

Unclassified

English - Or. French

26 November 2024

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

The Standard and the Burden of Proof in Competition Law Cases – Note by France

5 December

This document reproduces a written contribution from France submitted for Item 7 of the 144th OECD Competition Committee meeting on 5-6 December 2024.

Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08

JT03556315

France

1. The burden of proof for anticompetitive practices lies with the competition authorities. It is often more difficult to demonstrate evidence of the concurrence of wills that constitutes the subjective element of cartels than their material element, i.e. the restriction of competition. Demonstrating the concurrence of wills underlying an agreement does not benefit from the same probatory facilities as concerted practices, for which there are presumptions derived from EU law.

2. The *Autorité de la concurrence* (hereinafter the "*Autorité*") and, before it, the *Conseil de la concurrence* (Competition Council, hereinafter the "*Conseil*", which became the "*Autorité de la concurrence*" in 2008) have issued a large number of decisions sanctioning anticompetitive agreements between suppliers and distributors with a view to fixing the resale price of distributed products. These cases have produced a rich body of decision-making practice and case law, particularly on one point, namely proving that there was a concurrence of wills behind the anticompetitive agreement. This Note will therefore focus on recent developments in the *Autorité's* decision-making practice concerning the standard of proof in vertical practices cases.

3. For vertical agreements, as for any other type of agreement, it is settled case law that proof of an agreement, within the meaning of Article 101(1) of the Treaty on the Functioning of the European Union, or Article L. 420-1 of the French Commercial Code (Code de commerce), requires the demonstration of an agreement of wills to thwart the rules of the market¹. This involves demonstrating, first, an invitation by one party to the agreement to implement an unlawful practice and, second, that the other party has agreed to this invitation.

4. For resale price-fixing agreements, the decision-making practice was initially based on direct evidence, for example in a distribution contract, provisions by which a distributor undertook, with regard to a supplier, to apply the resale prices notified by the latter.

5. A problem soon emerged - no doubt once companies became more vigilant about drafting their contracts and other contractual documents (general terms and conditions, charters, etc.) - in cases where the *Autorité* did not have such documents or other written documents allowing it to directly establish the existence of an agreement, but was able to find certain practices likely to reveal resale price-fixing. This was true of cases where it appeared that suppliers had intervened with distributors to raise their resale prices, possibly at the request of other distributors. The same applied to cases showing that the vast majority of distributors broadly complied with the "*indicative*" or "*recommended*" resale prices provided by the supplier, which suggested a lack of intrabrand price competition. However, as the *Conseil de la concurrence* indicated in its Decision of 28 June 2002, it was still necessary to correctly determine whether this price uniformity was indeed the result of a series of vertical agreements between the supplier and each of its distributors, and could not be explained by other reasons, such as a horizontal agreement between distributors, or

¹ Ruling of the Court of Justice of 15 July 1970, ACF Chemiefarma, C-41/69, point 112, and of the General Court of the European Union of 26 October 2000, Bayer, T-41/96, point 67; see also the ruling of the *Cour d'appel de Paris* (Paris Court of Appeal) of 26 January 2012, Beauté Prestige International and Others, 2010/23945, page 42.

a parallelism of behaviour guided solely by competition, which would cause prices to converge towards identical amounts².

6. The question therefore concerned the relevance of elements of behavioural evidence in proving such a vertical agreement on resale prices.

7. In the *Autorité's* decision-making practice, backed up by the case law of its review courts, this resulted in a test known as the "*three-pronged body of evidence*" test, which has been widely used for years. However, this test gradually proved less and less relevant for the *Autorité* (1), which led it to consider, also in line with case law, another method of proof based on a two-stage demonstration and increased use of documentary evidence (2).

1. The "three-pronged body of evidence"

8. In the early 2000s, the *Conseil de la concurrence's* decision-making practice led to the emergence of a robust test capable of demonstrating the existence of a concurrence of wills based on behavioural evidence.

9. For this, the *Conseil* used the body of evidence technique, as set out in the case law of the Court of Justice of the European Union, which states that, in the absence of direct documentary evidence, such as clear contractual clauses, the agreement of wills can be demonstrated by assembling a body of precise, serious and concordant evidence³.

10. This test is based on the demonstration of three areas:

1. The mention or communication of resale prices to the public by the supplier;
2. The implementation of a price monitoring mechanism and potentially a pricing policy;
3. The finding that the distributors had applied the prices mentioned.

11. The first prong makes it possible to ensure that the supplier has expressed an invitation to the distributor to respect certain prices. It is important to remember that this prong in itself does not constitute an anticompetitive agreement. This means that suppliers are still free to communicate recommended prices, provided that the other two parts of the test do not prove true.

12. The second prong makes it possible to verify that, for the supplier, the purpose of communicating resale prices is indeed to see them applied and that the "recommended" prices are, in fact, imposed prices.

13. The third prong is used to prove that distributors have complied with the supplier's pricing policy.

14. While each of these three conditions must be met, the evidence of these clues is itself free, in accordance with the principle of free administration of evidence, and can therefore be proven by any means⁴.

² French competition authority Decision 02-D-42 of 28 June 2002 regarding practices identified in the distribution of household appliances and consumer electronics sector.

³ See *Cour d'appel de Paris* (Paris Court of Appeal) ruling 2008/00255 of 28 January 2009, *Epsé Joué Club*, page 9.

⁴ *Ibid.*

15. This three-pronged test quickly became central to the *Autorité's* practice and case law of its review courts⁵, in the absence of direct evidence of agreements of will.

16. As the *Cour d'appel de Paris* (Paris Court of Appeal) itself pointed out, this test is "*demanding*"⁶. This applies in particular to the third prong, relating to the effective application of the communicated prices by distributors. Although the *Conseil* initially used price collections carried out by the Directorate General for Consumer Affairs, Competition and Fraud Prevention (DGCCRF, a directorate of the Ministry of Economy), the question soon arose of whether these collections accurately reflected reality. The question was raised of the sampling of the prices charged, with the accused parties almost systematically arguing that the analysed prices were not relevant because they were insufficiently representative, particularly with regard to the number of products surveyed, the number of sales points concerned and the period during which the collections were carried out⁷.

17. Similarly, the question arose of the rate of compliance with the recommended prices by distributors. In Decision 06-D-04 bis, the *Conseil* considered that a compliance rate of 80% or more was high enough to demonstrate that distributors were significantly applying the recommended prices. Furthermore, it soon became clear that not all the distributors concerned needed to comply with the recommended prices for an agreement of wills to be established; the assent of a 'significant proportion' of distributors, or even a "significant" number of distributors was sufficient. In addition, price fixing by the supplier could involve controlling the discounts applied, which led the *Autorité* to examine not the price itself, but its variation from the recommended resale price.

18. On these issues, the *Cour d'appel de Paris* (Paris Court of Appeal) had the opportunity to clarify that price collections "*are not intended to demonstrate the existence of a single price in the vicinity of or above which distribution would be abnormally concentrated, but only to highlight a clue, insufficient in itself for proving an anticompetitive practice, but intended to show, through the examination of a sufficient number of collections, over a fairly large geographical area, concerning several products and in sales points belonging to diverse distribution methods, an application of the recommended prices by distributors that is sufficiently frequent to be noticed and analysed in the light of other clues of an anticompetitive agreement*"⁸. This useful clarification showed that it was not necessary to create a methodologically perfect price collection, which was physically impossible, but that the sufficiently representative price collection was part of a converging body of evidence. However, it did not end the debate on what would be sufficiently frequent, sufficiently extensive, etc.

19. Added to this is the fact that new technologies have made companies more reactive to price changes, particularly on the internet. Furthermore, the network heads engage in direct sales on their own websites, in competition with the physical sales of their

⁵ See, for example, Decision 06-D-04 bis* of 13 March 2006 regarding practices in the luxury perfume sector.

⁶ Cour d'appel de Paris (Paris Court of Appeal) ruling 2008/00255 of 28 January 2009, Epsé Joué Club, page 9.

⁷ See, for example, Decision 06-D-04 bis* of 13 March 2006 regarding practices in the luxury perfume sector, paragraphs 505 et seq.

⁸ Court of Appeal ruling of 29 April 2009, Philips, 2008.11907. This ruling was annulled, but not on this point, by the ruling of the Cour de cassation (French Supreme Court) of 7 January 2011, 09-14.316 and 09-14.667.

distributors. Companies have therefore been able to adopt more sophisticated strategies that further cloud the analysis of the prices charged by distributors.

20. To conclude on this point, it should be noted that, in most of the vertical agreement cases examined by the *Autorité* in recent years, it was the accused parties who argued in favour of the strict and systematic application of the three-pronged test, which they knew was sometimes difficult to achieve in practice⁹.

21. All this explains why, in recent years, the *Autorité* has endeavoured to put the three-pronged body of evidence into context and explore other probative tests better suited to the new economic realities.

2. The three-pronged body of evidence: one probative method among others

22. The popularity of the three-pronged body of evidence may sometimes have obscured the purpose of such a test, which is to demonstrate to the requisite legal standard, in the absence of direct documentary evidence, that there was an agreement of wills to enter into a vertical agreement, essentially through behavioural evidence.

23. However, although we talk about three prongs, we must not lose sight of the fact that the ultimate aim of this test is to demonstrate, as required by case law, the existence of (i) an invitation to participate in the practice and (ii) assent.

24. In a 2006 thematic study on standards of evidence in anticompetitive agreements, the *Conceal de la concurrence* itself recalled that the three prongs were designed to demonstrate the two elements of invitation and assent.

25. As a result, the first two prongs concern the supplier's desire to impose prices: "[T]he proof of this desire requires: first, evidence of the communication of prices by suppliers to their distributors (during a business meeting with distributors, for example), as there can be no agreement of wills without the externalisation of behaviour; second, evidence that these communicated prices are, in fact, in the mind of the supplier, imposed prices; this proof may result from a price control system put in place by the supplier"¹⁰.

26. The third prong, i.e. the implementation of these prices by distributors, allows "[e]vidence of the distributors' consent, in the absence of direct evidence (signature of price clauses, for example, or declarations)"¹¹.

27. In other words, the three-pronged test was just a way of establishing that the two conditions set out in the case law were met.

28. An examination of this same case law also led to the conclusion that the three-pronged body of evidence was not essential to demonstrate the existence of a concurrence of wills in resale price agreements.

29. For example, in its ruling of 7 April 2010 in the *Jouets* case, the *Cour de cassation* (French Supreme Court) stated that demonstrating the significant application of the

⁹ See, for example, Decision 20-D-04 of 16 March 2020 regarding practices implemented in the Apple products distribution sector, paragraph 835; Decision 21-D-14 of 24 June 2021 regarding practices implemented in the do-it-yourself product distribution sector, paragraph 140]; Decision 21-D-20 of 22 July 2021 regarding practices implemented in the glasses and glasses frames sector, paragraph 649.

¹⁰ French competition authority, *Rapport d'activité pour l'année 2006*, page 123.

¹¹ *Ibid.*

mentioned prices did not necessarily have to involve price collections: "*the significant application of the mentioned prices is a fact that can be proven by any means, in particular by quantitative elements, such as price collections, but also by qualitative elements, such as statements by the distributor or documents proving this application without dispute*"¹².

30. In the Parfums case, the *Cour d'appel de Paris* (Paris Court of Appeal) stated, with regard to the body of evidence method, that "*the conjunction of clues is a sufficient condition for proving an anticompetitive agreement*"¹³, but by no means a necessary condition. In addition, with regard to the demonstration of distributors' assent to the practice, the *Cour d'appel* (Court of Appeal) states: "*from this point of view, the Conseil was free to use, statistical criteria to demonstrate [this assent], whose operative nature will be examined below, as well as any other element, including internal documents, letters or faxes, mentioning an agreement*"¹⁴.

31. In line with this case law, the *Autorité* clearly distanced itself for the first time from the three-pronged body of evidence in Decision 20-D-04 on the distribution of Apple products¹⁵. In its reminder of the applicable principles, it stated: "*The combination of these three indicators, described as a 'three-pronged body of evidence', is therefore only the most widely used method of proving the concurrence of wills of the two parties for proving a vertical price agreement. However, insofar as this concurrence of wills can be proven by any means, the Autorité cannot, contrary to Apple's declaration, be required in all cases to assemble this three-pronged body of evidence when it has other documentary or behavioural clues that prove, on the one hand, the manufacturer's invitation and, on the other hand, the distributors' assent to the disputed practice.*"¹⁶

32. The *Cour d'appel de Paris* (Paris Court of Appeal) agreed with the *Autorité* on this point, stating: "*there is nothing to prevent the demonstration of the existence of such a practice resulting from the combination of different direct and indirect elements of evidence, in particular in the presence of sophisticated practices based on mechanisms which, taken in isolation, could appear to be legal, provided that together they constitute a body of serious, precise and concordant evidence. In this regard, the Court observes that the contested decision was correct in recalling that, although the most widely used method of proving the concurrence of wills in a vertical price-fixing agreement is based on the combination of three clues, described as a 'three-pronged body of evidence' (price dissemination, implementation of a pricing policy and widespread application of the disseminated prices), evidence of this concurrence of wills may also result from other documentary or behavioural clues, making it possible to establish, on the one hand, the manufacturer's invitation and, on the other hand, the distributors' assent to the disputed practice*"¹⁷.

¹² Cour de cassation (French Supreme Court) ruling 09-11.853 of 7 April 2010, Childcare in France.

¹³ Ruling of the Paris Court of Appeal (Cour d'appel de Paris) of 26 January 2012, Beauté Prestige International, n° 2010/23945, page 43.

¹⁴ Ibid, page 45.

¹⁵ Decision 20-D-04 of 16 March 2020 regarding practices implemented in the sector of distribution of Apple branded products:

¹⁶ Ibid., paragraph 835.

¹⁷ Ruling of the *Cour d'appel de Paris* (Paris Court of Appeal), 6 October 2022, 20/08582, point 456. An appeal was lodged against this ruling.

33. The Court annulled the *Autorité's* decision regarding this practice because it considered that the evidence of the imposed prices had not been provided due to differences in the assessment of the facts. However, the Court of Appeal's ruling confirmed that the applicable standard of evidence may not be based on the three-pronged body of evidence without direct evidence of the concurrence of wills.

34. Reference can be made to the *Autorité's* Decision 21-D-14 of 24 June 2021 regarding the distribution of Kärcher products, which also states that the "*three-pronged body of evidence*" is merely the generally used method of proving the concurrence of wills of the two parties and not an obligation for the *Autorité*¹⁸. The *Autorité* refers to the *Cour de cassation* (French Supreme Court)'s above-mentioned ruling of 7 April 2010 as a reminder that it may use qualitative factors to assess distributors' adherence to the supplier's pricing policy.

35. While this decision led to a dismissal of charges due to lack of evidence of assent by distributors, this was not the case with Decision 21-D-20 of 22 July 2021 regarding practices in the glasses and glasses frames sector. Here too, the *Autorité* recalled that it "*could not be required in all cases to assemble this three-pronged body of evidence when it has documentary or behavioural clues that prove, on the one hand, the manufacturer's invitation and, on the other hand, the distributors' assent to the disputed practice.*"¹⁹ In this Decision, the *Autorité* sanctioned Luxottica, relying only partially on quantitative elements to assess the distributors' adherence to its price control policy. Proof of this came first from the signing of contractual documents, and second from other documentary evidence (including emails and statements) stating that the distributors applied the price guidelines communicated by Luxottica²⁰.

36. In conclusion, on several occasions in recent years the *Autorité* has departed from the three-pronged body of evidence that had thus far characterised its decision-making practice. The use of different and complementary methods of evidence, in accordance with case law, enables the *Autorité* to guarantee the effectiveness of its action against vertical agreements without infringing the rights of the defence.

¹⁸ Decision 21-D-14 of 24 June 2021 regarding practices implemented in the do-it-yourself product distribution sector, paragraph 150.

¹⁹ Decision 21-D-20 of 22 July 2021 regarding practices implemented in the glasses and glasses frames sector, paragraph 649. This decision has been appealed (case pending).

²⁰ *Ibid*, paragraphs 711 et seq.