DOES THE FRENCH LEGO CASE THREATEN THE BUILDING BLOCKS OF YOUR PRICING POLICY FOR ONLINE SELLERS?

Date: 22 February 2021

Europe Competition Alert

By: Gabriela da Costa, Dr. Annette Mutschler-Siebert, M. Jur. (Oxon), Mélanie Bruneau, Jennifer P.M. Marsh, Christopher S. Finnerty

On 27 January 2021, the French competition authority (*Autorité de la concurrence* or ADC) adopted a decision[1] accepting commitments from the building block producer Lego France (Lego) to amend its discount policy. The ADC concluded that Lego's policy created a price differentiation that "was likely to handicap" pure online players, since they were de facto unable to access certain of Lego's discounts linked to functions carried out only by physical stores (such as the shelf space reserved for Lego products). As a result, Lego has agreed to redefine its rebate award criteria by making them more accessible and transparent to all resellers.

This alert considers if brands should be concerned by the ADC's conservative and surprising approach to dual pricing, which in our view is inconsistent with the European Commission's (Commission) direction of travel at European Union (EU) level and fails to recognise the inherent differences in the costs of online versus offline selling.

THE CURRENT POSITION ON DUAL PRICING IN EUROPE

Under the current EU competition law rules, restrictions on online selling are generally regarded as "passive sales restrictions." Accordingly, they are treated as hardcore restrictions of competition under Article 4(b) of the Commission's Vertical Block Exemption Regulation (VBER). These are serious restrictions of competition, which normally invalidate an agreement and expose the parties to high antitrust risk.

The Commission's Guidelines on Vertical Restraints (Vertical Guidelines) list "dual pricing" as a form of hardcore (passive sales) restriction in this category, insofar as it can restrict a buyer's ability or incentives to sell online.

> "Dual pricing" is defined in the Vertical Guidelines as charging a higher price for products intended to be resold by a distributor or reseller online than for products intended to be resold by that distributor or reseller offline.

However, the current Vertical Guidelines recognise that in particular cases dual pricing may qualify for individual legal exemption where the sales online "lead to substantially higher costs for the manufacturer" than sales made offline (for example, because the manufacturer has to deal with more customer complaints and warranty claims).

©2005-2026 K&L Gates LLP. All Rights Reserved.

The current Vertical Guidelines also permit sellers to award a customer a fixed fee to support its offline sales efforts. In other words, there is an implicit recognition that the costs of operating an offline operation differ from those of an online operation. Such financial support is permitted provided it is not a variable sum that increases with the reseller's offline turnover, since this would amount indirectly to dual pricing (i.e. make purchases for offline sale cheaper the more offline sales are made, as opposed to linked to its different cost base).

WELCOMED CLARIFICATION AND RELAXATION OF RULES AT THE EU LEVEL

At Commission level, there is additionally a growing (more explicit) acceptance of the need for greater clarity and flexibility for manufacturers that appropriately reflects the different costs of each channel and increases suppliers' ability to incentivise investments, notably in physical stores.

In its Final Report in thee-commerce Sector Inquiry (published in May 2017), the Commission firstly clarified the scope of the current rules. It noted that the Inquiry had revealed a "potential misunderstanding of the rules on pricing practices" where the manufacturer:

- Sets a different wholesale price for the same product to the same (hybrid) retailer, depending on the resale channel through which the product is to be sold (offline or online); and
- Sets a different wholesale price for the same product to different retailers.

The Commission's Final Report clarified that charging different wholesale prices to different retailers is "generally considered a normal part of the competitive process." The hardcore restriction under the Vertical Guidelines is concerned only with dual pricing for one and the same (hybrid) retailer.

Secondly, the Commission explained that *"[d]ual pricing is often viewed by stakeholders as a potentially efficient tool to address freeriding. They argue that dual pricing may help to create a level playing field between online and offline sales, taking into consideration differences in the costs of investments. Comments in relation to dual pricing point to the need for a more flexible approach to performance-related wholesale pricing. A more flexible approach would allow for differentiation between sales channels, depending on the actual sales efforts, and would encourage hybrid retailers to support investments in more costly (typically offline), value added services*." Accordingly, the Commission concluded that "*the Final Report points to the possibility of exempting dual pricing agreements under Article 101(3) TFEU on an individual basis, for example where a dual pricing arrangement would be indispensable to address free-riding*."

This helpfully demonstrated that the Commission was prepared to broaden its interpretation of the scenarios that might qualify for "individual exemption" compared with the narrow example provided in the current Vertical Guidelines. Specifically, this confirmed that in the Commission's view it is legitimate to apply different prices if these avoid an offline business being forced to compete unfairly with businesses that are not required to make the same level of investment.

It is welcomed that a further relaxation is predicated in the new VBER and Vertical Guidelines, which will come into force in May 2022. The majority of feedback to the Commission's current Consultation (including our firm's own submissions) supports a change to the rules, so that dual pricing even in the narrow sense defined above (for hybrid sellers) would no longer be regarded as a hardcore restriction, with appropriate safeguards to be defined in line with the case law. This direction of travel is supported, particularly as high-street retail continues to

©2005-2026 K&L Gates LLP. All Rights Reserved.

suffer due to an inability to compete with major online vendors on price and the continued challenges brought about by pandemic lockdowns.

STRICT APPROACH IN LEGO CASE

Against the backdrop of the European position outlined above, the Lego case is surprising.

The facts in Lego can be summarised as follows: In late 2013, Lego revised its reseller pricing policy. In parallel with increasing the price of all of its products by 15%, Lego introduced a system of "functional discounts" of up to 13.044%, which would have the effect of mitigating the price increase for partners who qualified for the discounts/rebates. Two pure online players, Cdiscount and EMC Distribution, complained to the ADC that the difference in the total discounts available for pure online players compared with partners selling through brick and mortar stores was discriminatory, because online-only resellers de facto could not access the extra discounts linked to qualitative physical store functions such as extra shelf space (7 to 9 percentage points' difference, depending on the period).

Following an investigation, the ADC expressed concerns that this practice of different effective pricing for pure online players "*might constitute a discriminatory pricing likely to have anti-competitive effects, by disadvantaging the pure players and reducing the competitive pressure they could exert*." Accordingly, Lego proposed commitments to address the ADC's concerns, which following modification have now been accepted.

This case echoes the findings and outcome of the German Federal Cartel Office (Bundeskartellamt or FCO) investigation of Lego in 2016.

WHY THE LEGO CASES DON'T STACK UP

The very rigid approach to differential pricing in the Lego investigations is flawed for several reasons:

- Foremost, it seems hinged on a hypothetical possibility that pure players might be disadvantaged, whilst failing to take account of differences in the actual costs and efforts involved. Taking shelf space for instance: a physical store has finite available space—shelf allocated to one product necessarily means there is less space for other inventory and thus needs incentivising; this is obviously not a problem for a website. Indeed, dictating identical pricing could seriously threaten competition more than aid it; since it makes it even more difficult for struggling offline players to continue competing because manufacturers have no ability to put them on a level footing as pure players. (Ironically, the ADC and FCO's narrow interpretation of the dual pricing rules could also remove the ability to compensate costs borne by online players that are not relevant in the brick and mortar environment.)
- These cases interpreted the dual pricing rule as applying to different pricing between online (-only) sellers compared with other sellers. As explained above, the Commission has clarified this is a mistaken (overly broad) interpretation of the EU rules, which limit the hardcore restriction to dual pricing for the same hybrid seller.
- Even if there were some sort of "de facto discrimination," it is unclear on what basis this would be illegal. Under EU (and French and German) laws, there is no legal obligation on a non-dominant supplier to apply identical terms to its different customers (this is perhaps the only area where EU antitrust law is

©2005-2026 K&L Gates LLP. All Rights Reserved.

more liberal than the United States, where the Robinson Patman Act prohibits price discrimination). Further, even where a company is dominant, there is arguably a defence in the EU for charging different prices if these are justified by objective differences.

SHOULD BRANDS BE CONCERNED?

In recent years, the ADC and FCO have diverged from the Commission's position in several areas, pursuing a conservative and strict analysis compared with an increasingly fact-based approach by the Commission, which in our view more accurately reflects the realities of e-commerce developments in the EU market. However, here we do wonder whether the Lego cases are outliers, even for France and Germany, given their specific context.

Firstly, Lego's conduct and the key analyses in the investigations (at least in Germany) took place prior to the Commission's clarification of the EU position, and in the context of the wider EU rules originally pursuing a policy designed to protect emergent online players at all costs. Second, and critically, we believe the FCO's conclusions (which the ADC will have been minded to follow for similar facts) will no doubt have been coloured by the fact that Lego had just (separately) been fined for resale price maintenance in Germany. That separate conduct included sending resale price lists which retailers were expected to observe, threatening not to supply retailers who deviated, and importantly for current purposes: sometimes making discounts conditional on adherence to those price lists. In other words, it seems at least possible that the FCO and ADC may have been influenced by suspicions that Lego's functional discounts were aimed primarily at controlling end prices, not the compensation of actual costs or efforts by offline partners.

Indeed, in prior statements or decisions involving dual pricing, these authorities have not been blind to the differences in the channels and Lego represented a major departure.

Following its own e-commerce sector inquiry, the ADC published a report (Avis 12-A-20 du 18 septembre 2012 available in French here), which in fact reflected a more flexible approach to dual pricing for online and offline resellers than the EU approach under the current rules. The ADC expressed the view that different prices for offline and online players would not be regarded as a restriction by object if (i) the price differential was not likely to have anticompetitive effects by limiting competitive pressure from online resellers in the particular market; and (ii) the price difference was objectively justified (e.g. by different costs).

In Germany, in contrast to Lego's discounts, which were linked to actual qualitative retail functions, the prior dual pricing cases had involved more obvious restrictions of online selling not linked to the resellers' respective efforts. For example, in a 2011 case involving sanitary fittings maker Dornbracht, the significantly deeper discounts for supplies on-sold to offline players were accompanied by numerous public statements showing that the supplier had the specific intention of discriminating against internet sales. The other cases, relating to a major household appliance brand and to the gardening tools brand Gardena respectively (both in 2013), involved rebates linked to hybrid resellers' turnover achieved from offline versus online sales (in line with the accepted EU interpretation of unlawful dual pricing).

More recently, in October 2019, although the FCO confirmed a strict view of dual pricing and called for maintaining the hardcore restriction in the new EU vertical rules, it expressly recognised in the “Quo vadis Vertikal-GVO” working paper (available here in German) that differentiation linked to sellers' actual costs and sales efforts can have the effect of encouraging hybrid dealers to invest in added-value physical services for

©2005-2026 K&L Gates LLP. All Rights Reserved.

consumers. It also recalled the possibility of a fixed remuneration for offline efforts as currently provided for in the Guidelines.

Accordingly, albeit that these authorities may currently approach dual pricing with higher scrutiny, we would hope that in a case with a different context their approach would be more fact-specific and less rigid than in Lego. Nonetheless, these cases highlight the need for the Commission to state the more relaxed position very clearly in the new VBER, to ensure a harmonised rule across Europe, and reduce the significant uncertainties for businesses resulting from these divergent national approaches.

In the meantime, it always remains prudent in Europe—irrespective of territory—to ensure differential treatment has an objective justification, for example, the relative costs of trading or real incentives to deliver customer value in the physical world. Additionally, where an offline player is compensated for efforts that can also be delivered in a virtual space and are not exclusive to a physical store (e.g. extra staff training, customer engagement initiatives, additional marketing spend), it seems sensible to consider also compensating the equivalent efforts of the online player who meets such requirements. Finally, brands should not forget that it is also open to them to require online players to meet qualitative criteria as a condition for authorisation that deliver a quality customer experience equivalent to that required in an offline sales environment—in other words, provided they do not amount to a de facto online sales ban, it is legitimate and in fact sensible to require online authorised resellers to also invest in qualified staff, warranty support functions, and so on, if these are expected from brick and mortar players. For many (particularly technically complex or premium) products, a physical store requirement as a condition to online selling also remains appropriate in our view.

©2005-2026 K&L Gates LLP. All Rights Reserved.

KEY CONTACTS



GABRIELA DA COSTA
PARTNER

LONDON
+44.20.7360.8115
GABRIELA.DACOSTA@KLGATES.COM



DR. ANNETTE MUTSCHLER-SIEBERT, M. JUR. (OXON)
PRACTICE AREA LEADER - POLICY AND REGULATORY

BERLIN
+49.30.220.029.355
ANNETTE.MUTSCHLER-SIEBERT@KLGATES.COM



MÉLANIE BRUNEAU
PARTNER

BRUSSELS
+32.2.336.1940
MELANIE.BRUNEAU@KLGATES.COM



JENNIFER P.M. MARSH
PARTNER

LONDON
+44.20.7360.8223
JENNIFER.MARSH@KLGATES.COM



CHRISTOPHER S. FINNERTY
PARTNER

BOSTON
+1.617.261.3123
CHRIS.FINNERTY@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.