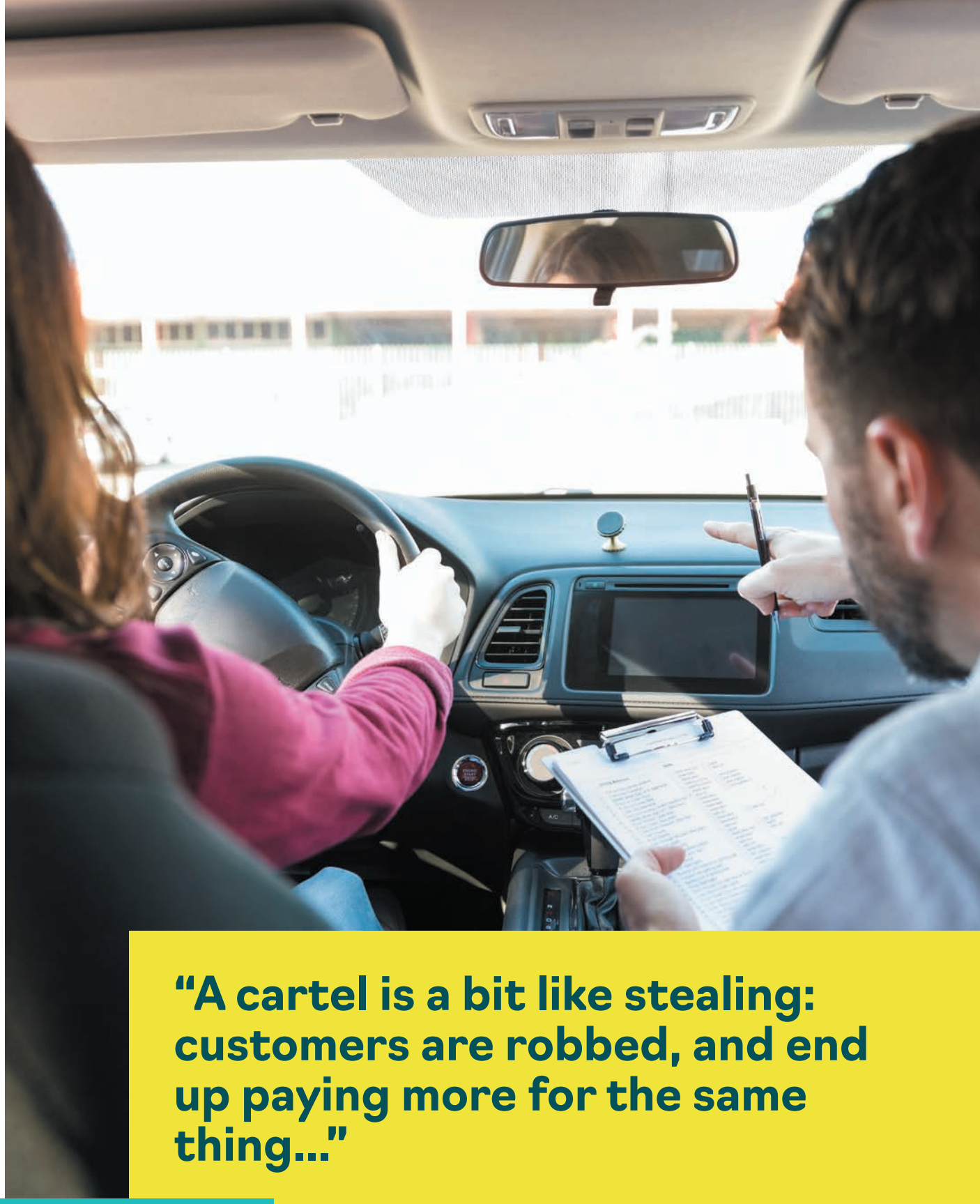
Cartels artificially raise prices – increases of up to 20% are possible in some cases and last over long periods (10 to 20 years) – without giving customers anything in return with regard to product quality, for example; there is therefore no economic justification for them. They are often formed in intermediate product markets: in this case, the first victims are other companies, whose competitiveness is reduced.

Moreover, cartels freeze the market: companies have less incentive to innovate and outdo themselves, since they are no longer subject to the stimulus of competition.

What forms can cartels take?

Cartels may notably consist in:

- setting sales prices jointly, whether directly or indirectly: target price, profit margins, maximum discount level, payment terms, delivery costs, etc.;
- sharing out markets in terms of geographic area or customer base. For example, by mutual agreement with his two competitors, Guillaume H.'s company would be granted exclusivity within a radius of 5 km around his driving school;
- jointly determining production quotas: each cartel member is allocated a certain maximum quantity to produce;
- jointly boycotting a new arrival, including putting pressure on suppliers so that they refuse to supply it.



“A cartel is a bit like stealing: customers are robbed, and end up paying more for the same thing...”

3 No excuses for cartels!

Raphaël D.'s company is being investigated by the Autorité de la concurrence for participating in a price-fixing agreement with its competitors. Here are some examples of inadmissible arguments.

"We only formed a local cartel"

It does not matter whether or not the cartel is local: competition law applies to all companies and markets, regardless of their size. If the Autorité de la concurrence were to only sanction offences of a national scale, local cartels would develop to the detriment of all local stakeholders, both businesses and consumers.

Example

In 2013, the Autorité sanctioned companies for distorting competition in the local contract to reconstruct watchtowers at Perpignan prison.
Decision 13-D-09 of 17 April 2013.

"During meetings, I stayed at the back of the room and didn't say anything"
"I am not familiar with competition law and therefore couldn't have known that the practices were illegal"
"I responded to an invitation from my professional body"

Raphaël D.'s company's participation, no matter how passive, in an anticompetitive meeting is enough to prove its association with the cartel – regardless of whether or not it took an active part in setting prices during the meeting. The company's silence implies its acceptance! It is also irrelevant that Raphael D.'s company attended only one meeting to demonstrate its adherence to the anticompetitive agreement.

Warning! An anticompetitive agreement can take place in a framework that may appear safe, such as a meeting of a body representative of the profession or a trade fair. The identity of the organiser or the legitimate stated purpose of the meeting will not allow Raphaël D.'s company to be released from its responsibility when anticompetitive exchanges have taken place during this meeting.

In order to avoid any liability, Raphaël D.'s company must publicly distance itself from these actions either by leaving the meeting and requesting that this decision to leave be precisely (exact time) recorded in the meeting report, or by sending a letter to the other participants explicitly stating that it does not subscribe to the content of the discussions - on the grounds that they are in conflict with competition law - and that he will not attend future meetings.

Example

In 2015, the Autorité sanctioned certain companies for passively attending anticompetitive meetings in the parcel delivery sector.
Decision 15-D-19 of 15 December 2015.

"My supplier forced me to participate in the cartel"

The fact that a company used coercive practices on Raphaël D.'s company does not exonerate it, unless it is proven, that the coercion was 'irresistible'.

Thus, it is not enough to argue that a supplier forced Raphael into the agreement if he readily accepted the invitation.

"As the head of the company, I was not aware of the agreement. It was the isolated behaviour of one of my employees"

This argument is not generally admissible, since it is presumed that the conduct of an employee commits his or her company. It is therefore up to the company to ensure that its employees fully comply with competition law in the exercise of their duties.

"I came to an arrangement with my competitors but the sector was in crisis"

Under no circumstances can an economic crisis justify the implementation of an anticompetitive agreement. This is because anticompetitive agreements do not in any way resolve the structural problems of a sector. They do not address the real problems and only delay the modifications required.

The financial difficulties encountered by Raphaël D.'s company may, nonetheless, be taken into account when it comes to defining the sanction.

Example

In the case involving parcel delivery companies, the Autorité did not accept the argument that the companies made a price-fixing agreement because of the difficulties in the sector. This is because, instead of seeking to reduce overcapacity – a structural problem in the sector – the companies agreed to raise prices.
Decision 15-D-19 of 15 December 2015.

"There are always reasons to form a cartel. Too bad that they are always... bad."

Check out the video at:
autoritedelaconcurrence.fr

4 Competition inspections: how to conduct oneself

Nadia U.'s company underwent a 'raid' (also known as a 'surprise inspection') at its premises, following suspicions by the Autorité de la concurrence of possible price-fixing practices. Nadia U. asks herself what her rights and obligations are during this operation.

UNDERSTAND AND KNOW THE RULES

What is a surprise inspection and how is it carried out?

A surprise inspection requires a warrant to be issued by a judge and is carried out in the presence of a judicial police officer.

The agents from the Investigation Service of the Autorité will present themselves at the reception of Nadia U.'s company along with the judicial police officer.

As soon as they arrive, the agents will notify Nadia U. of the judge's warrant, which mentions the list of companies targeted and the suspicions concerning them. The inspection will then begin.

The agents are authorised to access all of the premises, search offices, place seals, seize original documents (diaries, notebooks, etc.) and any computer media (computer documents and files), both professional and personal. They may also ask Nadia U. questions to gather explanations relevant to the investigation.

The agents will write up a report on the spot describing how the inspection unfolded, to which they will attach an inventory of the documents seized.

N.B.: The judge may authorise inspections on any premises, even private property, provided that the documents or evidence sought are likely to be kept there!

What are Nadia U.'s principal obligations?

Nadia U. ne doit pas :
✕ oppose an investigative measure with judicial authorisation;
✕ prevent agents from accessing the company's premises;
✕ stall agents on the grounds that a lawyer has not yet arrived, for example;
✕ refuse to provide agents with the data (computer files, passwords, etc.) that they have requested;
✕ break seals;
✕ oppose the seizure of documents or computer files.
✕ alter the integrity of the electronic files content (for example, by deleting e-mails) after the arrival of investigators

Nadia U. must appoint someone to represent the occupant of the premises if she wishes to be absent.

N.B.: If Nadia U. opposes the operation in any way, she risks sanctions (criminal sanctions and/or administrative financial penalties for perverting the course of justice).

What are Nadia U.'s principal rights?

During the inspection, Nadia U. has the right:
✓ to consult the legal advisor (lawyer) of her choice;
✓ to refer any serious challenge regarding the conduct of operations to the judicial police officer.
✓ to report the existence of content relating to the private life of company employees or protected by the lawyer-client privilege and to request their protection

After the inspection, she can:
✓ if necessary, contest the lawfulness of the order and/or the conduct of the operations before the First President of the Court of Appeal within its jurisdiction.

N.B.: Appeals are not suspensive. The Autorité will therefore keep the evidence.

“When it comes to inspections, you have rights... but you also have obligations.”

5

Calls for tender: the lines that must not be crossed!

Florent L. runs a small plumbing business. He hopes to apply for a call for tender for the construction of a nursery school and plans to contact his competitors, but wants to know to what extent this is authorised under antitrust law.

UNDERSTAND AND KNOW THE RULES

Why does a project owner use a call for tender?

In a call for tender, whether public or private, a project owner selects a company following a competitive bidding process. The aim of this procedure, which is compulsory for projects over a certain value in public calls for tender, is to encourage companies to make the most competitive offers possible, while taking into account the qualitative constraints imposed by the specifications. The project owner selects the most attractive offer.

What Florent L. can do with his competitors

Florent L. may suggest forming a joint venture with other companies in order to bid on the call for tender:

✓ if the skills of each of the bidding companies are complementary and necessary to submit a complete bid. For instance, Florent L. can go into partnership with a joinery and construction company;

✓ if Florent L.'s company is too small to compete on its own.

What Florent L. cannot do with his competitors

He may not consult with his competitors in advance with the sole purpose of distorting the outcome of a call for tender. This means that Florent L. cannot discuss the identity of the tenderers, the amount of the bids or the distribution of lots with his competitors.

In particular, competitors cannot decide in advance which of them will win the contract. This practice, which is often sanctioned by the Autorité de la concurrence, consists of sharing out lots between competitors in advance. It often takes the form of bogus bids, known as 'cover bids', in order to give the client the impression that there is a real competitive bidding process.

Example

In the case involving the reconstruction of watchtowers at Perpignan prison (2013), the Autorité de la concurrence sanctioned several companies in the group Eiffage and the company Vilmor Construction for exchanging information before submitting their response to the call for tender. Vilmor Construction had submitted a cover bid, in order to make the offer by Eiffage Construction Roussillon seem more attractive. In exchange, Eiffage Construction Roussillon had agreed to pay 'extra rent' for the lease of land belonging to a property management company in which the head of Vilmor Construction was one of the main partners.
Decision 13-D-09 of 17 April 2013.

“Sharing out the lots in a call for tender is like rigging a match by choosing the winner in advance!”

Check out the video at:
autoritedelaconcurrence.fr

6 Be careful what information you share with competitors!

Jean T. runs a hotel and is considering contacting his local competitors to plan for the summer season. He would like to know what kind of information he can exchange with them without violating antitrust law.

UNDERSTAND AND KNOW THE RULES

How can sharing information distort competition?

Competition assumes that each company in the market determines its own behaviour independently, without knowing the conduct of its competitors with certainty. An exchange of information may become illegal if it artificially increases market transparency.

What Jean T. can and cannot do

Jean T. may exchange public information with his competitors, provided that it is immediately and comprehensively available to all. He may also provide aggregated information (such as averages for the whole industry), as long as it is not possible to reconstitute the data for individual companies.

Example

In the parcel delivery case (2015), the Autorité de la concurrence sanctioned exchanges between competitors regarding future price increases. The companies were not able to obtain this information on the market in a reliable, immediate and comprehensive manner; the arrangement therefore increased market transparency artificially.
Decision 15-D-19 of 15 December 2015.

If Jean T. exchanges historical data that is not public and is strategic with his competitors, this conduct may, in some cases, be considered against antitrust law. It is essential that Jean T. consults a legal adviser!

Jean T. would like to exchange future and strategic data with his competitors (e.g. future price lists): this practice is prohibited!

Jean T. cannot hide behind his trade association

Jean T. believes that the practice of sharing information is lawful, on the grounds that his trade association has taken part in it, for example by distributing price lists (even if these are only indicative).

However, the participation of a trade association does not exonerate companies from their involvement in the agreement, even if the trade association can also be prosecuted. Thus, the members of a professional association must ensure that it does not step out of its legitimate role of fostering good practices and defending the interests of the profession.

If the professional association engages in anticompetitive practices, it is the responsibility of each member to publicly distance themselves by leaving the meeting and requesting that their decision to leave be precisely recorded (the exact time) in the minutes of the meeting.

“Beware – talking to competitors is not inconsequential.”

7

Do not impose resale prices!

Claire C., who runs a small bicycle-manufacturing company, decides to impose an end-consumer resale price on her independent retailers. This practice is prohibited.

UNDERSTAND AND KNOW THE RULES

Why let a retailer set its prices freely?

In a market economy, the freedom to set prices encourages the most efficient or innovative retailers to win customers by lowering resale prices.

It is prohibited for a supplier to impose a resale price on its retailers.

What Claire C. can do

Advising retailers of a price or setting a maximum price, above which the retailers commit to not sell a product, is not prohibited, provided that the practice does not conceal price-fixing.

What Claire C. cannot do

As a supplier, Claire C.:

✕ may not use minimum, recommended, 'advised' or 'indicative' resale prices that are, in fact, mandatory, for example by monitoring and/or sanctioning physical or online retailers who do not apply these prices;

✕ may not contractually set resale prices.

Retailers are liable if they agree to apply the prices imposed by Claire C.

There are a few exceptions:

✓ book sales. Publishers may impose a fixed resale price on booksellers;

✓ agency/commissioning contracts are not covered by this prohibition.

Example

For several years, the French leader in the pétanque ball market implemented a pricing policy consisting in imposing end-customer resale prices on some of its retailers. These resellers (large specialist retailers, independent traders and websites) were also threatened with commercial reprisals if they did not comply with Obut's catalogue prices.

The Autorité de la concurrence handed out a fine of €320,000 for these practices.
Decision 17-D-02 of 10 February 2017.

“Imposing a resale price on your retailer is wrongfully deciding for them.”

Check out the video at:
autoritedelaconcurrence.fr

8 Do not restrict online sales!

Sophie J. runs a small business that manufactures high-end glasses frames. She has set up a selective distribution network of physical shops. One of her authorised retailers would like to open an online shop. Sophie J. wants to know what conditions she can impose on them without contravening competition law.

UNDERSTAND AND KNOW THE RULES

Why are online sales an opportunity for the economy?

Today, e-commerce is a key product distribution channel, whether through direct sales or platforms.

From the customer's point of view, e-commerce offers many advantages: it is quick and easy to order, open 7 days a week, proposes broader product ranges, opens up rural areas and facilitates price comparisons, etc.

From the company's point of view, e-commerce makes it possible to address the end customer directly, collect valuable customer data and expand its customer base beyond its usual catchment area.

What Sophie J. can do

✓ impose qualitative criteria equivalent to those used for the physical shops in her network, in particular with regard to the presentation of the website or online assistance;
✓ require a minimum turnover to be achieved at physical points of sale;
✓ refuse online sales by retailers that only operate on the Internet ('pure players');
✓ refuse Internet sales, citing objective and proportionate grounds (e.g. respecting the law in the case of firearms, or a public health requirement).

What Sophie J. cannot do

✗ prevent an authorised retailer from opening an online shop;
✗ charge different wholesale prices depending on the distribution channel;
✗ reserve online sales for her own benefit;
✗ prevent passive sales, i.e. sales to customers who have not been solicited (e.g. by obliging a customer based in France who has gone onto a website located abroad to place an order on the French site);
✗ limit the volume of sales on the Internet, compared to sales in physical stores;
✗ impose online resale prices.

“Preventing one’s authorised retailers from selling on the Internet is strictly prohibited.”

9 Don't abuse your dominant position!

Robert M. manages an SME that sells ready-mixed concrete and has a market share of 85% in his catchment area. He wonders whether he can take advantage of his position, for example by requiring that his customers sign exclusive supply agreements. Robert M. must be careful: certain practices which are in principle lawful can become illegal when carried out by a company in a dominant position.

UNDERSTAND AND KNOW THE RULES

What is a dominant position?

Robert M.'s company can be considered to be in a dominant position when its large market share enables it to behave independently, without concern for its competitors' or customers' reactions.

The dominant position of Robert M.'s company is not unlawful as such; it may be because its products or services are inherently superior. But it does give Robert M.'s company a special responsibility, which it must take care not to abuse.

Robert M. must ensure that he does not abuse his dominant position, in particular by:

✕ combining the sale of several products: he cannot use his dominant position in the ready-mixed concrete market to impose the sale of another product;

✕ imposing exclusive supply clauses on his customers;

✕ setting up a system of non-quantitative discounts to encourage customers to remain loyal to his company;

✕ disparaging a competitor: Robert M. cannot discredit a competitor by spreading false information;

✕ applying predatory pricing: Robert M. cannot slash prices – making a loss – with the sole aim of ousting a competitor, and then raise his prices.

Example

In the case involving the drug Subutex (2013), the Autorité de la concurrence fined the pharmaceutical company Shering-Plough, dominant in its market, for discrediting the generic drug of its competitor Arrow. Decision 13-D-21 of 18 December 2013.

“You are in a dominant position, well done! But don’t abuse it...”

10

In the event of a breach... expect penalties!

**Sarah S. runs a small business that produces furniture. She has come to an agreement with her retailers to impose a resale price on them.
The Autorité has deemed the practice anticompetitive, and will therefore impose a financial penalty on Sarah S.'s business. Sarah S. would like to know how penalties are determined.**

UNDERSTAND AND KNOW THE RULES

Why financial penalties?

The specific role of financial penalties is to punish the perpetrators of anticompetitive practices as well as to dissuade all economic players from engaging in such practices. The objective of the financial penalties imposed by the Autorité is therefore twofold: repressive and dissuasive.

How are penalties determined in France?

In France, financial penalties are determined based on the size of the market affected, the seriousness and duration of the practice, the impact of practices on the market, any extenuating or aggravating circumstances and the company's individual situation. In any case, the maximum penalty is up to 10% of global turnover before tax.

The penalty amount also depends on the type of practice. In general, cartels are considered to be the most serious of practices compared to vertical agreements or abuses of a dominant position.

Other factors may be taken into account to reduce the penalty:

- through the leniency procedure, companies can obtain a partial or total reduction of their penalty for revealing the existence of practices or providing decisive information to the Autorité;
- the settlement procedure, whereby a company refrains from contesting the practices of which it is accused and is able to negotiate with the Autorité a range within which the penalty will be set.

To what extent is the status of SME taken into account when determining the penalty?

While there are no specific provisions for SMEs, penalties are always proportionate to the value of the company's sales. In addition, SMEs are eligible for penalty reductions, like all other companies, if they are in serious financial difficulties. It is up to the company to prove that it is in difficulty.

Example

In the case involving wallpaper (2014), the company Zambaiti received a 78% reduction in penalties due to its financial difficulties.
Decision 14-D-20 of 22 December 2014.

“Engaging in anticompetitive practices is taking a huge risk!”

11 Are you in breach? Consider settlement!

Marion F. runs an on-demand photo printing company on the Internet. She meets regularly with her main competitors to coordinate rates. Marion F. received a 'statement of objections' from the Autorité de la concurrence, alleging that her company had agreed prices with its competitors. The facts and evidence presented in the statement are difficult to dispute. What can Marion F. do?

UNDERSTAND AND KNOW THE RULES

What is settlement?

To reduce her risk, Marion F. may decide to apply for the settlement procedure. In doing so, she undertakes not to contest the content of the statement of objections and negotiates with the investigation services a range within which the penalty will be set, which might be well below the fine normally incurred. This is a financial settlement between the company and the Autorité de la concurrence. The case will be judged by the Board of the Autorité, which will issue a fine within the stated range.

What are the advantages of this procedure for Marion F.'s company?

If the chances of successfully contesting the statement of objections are very slim and the risk of penalty too great, Marion F. has every incentive to seek a settlement to:

- very quickly know the maximum penalty amount that could be imposed and set this amount aside well in advance;
- receive, in principle, a lower fine than that normally incurred;
- benefit from a simpler procedure before the Autorité.

Example

In the pétanque ball case, the company Obut applied for settlement and therefore waived its right to contest the facts. The fine imposed was €320,000, which is less than that normally incurred.
Decision 17-D-02 of 10 February 2017.

“Give-and-take: not contesting the facts guarantees a lower penalty.”

12 In the event of a local breach, an amicable settlement is possible with the DGCCRF.

Kylian A. runs a building inspection company. He and three other inspectors have agreed to jointly fix prices and to share customers geographically across the Hérault département. The DGCCRF (French Directorate General for Competition Policy, Consumer Affairs and Fraud Control) discovered the practice and has proposed a settlement. Kylian A. wonders whether he should accept.

UNDERSTAND AND KNOW THE RULES

What does this measure entail?

When the DGCCRF discovers an anticompetitive practice locally that does not affect the country as a whole, it may propose a negotiated solution to the perpetrators. In this case, the case is closed if the companies accept the proposals presented to them. This consists in putting an end to the practices identified and, where necessary, paying a financial settlement for a company of up to €150,000 within the limits of 5% of its turnover.

An injunction is notified when a practice must cease or change. A financial settlement is made according to the seriousness of the breach and the individual situation of the companies in question.

The measure is reserved for microbusinesses, SMEs (with an annual turnover of less than €50 million) and their professional associations at local level (for the département or region).

What the advantages?

- It rapidly puts an end to the offences committed;
- It enables offending companies that accept a negotiated solution to benefit from a financial settlement;
- If necessary, it provides companies with the support of local DGCCRF services, which can provide them with advice to correctly implement the injunctions.

Example

In 2017, the DGCCRF proposed a settlement to an economic interest group of veterinarians that helped put an end to a boycott that was harming free competition in the market for the distribution of non-prescription veterinary products to livestock farmers in Ille-et-Vilaine, Mayenne and Morbihan départements.

What happens if negotiations fail?

The company may refuse the proposal. The law then requires the DGCCRF to bring litigation proceedings before the Autorité de la concurrence. In this case, the company may incur a maximum fine of up to 10% of its turnover, without any cap in terms of absolute amount. In addition, the Autorité de la concurrence may force the company to publish an extract of its decision in the local press.

Useful information

If you believe that you (a company or individual) have been a victim of anticompetitive practices, you can file a complaint with the Departmental Directorate for Public Health and Safety (Direction départementale de protection de la population, DDPP) or the nearest Regional Directorate for Business, Competition Policy, Consumer Affairs, Labour and Employment (Direction régionale des entreprises, de la concurrence, de la consommation, du travail et de l'emploi, DIRECCTE). You can also send a report the DGCCRF's dedicated inbox: "paclocales@dgccrf.finances.gouv.fr".

“Mediation is usually better than a lawsuit!”

13 Above all, don't wait... ask for leniency!

Antoine G. runs a flower delivery company. He regularly sees his competitors to share with them the future price increases that each company intends to impose on its customers. He wants to end his involvement in the illegal cartel and disclose its existence to the Autorité de la concurrence.

UNDERSTAND AND KNOW THE RULES

If he reports the practices, Antoine G. can benefit from the leniency procedure

Through this procedure, Antoine G.'s company can benefit from a total or partial exemption from financial penalties if it helps to substantiate the prohibited practice and identify the perpetrators, by providing the Autorité with information on the cartel in which it is participating.

If he does not act, Antoine G. runs the risk of falling behind his competitors

To say nothing and continue the agreement is to risk being 'double-crossed' by a member of the cartel reporting the practice first. In that case, Antoine G.'s company would have to bear the consequences, particularly in terms of penalties.

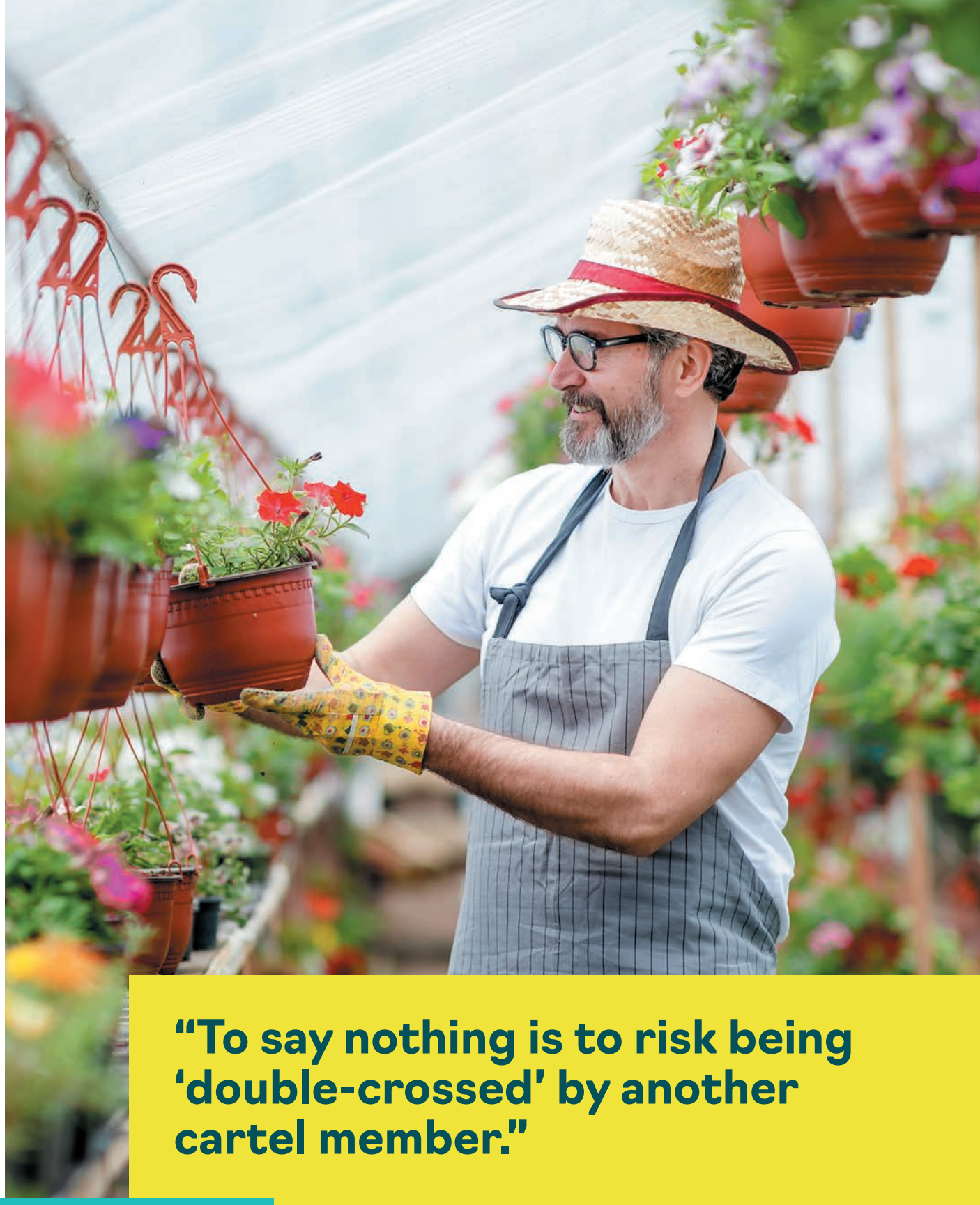
What kind of leniency is Antoine G.'s company entitled to?

If Antoine is the first to reveal the cartel practice to the Autorité and if the Autorité did not previously have sufficient evidence to prove the practice, his company would be eligible for a total exemption from the fine that it would otherwise have incurred.

If Antoine is not the first to reveal the practice to the Autorité, his company may nonetheless benefit from a penalty reduction of up to 50% depending on the order in which the Autorité was contacted and the added value of the additional information he provides.

Example

In the case of the dairy industry cartel, Yoplait was granted full exemption from penalties as the first applicant for leniency. The company Senagral, the second to apply for leniency, was granted a 35% reduction in penalties.
Decision 15-D-03 of 11 March 2015.



“To say nothing is to risk being ‘double-crossed’ by another cartel member.”

Check out the video at:
autoritedelaconcurrence.fr

14

Change your behaviour: the role of commitments

Jules R. runs a small business that distributes agricultural equipment manufactured by the company Agrico, leader in the sector. His contracts impose exclusive supply clauses on him from Agrico. Jules R. is asking himself whether this practice is lawful and decides to refer the matter to the Autorité de la concurrence. Informed of this complaint, Agrico proposes to the Autorité to modify its future behaviour by making 'commitments'.

UNDERSTAND AND KNOW THE RULES

What is the point of the commitments for Agrico?

The Autorité de la concurrence considers that the practices implemented by Agrico are of concern, since Agrico represents 80% of the market. In response to these competition concerns, Agrico proposes to end exclusivity clauses and practices. The Autorité has decided to accept these commitments, after testing them on market stakeholders, insofar as they durably and effectively resolve the competition concerns. For its part, Agrico avoids a possible financial penalty in return for strict compliance with its commitments. The use of commitments is mainly adapted to practices that may result in the abuse of a dominant position.
Once accepted by the Autorité, the commitments become binding and, if Agrico fails to comply with them, it is liable to sanctions.

Feel free to participate in the market test!

When Agrico proposes commitments to the Autorité, these commitments are subject to a market test. The test aims to improve the quality and effectiveness of the commitments, taking into account the reality of the market and the practices of market players.

In practice, this means that Agrico's proposal is published on the Autorité de la concurrence website. Any interested third parties are therefore able to express their views and criticisms: lack of clarity in the drafting of commitments, inadequate deadlines, ineffective commitments, etc. Answers may be sent simply by writing or sending an e-mail to the Autorité de la concurrence.

Exemple

In the case involving espresso coffee pod machines (2014), the commitments proposed by Nespresso were significantly strengthened following the market test and the requests of the Autorité. The measures taken remove the technical, legal and commercial barriers to the arrival onto the market and development of other manufacturers producing pods that are compatible with Nespresso coffee machines.

They are, however, proportionate so as not to hamper Nespresso's innovation while preventing competition in the market from weakening. The Autorité has accepted and made these commitments binding and has decided to close the proceedings brought before it. It ensures that Nespresso strictly complies with them.
Decision 14-D-09 of 4 September 2014.

“To ask for commitments is to remain in control of one's destiny by proposing a solution.”

15 Prevent breaches by raising awareness among your employees

**Alice V. runs a family-owned coach transport company.
Her sales team is often required to respond to local calls for tender. She wants to be sure that her teams are complying with competition law, particularly with regard to sharing information with competitors.
To do so, Alice V. wants to set up a compliance programme consisting in instilling a sound understanding of competition rules.**

UNDERSTAND AND KNOW THE RULES

What is a compliance programme?

Compliance programmes comprise measures enabling companies to ensure that regulations are adhered to, detect any breaches and take the necessary steps to put an end to them and prevent them from recurring.

Compliance programmes may concern competition rules as well as other fields of law, such as those relating to corruption, stock-exchange and financial legislation, the safety of persons and goods, health, and environmental protection.

What are the main features of a compliance programme?

To be effective, Alice V.'s company compliance programme must have several features, including:

- ✓ a clear and public commitment from Alice V.,
- ✓ measures to train and inform employees,
- ✓ an internal audit system and a reporting system.

Prevention, a necessary step for companies

The Autorité encourages companies to set up such programmes and to provide the necessary resources to ensure that they are successful. It believes that their development and implementation should be incorporated into the day-to-day running of companies. While, for Alice, setting up a compliance programme is an investment, it will pay off in the long run because her company will have taken all possible precautions to not break the rules.

“Compliance initiatives: prevention is better than cure!”

16

What can you do if you are a victim of an illegal agreement?

Louis B. runs a company that sells shoes online and uses delivery companies to send his products to customers. Noticing a general rise in the price of delivery services, he suspects that the delivery companies may have fixed prices among themselves.

UNDERSTAND AND KNOW THE RULES

Where competing companies set prices among themselves with the sole aim of artificially restricting competition in the market, the practice constitutes an offence under antitrust law.

Referring to the DDPP or the Autorité de la concurrence

In order to substantiate the practices, Louis B. may refer the matter to the Departmental Directorate for Public Health and Safety (DDPP), the DGCCRF or the Autorité de la concurrence, supporting his request with evidence that could trigger investigations. The case will be assigned to one of the two institutions at a later date, depending on the scope of the practices.

A whistleblowing system: a new obligation for certain SMEs

It should be noted that, since 1 January 2018, under the Sapin 2 law, companies with at least 50 employees are required to provide their employees with a reporting system, in particular, of any serious violation and manifesto of the law thus including infringements of competition law.

The procedure for reporting to the Autorité de la concurrence

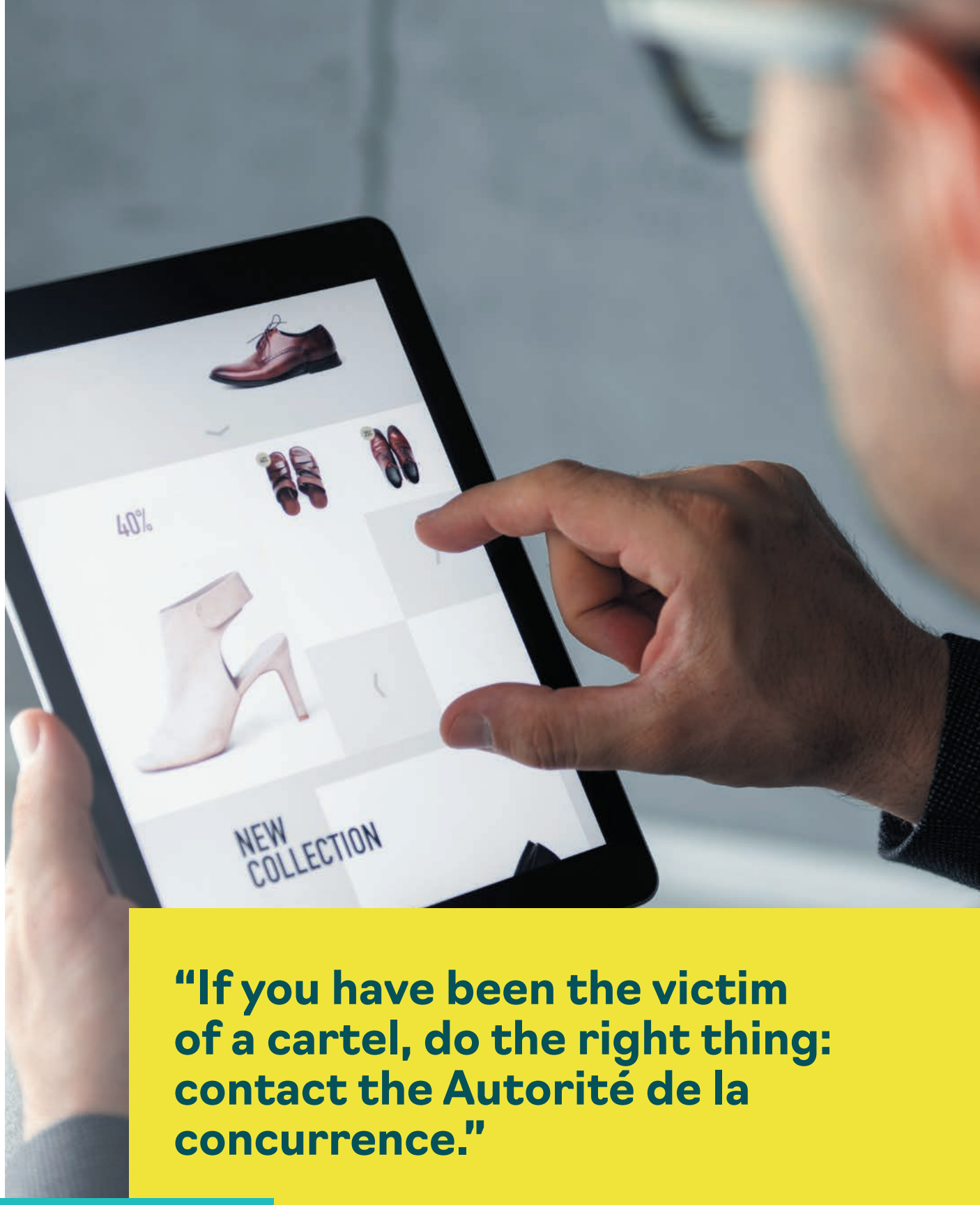
Referrals to the Autorité cannot be anonymous. The name of Louis B.'s company will be known by the members of the alleged cartel. However, if Louis B. wishes to remain anonymous, particularly for fear of reprisals, he can simply 'report' to the Autorité, which may decide to launch investigations on its own initiative.

Possible action for damages at a later time

The penalty imposed on the company, if any, will go to the Public Treasury and will not in any way compensate Louis B.'s company.

If Louis B. intends to claim damages, he must refer the matter to the Commercial Court immediately or following the Autorité's decision. Once the Autorité's decision has become final (all appeals against this decision have been unsuccessful), it becomes evidence that the practices took place.

Louis B. can file a report using the form provided for this purpose on the Autorité de la concurrence website.



“If you have been the victim of a cartel, do the right thing: contact the Autorité de la concurrence.”

17 What to do if you are a victim of abuse of a dominant position?

Emma O. runs an SME that manufactures generic drugs. It is about to launch its latest generic equivalent of Prosal, for which the patent has just expired. At the same time, the patent holder is spreading evidently false information on the intrinsic properties of the generic drug to pharmacists. What can Emma O. do?

UNDERSTAND AND KNOW THE RULES

If the patent holder is in a dominant position, this disparaging practice is likely to constitute abuse of a dominant position. It may also amount to unfair commercial practice.

In order to substantiate the practices, Emma O. may refer the matter to the Departmental Directorate for Public Health and Safety (DDPP), the DGCCRF or the Autorité de la concurrence, supporting her request with pieces of evidence that could trigger investigations.

The complaint to the Autorité de la concurrence

When it referred to the Autorité, Emma O. may request interim measures (known as 'urgent interim measures') if the practices reported are likely to seriously and immediately harm the interests of her company. For example, if granted by the Autorité, such measures may consist in ordering the perpetrator to suspend the practices while the investigation and the decision run their course.

Referring to the Autorité de la concurrence

Referrals to the Autorité cannot be anonymous. The name of Emma O.'s company will be known by the other party. However, if Emma O. wishes to remain anonymous, particularly for fear of reprisals, she can simply 'report' to the Autorité, via the form available on its website, which may decide to initiate investigations of its own accord.

The penalty imposed on the company, if there is one, will go to the Public Treasury and will not in any way compensate Emma O.'s company. If she intends to claim damages, Emma O. must refer the matter to the Commercial Court or the District Court immediately or following the Autorité's decision. Once the Autorité's decision has become final (all appeals against this decision have been unsuccessful), it becomes evidence that the practices took place.

Emma O. can file a report using the form provided for this purpose on the Autorité de la concurrence website.

Example

In the case involving solar panels (2013), the company Solaire Direct referred practices employed by EDF to the Autorité de la concurrence and requested that urgent interim measures be implemented. Consequently, the Autorité quickly ordered EDF to cease the practices that consisted in making means available to its subsidiary EDF ENR, a supplier of solar panels, that could not be reproduced by competitors such as Solaire Direct.

This ensured that the company Solaire Direct survived. Finally, the Autorité imposed a financial penalty on EDF for abuse of a dominant position.
Decision 13-D-04 of 14 February 2013.

“If your company has been the victim of abuse of a dominant position, do the right thing: contact the Autorité.”

Find the guide online

Autorité de la concurrence

Competition Guide for SMEs

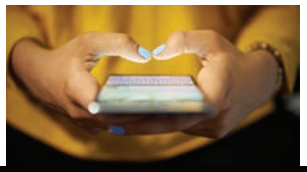
A tool to better understand and act

« The purpose is clear: Helping SMEs to integrate rules into their strategy »

Emmanuel Combe
Vice President of the Autorité de la concurrence

Know the rules

What should I do if I am a victim or an offender?



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Readers are invited to refer to the decisions and to the associated jurisprudence to accurately assess the context and scope of the rules that are presented.

This guide is intended to inform the public and to promote the prevention of infringement to competition law.



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