

Differential pricing and category-specific terms and conditions

GTCs: The foundation of pricing and commercial policies

According to French competition rules, General terms and conditions (GTCs) are the foundation of commercial negotiations and indifferently apply to all buyers of goods or services (article L441-6 I 1 of the French Commercial Code). By statute, GTCs must include unit prices and set out the terms governing sales, payments, and price reductions.

It is common practice to include in one document the terms governing sales, payments, and, where applicable, price reductions (immediate discounts or deferred rebates), and in another the unit price list (which may or may not also include all or part of the terms governing price reductions). In other words, sellers draw up a, shall we say, "administrative" document on the one hand, commonly referred to as the GTCs, and a document that is of a rather "financial" nature on the other hand and which includes the pricing of the goods and/or services.

The GTCs form the base of the seller's commercial policy and they normally apply to all customers, to whom they must be made available upon request.

However, GTCs ("*Conditions Générales de Vente*") do not prohibit sellers from adopting a customer-specific approach, especially in the form of targeted price reductions.

Three possible differential pricing techniques

Firstly, **in the GTCs themselves**, the seller can covenant quantity- or quality-based **price reductions** (e.g.: order quantity or value; ordering or delivery terms) worded in such a way that they will in fact only apply to specific customers. However, the French Commercial Code authorizes sellers to go even further when differentiating pricing or terms of sale or payment in order to take into account the specific situation of a category of buyers – or even of a single buyer.

For instance, with **special terms and conditions** (STCs), ("*Conditions Particulières de Vente*"), sellers can adapt their GTCs on a case-by-case basis **to a single buyer of goods or services**. STCs embody the negotiations conducted between the parties to adapt the pricing and sales terms to the buyer's needs. Sellers are under no obligation to disclose their STCs which therefore remain confidential between the parties (article L144-6 I of the French Commercial Code).

Furthermore, sellers can define sales and/or pricing terms that **specifically apply to a certain category of customers**. Therefore, with **category-specific terms and conditions** (which we will call CTCs for "*Conditions Catégorielles de Vente*"), suppliers can for example set different prices for each category of buyers in their customer base, thus adapting their GTCs to a specific category of professionals. Just like GTCs, CTCs must by law be made available upon request, but here only to buyers of goods or services that belong to the category concerned (article L144-6 I 1 of the French Commercial Code).

Defining customer categories

Since the French Commercial Code does not include any predefined categories of buyers, customer categories are defined by the seller under their own responsibility. In that regard, the French commission in charge of examining commercial practices, the CEPC (which stands for "Commission d'examen des pratiques commerciales"), pointed out that customer categories must be defined according to **objective criteria** allowing the clear identification of all operators that satisfy the criteria. For instance, categories of buyers can be defined according to turnover levels, customer types, or distribution methods (CEPC, opinion no. 07-01 on differential pricing regulation as provided for by article 41 of the French Act of 02 August 2005 in favour of SMBs).

That is how, following the recommendations of the CEPC, France's highest civil court, the Cour de cassation, recently came to lay down essential rules relating to the definition of "buyer categories" and to the extent of

the obligation to disclose CTCs (Cour de cassation, commercial division, 29 March 2017, no. 15-27811). In the case at hand, Cooper, a pharmaceutical company specializing in the supply of drugs to pharmacists, had refused to disclose its CTCs for pharmacies and pharmacies' groupings to two companies, Pyxix and Sagitta (a professional negotiator of supplier product purchasing terms for member pharmacies and a group purchasing organisation acting as logistics company respectively).

The Cour de cassation recalled that the supplier carries the burden of proof as to whether a specific buyer belongs or not to a customer category. Therefore, in the case at hand, the court ruled that Cooper, as supplier, had to justify its refusal to disclose its CTCs for pharmacies and pharmacies' groupings by proving according to objective criteria that neither Pyxix nor Sagitta belonged to that category but to the wholesaler-dealer category instead.

Therefore, suppliers cannot just refuse to disclose their CTCs to buyers based on their appellation (here pharmacist v. wholesale-dealer) and must be particularly careful when defining each customer category.

To conclude, sellers are free to set their commercial and pricing policies and to offer differential pricing to their customers. **In that regard, CTCs are an especially simple and effective tool, but they require sellers to make a detailed analysis of how their customer base is structured in order to objectively define which category or categories of customers are liable to benefit from targeted sales terms or price reductions.**

By Christophe Héry and Ornella Edon

Contact: Christophe Héry

E-mail: chery@lmtavocats.com

Tel.: +33 1 53 81 53 00

Fax: +33 1 53 81 53 30

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