

The toys case : RPM in the toys
sector.

Summary of the case

- **Downraids in the premises of Carrefour, Chicco, Lego, Megablocks, Ravensburger, and Goliath (all of them fined but Ravensburger + Hasbro, Maxi Toys and JouéClub)**
 - **Inquiry : hearings with largest grocery retailers and specialist toys distributors (esp. Maxi Toys) and other toys suppliers**
 - *evidence of retail price maintenance during the Christmas season for 5 toys suppliers (Chicco, Goliath, Hasbro, Lego and Megablocks) in 2002 and/or 2003 (plus 2001 for Lego)*
 - *Major role played in RPM by Carrefour ; active participation of JouéClub and Maxitoys in 2002 and/or 2003 (plus 2001 for Carrefour)*
- €37 M fines (27,4 for Carrefour ; 5,1 for Hasbro)**

Background : french regulation of commercial practices between suppliers and retailers

Perverse effects of the regulation (per se restrictive practices prohibited by the code of commerce) in force from 1996 until august 2008

- Price **discrimination** is prohibited unless justified = wholesale prices must be equal for all retailers
- Below invoice pricing prohibited and only **definitely earned rebates** can be listed on invoice and be deduced from wholesale price

Background : regulation of commercial practices between suppliers and retailers

Consequences :

- deductible rebates dwindle : **retail price = wholesale price = legal minimum**
- Retailers margins are exclusively « backward » non deductible
 - conditional rebates not deductible (not definitely earned at the time the sale)
 - commercial cooperation services from retailers to suppliers to promote the sales of their products (publicity, point of sale advertising) : supposed to be detachable from the sale itself
- **up to 35%** of wholesale prices gets back to retailers (artificial : falsely conditional or non existent or disproportional services)
- prices cannot get down : increase
- prices are easy to monitor : **RPM**

Example : prices in the toys sector

Christmas season : toys are leaders products sold at « margin zero » =
wholesale price = legal minimum by large grocery retailers

→ all toys in publicities at legal minimum even for specialists
eventhough they have deductible rebates and so lower legal
minimum

→ except for Lego toys : in 2002, tries to lower false sevicees, grants
deductible reabates and monitor retail prices different from
wholesale prices = very difficult – back to « normal » in 2003

During the left of the year prices are higher than legal minimum (with
range of products sold by large grocery retailers much more narrow
than for Christmas and than specialists)

Carrefour's major role

- For each Christmas season, Carrefour launches a nationwide advertising campaign for Christmas toys « **Carrefour reimburses 10 times the difference** »
- Each time a client comes for reimbursement
 - ➔ Carrefour calls the supplier to ask him to « *see to it* » that the « *problem is solved* » (i. e. the so called « *error* » in the displayed price is « *corrected* ») by the concerned retailer
 - ➔ or negotiates a wholesale price cut
 - ➔ or takes the toy off the shelf
- Many mails exchanged between Carrefour and suppliers and suppliers and other retailers (always vertical, never horizontal contacts) : Carrefour asks for an action and is informed of the outcome

Maxitoys role

- Plays the telltale role or the maverick : buys toys in Belgium, gets lower prices, does not have the same legal minimum price as others, sells toys at lower prices
- Is very often called to order by the suppliers informed by Carrefour or by others (JouéClub) : *we called Goliath to inform them that they were some who did not respect the « professional code of ethics »*
- Maxitoys admits : *« I was selling a toy at €15 instead of €17,77. If I refused to publish an erratum the market was disrupted. If I did, I raised my margins without disrupting the market »*

The CC analysis for RPM

- RPM is **per se prohibited** by national and european competition law « *retail prices must be freely determined by unharmed competition* »
- If prices of a given product are all in line can be explained by just a **parallel reaction** of retailers to advised prices by suppliers or a **horizontal agreement** between retailers or vertical agreements between the supplier and most of its retailers

How to make the difference, to prove vertical agreement :

- either the resaler contract provides for price maintenance
- or a body of evidence, serious, precise and converging :
 - The retailers have knowledge of « advised retail prices »
 - Measures are taken to ensure that deviating prices are corrected
 - A significant proportion of retailers set prices at that level

Council's decision

- communication on retail prices : advised retail prices are not per se prohibited but allow to let know about the target. In the case, 3 ways of communicating about the « right » retail price :
 - No deductible rebates = wholesale price = legal minimum = retail price (large grocery retailers)
 - Deductibles rebates but it is told to retailers that they must not be deduced (some specialists)
 - Lists of advised prices (for some suppliers)
- First sifting** : no evidence of either for some suppliers, for some suppliers with some retailers, for all years (2001 -2004) or some of them

Council's decision

- On the measures taken to ensure that prices did not deviate. The CC does not look for retaliation :
 - ➔ Evidence showing that some suppliers, either from their own initiative or when asked by a retailer, reminded the « deviant » of the « right price »
 - ➔ Evidence showing that some retailers played a very active role in exposing the « deviant » : internal mails and documents for Carrefour, exchange mails for Jouéclub, declarations for Maxi Toys
- Second sifting** : no evidence for some suppliers ; only the retailers that played an active role were retained

Council's decision

- On the actual application of communicated prices – either qualitative evidence that suppliers or retailers admit that prices are actually set at that level in a large measure or statistical tests on recorded retail prices:
 - Prices recorded in Christmas publicities»
 - Record of prices at least equal to communicated prices (1%)
 - If 80% of recorded prices are at least equal to, application is significant

Council's decision

- Carrefour and JouéClub cannot argue that they had no choice and just applied the regulation prohibiting to sell at a loss : many clues indicate that the threshold was artificially high : falsely conditional rebates ; commercial services falsely detachable from the sale of the product
- False « commercial services » : judges have set quite strong standards of proof under art. 442-6 of commercial code
- The Council did not point out one service in particular as « not corresponding to any commercial service effectively given or disproportionate regarding the value of the service given » (art. 442.6)

Council's decision

- Gathers a set of clues which converge to prove that SRP is artificially high :
 - Carrefour negotiates first a global ceiling than fills in with services
 - These services are the same for all suppliers and are not precisely defined
 - Logistics services are anyway compulsory for suppliers : they are not detachable ; same for centralisation services
 - A service designed for new products is paid as a percentage of all sales, regardless of the number or importance of new products
 - With Lego, a global ceiling is set for both « marges avant » et « marges arrières » (the more of the first, the less of the second)