Read this post online

Qui est le moins cher (who is the cheapest)? Reigniting the price in the food retail sector…

Advocates of the systematic comparison of prices between competitors have every reason to be pleased!

Two recent court decisions confirmed the recognition of the positive effects of price comparability by facilitating the implementation thereof, in the name of the sacrosanct principle of free competition.

First, in a judgment dated **October 3, 2011** (n°09/04687), the First Instance Court of Strasbourg rejected the claim of the discount supermarket chain Lidl who challenged the right of Leclerc (a major operator of medium-sized hypermarkets in France) to compare, via its price comparison website *<quiestlemoinscher.com>* (literally <whoisthecheapest.com>) one of its product from the Eco+ product range with a product not considered as a "low budget product" at Lidl.

Lidl also claimed that the compared products (two sour cream references) were not identical (Lidl's product was notably closed with a lid) and could not therefore be used for the purpose of comparative advertising. Lidl considered that Leclerc, by doing so, engaged into misleading advertising and therefore requested the First instance Court of Strasbourg to order the latter to pay, among other amounts, the sums of 5,000,000 Euros in damages to compensate for the loss suffered as a result of the unlawful comparative advertising and unfair competition practice.

In its judgment, the First Instance Court of Strasbourg dismissed Lidl's claims and held that the comparative advertising broadcasted by Leclerc duly complied with the lawfulness requirements prescribed both under French law (Article L.121-8 of the French Consumer Code) and under EU Law, i.e.:

- The comparison must be a comparison of products or services meeting the same needs or intended for the same purpose;
- The comparison must be an objective comparison of one or several essential, relevant and representative feature(s) of these products or services;
- The comparison must not discredit or denigrate the trademarks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor.

In the case at hand, the First Instance Court of Strasbourg held notably that *"the prices indicated for the*

compared products are correct" and that "*the two compared products are two containers of sour cream with 15% fat packed in plastic or cardboard containers with the same shape and capacity*".

As such, the First Instance Court of Strasbourg found that "*the two compared products are identical by nature*" notwithstanding the presence of a lid on Lidl's product, as opposed to Leclerc's Eco+ product. Said lid "*has no impact on the intrinsic quality of the products, only on their preservation and hygienic condition, with the result that it does not appear as a decisive element in the consumers' choice (…) that is primarily driven by the consumers' search for the best price*".

The First Instance Court of Strasbourg then inferred from the above that "*the two light sour cream containers, with or without lid, are interchangeable*" and that the comparative advertising performed by Leclerc was lawful under French and EU law insofar as it compared two products with "*identical essential, relevant and representative features, i.e. the nature of the product (light sour cream with 15% fat), its texture (thick) and its presentation (plastic or cardboard containers with the same shape and capacity)*".

Free comparability of prices was also sanctified in **a decision rendered on October 4, 2011** by the *Cour de Cassation* (French Supreme Court) that confirmed the lawfulness of the collection/tracking of prices in stores – more than three years after the Law for the Modernization of the Economy (so-called "LME" Law) became effective.

Fearing that price collection/tracking would entail a general fall in prices, several large retailers had developed the habit of forbidding this price collection/tracking practice by preventing holders of electronic price-recording devices from accessing their stores.

This is precisely what the company Carrefour Hypermarchés had tried to do by refusing access to employees of Leclerc who wanted to collect prices in a Carrefour store located in the same commercial area.

Faced with Carrefour's refusal to let the employees enter the store, Leclerc summoned Carrefour and requested the First Instance Court of Montpellier to order the latter to let the employees collect the prices of products on shelves, subject to a financial penalty for each day of non-compliance.

The First Instance Court of Montpellier granted Leclerc's request but Carrefour lodged an appeal.

In a judgment rendered on May 18, 2010, the Court of Appeals of Montpellier reversed the first instance judgment, holding that Carrefour, by virtue of its ownership right, had the ability to forbid any persons other than potential clients to access its stores. The Court of Appeals of Montpellier also specified that Leclerc had failed to demonstrate the existence of a commercial practice (i.e. price collective/tracking) that "*would constitute a lawful restriction to ownership right*".

On October 4, 2011, the *Cour de Cassation* quashed this ruling, holding that between the need for free price competition on the one hand and the protection of the ownership right on the other hand, free price competition must prevail: "*by ruling so, while the determination of prices through free competition requires that competitors must be able to compare their prices and, consequently, cause their employees to collect*

prices in their respective stores, the Court of Appeals violated the above-reference text".

The text (Article L.410-2 of the French Commercial Code) referred to and relied upon by the *Cour de Cassation* to ground its decision does not, however, expressly address the price collection/tracking issue[1].

This proves that the *Cour de Cassation* wished to clearly and lastingly endorse the price collection/tracking practice, if need be on the basis of a text that does not directly deal with this issue.

Price collection/tracking has thus now become an endorsed practice. Yet, it remains that practical conditions for exercising this right to collect/track prices deserve to be further detailed in order to avoid excesses and tensions that could be generated when a competitor's employee unexpectedly visit a store to collect/track prices.

As a result of these two decisions, price comparability is henceforth facilitated because:

- Firstly, to be lawful, a comparative advertising is not required to focus on two strictly identical products but only on products that are interchangeable for the average consumer;
- Secondly, the employee of a large retailer may freely access the stores of a competitor to collect/track the prices of the products offered for sale.

By increasingly encouraging price comparability, these recent court decisions rekindled the ruthless price war between large retailers.

This should also enable so-called EDLP *("Every day low price") and* "price compensation" commercial strategies – that advocate and lead to the systematic refund of the price difference if the same product is found to be cheaper in a competitor's store – to reach their full potential.

Nothing now prevents the ordinary consumer, equipped with a price scanner (a recent application available for smart phones), from collecting the price of the same product in two different stores and from requesting directly at the time of checkout the refund of the price difference!

Price war has only just begun…

---

[1] Pursuant to Article L.410-2 of the French Commercial Code, "*Unless otherwise stipulated by law, the prices of goods, products and services that were subject before January 1, 1987 to the terms of Ordinance n°45-1483 of June 30, 1945 are determined by free competition. Yet, in industries or areas where price competition is limited either by monopoly situations, lasting supply difficulties or legislative or regulatory provisions, prices may be regulated by a decree of the Council of State after consultation with the Competition authority. The provisions of the first two paragraphs do not prevent the Government from enacting a Decree of the Council of*

State to limit excessive price increases or decreases or to take temporary measures justified by a crisis, exceptional circumstances, a public disaster or a manifestly abnormal situation on a specific industry market (…)".

Soulier Avocats is an independent full-service law firm that offers key players in the economic, industrial and financial world comprehensive legal services.

We advise and defend our French and foreign clients on any and all legal and tax issues that may arise in connection with their day-to-day operations, specific transactions and strategic decisions.

Our clients, whatever their size, nationality and business sector, benefit from customized services that are tailored to their specific needs.

For more information, please visit us at www.soulier-avocats.com.