

Resale Price Maintenance: A Big Issue For UK Luxury Brands

Law360, New York (October 23, 2013, 12:26 PM ET) -- Luxury goods makers have long known of the potential pitfalls of providing price guidance or recommendations to retailers. Recent activity by regulators across the European Union makes it clear that there remains a very real risk that regulators are as ready as ever to investigate guidance that crosses the line to become resale price maintenance.

Most recently, the U.K.'s Office of Fair Trading's probed sports bra designer DB Apparel UK Ltd.'s agreements with three British department stores, and took the preliminary view in September that these agreements were intended to push up retail prices. Earlier in the summer, the German Federal Cartel Office fined natural cosmetics maker WALA €6.5 million for putting pressure on its retailers to strictly comply with its resale price guidelines.

Since September 2012, EU national competition authorities have imposed fines or secured other remedies in at least 15 RPM investigations of luxury/branded goods producers. In addition, a number of antitrust probes are pending, including investigations of retail pricing of luxury watches in Poland, sportswear in Denmark, snowboarding and cycling equipment (in Poland).

RPM — Still a Fashionable Target

Imposing minimum or setting resale prices in distribution arrangements — RPM — has traditionally been a “hardcore” violation of EU competition law. In short, RPM was presumed to be anti-competitive and unlikely to be justifiable, on the basis that RPM can (1) facilitate collusion between suppliers or distributors; (2) drive up prices for the brand(s) concerned; (3) lead to the exclusion of smaller competitors; and/or (4) undermine innovation or dynamism in distribution.

Having said this, suppliers are permitted to set maximum resale prices or communicate nonbinding price recommendations to their retailers. However, the line between these (permitted) practices and anti-competitive price setting or setting of minimum prices can be difficult to tread, and it is particularly important to ensure that conduct on the ground does not turn recommendations into instructions.

For instance, in WALA, the German competition authority took the view that WALA's resale price recommendations amounted to the de facto imposition of prices. In that case the FCO found that sales representatives had checked in-store prices and threatened to stop supplying dealers that undercut the recommended prices. It also found that retailers had been required to commit to charging the recommended price in order to be part of WALA's distribution network. In addition, the FCO found that WALA's restrictions on online sales further facilitated enforcement of strict adherence to the price guidelines.

The 2010 Seasonal Hope for a More Relaxed Approach to RPM

While maintaining the commission's fundamental objection to RPM, the 2010 guidance on vertical arrangements acknowledged the potential for efficiency justifications, reflecting the general consensus in economic theory that RPM is not always "bad." The guidance acknowledges that fixed or minimum resale prices may lead to efficiencies in three narrowly construed situations. First, RPM may help suppliers launch a new product by incentivizing distributors to invest in creating a market for a new product in the launch phase. Second, set resale prices may be necessary to effectively run short-term price-based promotions in franchise-based distribution networks. Third, RPM may help address free riding on presales services (particularly relevant for complex products).

At first blush, certain luxury/ branded goods may be good candidates for such efficiency justifications. For example, many luxury goods are sophisticated products whose sales are enhanced by the provision of personalized presale services. Further, in a world heading towards products that are part of the "network of everything" (and have the technology necessary for this embedded), there will likely be new, technically complex products for which markets need to be created.

RPM Efficiencies: A Narrow Opening

Despite the 2010 softening of approach, in practice, competition regulators across the EU have continued to treat RPM as quasi-per se illegal. There is little sign of any relaxation in the approach of national regulators. To illustrate, in February this year, the press release issued by the Irish competition authority when it closed its investigation against footwear designer Brazil Body Sportswear reminded companies that RPM is "against the law" and that it would not hesitate to take enforcement action.

While it may be that very few cases since 2010 have leant themselves to efficiency defenses, experiences in those few cases suggest that making the defense is likely to represent a material burden. For example, at the end of 2012, premium automotive lubricant maker Orlen Oil argued before the Polish competition authority that the RPM clauses in its contracts with dealers were intended to facilitate the launch of a new product. The Polish authority found that there was no evidence that Orlen Oil's minimum resale price policy would have helped the successful launch of the new product. The authority also found that, in any event, the RPM clauses were not necessary for the introduction of the new product: There were other methods available (such as the payment of financial incentives to distributors), which could have been used to incentivize distributors, which would not have restricted price competition between distributors.

The bottom line for brand owners seems to be that they should be continue to be vigilant to ensure that their arrangements with distributors cannot be construed as enabling them to set distributors' retail prices (or impose minimum resale prices). At this stage it appears that national authorities will likely be minded to consider an efficiency defense if there was no less restrictive means to incentivize distributors open. Quite a bar to clear.

If anything, the European competition authorities' decisions over the last year have highlighted the continued importance of well-structured and implemented distribution arrangements and clear and unambiguous training for sales teams in particular.

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