



# Capsulas

## Is it possible to recommend resale prices or apply different prices when a product is sold on the Internet?

*The National Markets and Competition Commission (CNMC) intervenes in a number of cases in the cosmetics and food supplements market*

### Background

One of the purpose of competition law is to ensure free pricing, which is in the interest of consumers. Valid reasons for manufacturers to oblige distributors to maintain a minimum resale price are rarely found.

However, in 2016, the CNMC found that Martiderm's minimum retail price could be tolerated. The CNMC applied the de minimis rule, which had already been applied in the Natura Bisé case in 2010, and considered that, given the structure of the market and the company's market position, the commercial policy in question was not likely to significantly affect competition. In particular, the CNMC noted that the market was highly fragmented, with a large number of relevant competitors, and that the company's market share was insignificant within the group of companies operating in the "personal care" market.

Two recent CNMC decisions in the Isdin and Galderma cases indicate that the CNMC is seeking to consolidate its doctrine on the merits of the case.

### The Galderma case

This case started with a decision issued by the CNMC on 23 November 2022. Regarding the procedure that ended with this decision, it should be noted that the case started with a complaint filed in March 2017, which was withdrawn in January 2020, and that the CNMC

decided to continue the procedure ex officio for the next three years until the decision was issued.

On the other hand, the decision states that Galderma had a market share of less than 10% in the relevant product market. Nevertheless, the CNMC did not apply the de minimis rule and decided to analyse the case on its merits.

Both circumstances indicate that the CNMC is trying to establish its doctrine on these issues.

Unfortunately, however, the CNMC's decision is confusing and unfortunate.

Based on a section of the European Commission's 2010 Guidelines, the CNMC categorically states that dual pricing - i.e., different prices depending on the resale channel (physical or online) - is a particularly serious restriction of competition. However, it turns out that in November 2022, when this decision was issued, the Guidelines on vertical restraints 2022/C 248/01 of 30 June had already been published, thus superseding the 2010 Guidelines.

With regard to dual pricing, the 2022 Guidelines allow a manufacturer to have two price lists, depending on whether the product is sold online or offline. Dual pricing is allowed if it can be demonstrated that it incentivises or rewards an appropriate level of channel-specific investment. In addition, the Commission recognises that rebates or other similar forms of compensation may be used when implementing dual pricing.



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On the other hand, dual pricing is not acceptable if it is designed to prevent the buyer from effectively using the Internet to sell goods or services in certain territories or to certain customers. According to the Guidelines, this would be the case in particular where the difference in the wholesale price would make the online sale unprofitable or financially unsustainable, or where dual pricing is used to limit the quantity that the buyer can purchase for sale online.

In the Galderma case, the CNMC simply closed the case on the grounds that the company had not implemented a dual system. However, the reference to the 2010 Guidelines, instead of the 2022 Guidelines creates unnecessary confusion about dual pricing.

### The Isdin case

In the Isdin case, the CNMC intervened following a complaint from a customer and investigated the company's commercial policy. The CNMC concluded that the company had in some cases made supplies, discounts or other benefits conditional on the sale of its products at the recommended prices. Isdin and the CNMC reached an agreement to close the case, with the company making certain commitments and agreeing to submit to monitoring measures to ensure compliance.

The agreement between the CNMC and Isdin is set out in a resolution published on the CNMC website. This document is currently the reference document for any company seeking to operate under a recommended price regime. In the light of the Guidelines on vertical restraints, the following conclusions can be drawn from this decision:

(i) As a general rule, resale prices cannot be imposed directly or indirectly.

(ii) A resale price is considered to be imposed indirectly if a person who complies with a recommended price is rewarded (e.g. with rebates or special benefits); or if a person who does not comply with a recommendation is punished (e.g. by delayed delivery, intimidation or similar measures).

(iii) Exceptionally a minimum price may be acceptable, e.g. to promote a new product or for short term fixed price promotions (up to 6 weeks) in franchise systems. A minimum price may also be justified to protect brand image by preventing persistent underselling, to encourage pre-sales services or to prevent free riding in the distribution of complex products. Achieving these objectives is a necessary but not a sufficient condition for minimum pricing. Anyone wishing to do so must also prove that the minimum price is essential to achieve the objective in question, that there is still room for competition and that consumers also derive some benefit from these measures.

(iv) Mechanisms for monitoring resale prices may be used, but they may not be used to make discounts or other benefits conditional or to implement a price control system.

(v) It is recommended that rebate schemes be based on objective, transparent and non-discriminatory criteria. In any case, rebates should not be linked to the monitoring of pricing policy by customers.

(vi) Any communication of recommended prices should explicitly state that the recommendation is not binding. Our advice is also to make clear that those who follow the recommendations will not



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be rewarded, and those who do not will not be penalised.

- (vii) Companies using with recommended price systems must provide training to promote an internal culture of compliance with competition rules.

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