I-1.4: What is a price in Law ? From Contract Law to Regulatory Law.

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Price is a very mysterious element in law, because it is a matter left to the free will of the contracting parties, to the State when it has regulatory powers, or to none of the above when it is simply dependent on changes in market supply and demand. Thus, from a substantive perspective, price is not something controlled by law.

Admittedly, any observer will point to the abundance of case law and studies on the qualities that a price must have in order to be lawful, determined or determinable, and there are as many debates as to the legal consequences of a defect in the price that creates a flaw in the contract, e.g. does it render the contract void or lead to termination, does the contract become absolutely void or merely voidable…?

However, if we look head-on at the question of what a price actually is in law, we simply find the familiar idea of a certain sum of money that must be paid in order to obtain tangible or intangible goods or services. Thus, it is established that price is always tied to something because price is inseparable from money, which gives access to goods and services. There can be goods without a price, common goods for example, but there is no price without a corresponding thing offered for sale to a potential buyer. This is why a contract is formed whenever there is agreement on the thing and the price.

This is a very simple definition, enclosed in civil law with very little connection to public law and no role for the economy. Indeed, just as law uses the concept of the "person" as a way to cleverly ignore the human body, it uses price as a way to

ignore the value of things.

his is how law has become powerful because, since Roman law, it has created its own reality based on persons and goods, where material reality is merely at the disposal of the normative power of the law, unless we adhere to the traditional philosophy of natural law.

oday, the normative nature of law, i.e. its ability to control nature, is waning because borders are disappearing (erasing the normative aspect because it relies on borders) and because technology is making things more and more powerful. Consequently, just as the issue of the body must be addressed, so must the question of price as compared to the value of things. Law can no longer turn a blind eye to these questions.

hus, price was and remains the object of the agreement between the parties, based on their free will and informed consent, supported by rationality and expressed by the normative nature of the contract and then that of the legal system (I). However, for an economist, price is not so much something that is agreed but something that is produced or caused by the market, thereby referring legal matters to the branch of competition law (II). Moreover, the sum of money in exchange for which people can access goods may prove to be unsuitable when set by the contract or market, either because it cannot or will not be paid. This is when prices are set by a regulatory framework under public law (III). Administered prices are often contrasted with so-called “free-market” prices, when in fact market mechanisms can impose just as many constraints on the parties seeking to free themselves of them. This implies two oppositions: that of private law versus public

law; and that of the market economy versus a controlled economy. Such oppositions are increasingly difficult to uphold, as demonstrated by regulatory law and its outcome, “regulated prices” (IV).

CE IS WHAT THE CONTRACTING PARTIES HAVE AGREED UPON AND WHAT IS EXPRESSED BY THE NORMATIVE NATURE OF THE CONTRACT

he law of obligations gives a subjective definition of a contract as a set of obligations stemming from an agreement between at least two parties. What is the most important thing then? As regards the time, it is the moment when the contract is formed rather than the moment of its performance. In terms of quality, it is the quality of the will of the parties that matters. They must have really wanted that price for that particular good.

f course, contract law has evolved a great deal and can never be reduced to such a blunt statement, but ultimately this is the most important thing: the price is what the contracting parties wanted. As such, the price is no different from the other elements of the contract and comes under the same 19th century reasoning. People are rational and free, in particular they are free not to contract. They know the benefits of owning the desired good. Consequently, as long as the other potential party, i.e. their economic enemy, has not offered a price that represents the exact sacrifice by corresponding to the satisfaction the buyer will obtain from the good, they do not contract.

Thus the most important thing about the contract, which is basically a pact between economic enemies, is information and the freedom not to contract. If both parties are protected or organised there is no need for any restrictions nor to oblige one party to help the other (this is in opposition to the concept of market price, which by definition is an arena where different interests and economic enemies collide). As a result, price

alone is sufficient. It is “fair” as long as it is “exact”, which is a more appropriate term, and this is the notion implicitly referred to in the statement “*Qui dit contractuel, dit juste*” (if it is contractual it is fair).

This explains the importance the Civil Code and case law attach to sanctioning defects of consent, either those that distort understanding (mistake or fraud) or impede freedom (violence). If the judge restores the required quality to the will of the parties, the contract recovers its balance. This would imply that declaring the contract void is not the appropriate consequence when the price has been reached without sufficient negotiation (based on the freedom not to contract) or information (as was the case in the great case law saga regarding vague prices). This adjustment became possible in 1966, when case law developed a mechanism to replace the absolute voiding of the contract by giving the courts jurisdiction to modify the price.

. Similarly, when civil case law decides that unfairness on the part of one of the parties during negotiations constitutes “improper price setting”, this again demonstrates that it is the quality of information and rational will that have the power to generate exact prices i.e. that correspond to the sacrifice proportionate to the benefits obtained by the contracting party.

Thus, consumer law, whose philosophy is creeping into the law of obligations and is expressed through its own key principles, has the same foundations. First and foremost, the consumer must be informed. This supposes that the consumer is rational. Economic law, and in particular competition law, have the same approach. However the more realistic consumer law

often organises this information *ex ante*. Thus, with prospecting, the consumer is "cheated" of his consent by the sales talk and attractiveness of the object and thus has a right of withdrawal, quite simply because it only takes him a few days to realise he has no use for the good or that he has paid too much for so little.

Thus, the law of obligations gives the price a particular place, at once central and hidden, because legislation, case law and doctrine all create demands regarding price but always by going through the narrow approach of the quality of consent. Yet, first of all, law very rarely cares about whether the money paid to acquire the good is in line with its economic value, apart from some marginal concepts like that of the absurdly low price.

Secondly, lawmakers and case law have created a plethora of duties to inform, leading to dozens of pages that the contracting parties never read. As long as there is no shift, like the one the Constitutional Council made regarding statutes, from the concept of information to the more concrete and thus more effective notion of intelligibility, contract law will continue to work against itself without grasping the fact that one way to mislead is to inundate with information. This is the case with variable rate loans, whose catastrophic effects are not understood despite providing the consumer with vast quantities of information.

I PRICE: WHAT THE MARKET PRODUCES AND COMPETITION LAW REPAIRS IF IT IS UNFAIR

If we look at price through market mechanisms, we again find this invisibility but this time, quite to the contrary, it is the will that is invisible, if we refer to the concepts of the invisible

hand and the auctioneer. In this respect, the financial market is the purest of all markets. The parties, because they are rational, informed and wish to maximise their own interests (even if they are not economic), seek to profit from the force generated on both sides by the confrontation of all of supply against all of demand. This is how the equilibrium prix works, also known as the “exact price”.

What produces the exact price is the mobility of economic players and their fragmented nature. In this respect there are connections with civil law, because the mobility of economic players, which allows the seller to win over a competitor’s customer by offering him better quality or cheaper products, and which allows the buyer to make these sellers compete against each other, is based on the freedom not to contract. Thus, if a company is powerful enough or if there is an agreement not to exercise the freedom not to contract or to choose another product or partner, then the market does not function and the price is no longer adjusted. This means there is no more “fair price” in the event of abuse or restrictive practices, which is the most common and most serious form of behaviour.

On a market, the fair price is the one produced by the elasticity of supply and demand. Thus, Adam Smith points out that the highest price for a glass of water could be that of a diamond if the buyer has been in the desert for days with no oasis or caravan in sight. He will pay the exact price. In economic terms however, we cannot claim that this price is fair. The amphibology of the term "fair" has proved to be disastrous: we should say that the price is exact, if the adjustment of supply and demand has been allowed to run its course (here, very little water available and a very strong desire for water), and

not necessarily that it is fair or morally just that this particular mechanism should determine price.

f we are on a market with sufficient supply and demand, otherwise known as a liquid market in the financial sector, the market usually functions with contract law, private property rights, and courts in the event of a problem. The price is exact without the need to construct a specific *ex ante* legal apparatus for the market in question or instate permanent supervisory authorities because the law of the market, which like the contract is based on the opposition of interests, and the natural will of the players to protect their own interests, are enough to produce exact prices in a balanced manner. In this way, ordinary markets are self-regulated.

. This supposes that operators do not become so powerful that they use that power through restrictive practices or abuse of their position on the market to obtain some kind of advantage, in particular as regards prices, which they could not have obtained on a freely functioning competitive market. Thus, the competition authorities intervene to sanction players with business activities who act in this manner when their behaviour has this intent or effect.

This is the core of competition law, i.e. sanctioning uncompetitive behaviour, and it places the price at the heart not only of the analysis but also of the sanctions, also known as “remedy”, which is appropriate as the goal is to cure the market, a concept to which civil law still pays little heed.

Firstly, when analysing a situation, a price will be deemed “unfair” not so much because it was unfairly set – competition law, the economic law that guards the market, may be there to sanction but it is objective – but because the price observed on

the market is unjustifiably higher or lower (predatory pricing) than the one that would have been produced by the adjustment of supply and demand.

. However, while it may be easy to determine that prices are too high compared to a theoretical market price, this is much more difficult when it comes to prices that are considered to be “too low”. In fact, unless it can be demonstrated that these prices are not only lower than the theoretical price but that they are designed to eliminate competitors and then increase prices later on, which would be harmful to consumers in this second phase, unless they are predatory, low prices are in the consumer’s favour.

ndeed, it was generally accepted that the purpose of consumer law was to protect the consumer, of unfair competition law to protect the competitors and of competition law to protect the competitive market. Today, competition authorities, starting with the European Commission and the Federal Trade Commission, claim that the purpose of competition law is to protect the consumers’ interests. Consequently, at what point does a price become “too low”?

E PRICE THAT POLITICIANS PRODUCE THROUGH REGULATORY MECHANISMS

. Moreover, the market is not everything, in two respects. Firstly, the market can malfunction, either temporarily (e.g. because the State has just liberalised a sector and the continued existence of a very powerful historic operator renders competition impossible) or permanently (e.g. because there are energy or telecommunications networks that are natural monopolies from an economic standpoint).

n this case, the State can challenge the market for two possible reasons. First, there will never be a market for natural monopolies and so the State can deem that it has the legitimate power to act unilaterally and that this is effective wherever the market cannot function. The second reason is both deeper and more contingent: the exact price is not the fair price.

n fact, there are many situations where supply and demand exist but the criterion is no longer the need to drink water for the price of a diamond if necessary as the market would have it, but the right to drink water even when the person in question's pockets are not filled with diamonds. If his or her pockets are empty, the "fair price" will be equal to zero, as with free access to healthcare, education and justice, which are nevertheless market services.

. Here, the fair price takes on a moral definition. It is guaranteed by the State, which is there to protect the social pact that gives it legitimacy and to allocate public finances to this task, no matter how bad a state they are in.

. The price, set unilaterally by a political authority, for example for electricity, gas, university fees, hospital stays etc., is a regulated price that comes under public law and is subject to discretionary authority.

Competition law sits beneath the distinction between public and private law, and competition authorities do not appreciate it when States use excuses in order to protect their own territory. This is true as regards the organisation of the public domain, public corporations etc. Administrative case law has skilfully limited this by including the full application of competition law and the prices practiced by public operators in the

administrative courts' jurisdiction.

GULATED PRICES STEMMING FROM THE TRIANGLE BETWEEN LAW, THE ECONOMY AND POLITICS

Ve are probably in the process of overcoming the oppositions described above through the concept of "regulated prices". If we take the above-mentioned example of natural monopolies for energy transportation or telecommunications, companies that wish to obtain access to these networks sign contracts with the network managers. The access price is not set *ex ante* by a regulation. Rather, it uses the civil model where price is set by a discussion between the two parties. However, the freedom not to contract no longer exists because the company wishing to transport or receive its energy or electronic signals has no alternative technical solution other than going through the network managers.

. This is why lawmakers have organised a system for settling differences, another word for dispute resolution, a role given to the regulatory authorities. This has forced network managers to not only provide information but also to be "transparent" in order to allow the regulatory authority and the contracting party to assess whether the price is fair, i.e. economically founded in this context.

. In addition, the network manager's budget is controlled by the regulatory authority and through that, so are the prices it practices. This is the object of discussion, and a balance is sought between the investments required, the risks to be prevented and what constitutes a reasonable margin.

Generally speaking, national and EU legislation uses the expression "cost oriented pricing", which in economic terms

means nothing because cost control is practically impossible and, even if it were possible, we know that this is not a good solution because it pushes companies to increase their costs.

. In a wiser approach, since regulatory authorities tend to behave like judges, (which may be because case law has imposed many procedures on how they act, such as respecting the rights of the defendant and the adversarial process), regulatory authorities do not impose prices. Under the courts' supervision, they merely set the boundaries of a contractual process on which they leave their mark through the principle of transparency.

n the years to come, contracts will be increasingly used to set the boundaries of acceptable individual and collective behaviour, particularly for prices. However, once we have the system, "more than a market" but without being "State dominated", we will be in a regulated system where prices are set jointly between politicians, the market (as the objective and collective crystallisation of the contractual mechanism) and the economy (goods and the desire to own them).

. Regulated prices evoke a technocratic vision of the world because regulatory authorities are at the heart of the system, which mitigates the major difficulty caused by the gradual disappearance of borders. In addition, the ideology of free goods and an end to property rights that is emerging on the Internet has not yet found a solid business model. However the concept of fair price, in the moral sense of the word, persists, and is the responsibility of public institutions.