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Below-cost resale price: The French CEPC considers that the resale of degraded products after their initial acquisition by the reseller should not be considered as a resale in the same condition and could therefore be made at loss

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CEPC, 9 April 2024, Opinion n° 24-6 on a request for an opinion from a law firm on the application of the ban on resale at a loss to imperfect products

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Facts and issues. The CEPC has ruled on the application of the ban on resale at a loss to imperfect products. By this is meant, in the sense and context of the opinion, non-food products that have deteriorated or presented defects, and more specifically, products purchased "intact" by the retailer and which have subsequently undergone deterioration or a certain amount of wear and tear, for example as a result of their display in the store or repeated fitting by consumers. In this way, retailers would face practical difficulties in selling such products, as their value would be significantly depreciated in the eyes of consumers, who would only be willing to buy them at a very low price and therefore potentially below the resale-at-a-loss threshold. Under these circumstances, can these products be resold at a loss?

Solution. According to the CEPC, "*it seems reasonable to consider that a product purchased intact [by the retailer] and which has subsequently undergone some deterioration or wear and tear, for example as a result of its display in the store or repeated fitting by consumers, would not strictly speaking be resold as is within the meaning of this article*". A comment will also be made below on the other situation mentioned in the notice, dealing with the resale of products acquired by the reseller with pre-existing defects or imperfections.

Comments. A rare procedure that is still punishable under criminal law, while restrictive competition practices and other prohibited practices have to a large extent been subject to civil sanctions since 2008 and administrative sanctions since the law of March 17, 2014, including non-compliance with invoicing rules since the entry into force of the ordinance of April 24, 2019, resale-at-loss issues, although less frequent than in the past, nevertheless regularly come back into the spotlight, either as a result

of promotional news (cf. *DGCCRF's 2018 results* ", p.17, concerning a penal transaction involving a major retailer for offering a famous spread with a -70% discount), or as a result of fundamental questions with significant practical implications. These include, for example, the question of the conformity with European law of the general ban on resale at a loss under French law (CJEU, March 7 2013, aff. C-343/12, Lettre distrib. 04/2013; Douai ch. 2 sect. 2, March 31 2016, n°15/02238, Lettre distrib. 05/2016 and Com., Nov. 22 2017, n°16-18028, Lettre distrib. 12/2017, *obs.* MP. Bonnet-Desplan; CJUE, Oct. 19, 2017, aff. C- 295/16, Lettre distrib. 11/2027, *obs.* J. Bouffard) or the more Franco-French ones of the scope *ratione personae* of the ban (Crim., Nov. 22, 2006, n°06-83.008; CEPC, Opinion n° 21-1 of March 18, 2021, Lettre distrib. 05/2021, *obs.* T. Leichnig), *ratione temporis* (Crim., Dec. 6, 2006, Lettre distrib. 02/2007) or *ratione materiae* (Caen, Feb. 23, 1989, BID 1989/9, p. 38; Crim., Nov. 22, 2006, *prec.*) with regard to the notion of resale of a product " *as is* ", among other conditions for the characterization of the incrimination.

The reference to resale " *as is* " implies resale without transformation. The characterization of such a resale is not always obvious, and case law on the subject is not very rich, with relatively few disputes. For example, does transformation, which excludes resale in the same condition, mean an operation that can only be carried out by the reseller between the acquisition of the good and its resale? At what level of intervention on the product can we speak of transformation? For example, could this transformation also be due to the action of a factor external to the reseller and having an impact on the " *condition* " of the good, such as in this case the action of potential buyers on the good during its trial run, leading to the same good, assuming it is still " *in condition* ", no longer being in good or impeccable condition? Whether or not a resale is " *as is* " will be decisive in determining whether a particular resale is prohibited or legal, even though none of the exceptions to the prohibition on reselling goods below their actual purchase price would apply. A resale of a good at a loss and not " *as is* " falls outside the scope of the criminal offence, so that it is no longer necessary for the resale in question to fall within the legal exception of resale at a loss, if it is to be lawful.

Evoking a " *possible margin of appreciation* ", the CEPC is in favor of a broad, non-exclusive interpretation of the notion of resale " *as is* " for a resold product that has not, strictly speaking, been technically transformed, but rather materially degraded. In its view, the notion of " *resale of a product as is (...)* within the meaning of article L. 442-5 (...) unquestionably implies an absence of significant transformation of the product purchased by the reseller ". This welcoming approach is not devoid of common sense in view of the facts set out in the opinion, as the list of exceptions to the prohibition does not make it possible to apprehend the situation thus described, which is to be regretted from our point of view, whereas certain neighbouring situations enable the disposal of products which would otherwise be difficult to resell (e.g. the case of products which no longer meet general demand due to changes in fashion, etc.). In this case, the situation described clearly does not have the hidden aim of causing the reseller " *an island of loss in an ocean of profit* ", as the saying goes. This solution could be transposed to many situations other than the resale of clothing alone. We are thinking, of course, of the sale of voluminous exhibition products, for which retailers sometimes apply a price reduction. The margin of appreciation mentioned by the CEPC could enable them, especially in cases of imperfection of the item sold, to go further by reselling at a loss, and thus more easily free up their precious square meters.

However, while this option may inspire other cases, it does imply prudence and parsimony, and must not be diverted from the purpose stated in the opinion. In the same opinion, the CEPC is less permissive when it comes to products initially purchased "imperfectly" by the reseller - even without his knowledge, although this is not expressly stated in the opinion - and subsequently resold with the same imperfection. The latter must be considered as resold " *as is* ", and the legislation on resale at a loss applies to them. Retailers, and in particular those involved in the fast-growing second-hand and reuse markets, will therefore need to remain vigilant on this issue.