

Brand owners beware

Preserving brand image in Europe via price guidance and internet sales limitations is getting increasingly challenging for brand owners by Miranda Cole, Partner, and Laurie-Anne Grelier, Associate, at the Global Branded Goods Practice, Covington & Burling LLP

European competition law has long sought to ensure that intra-European trade is not disrupted by anti-competitive conduct that segments the internal market, whether through restrictions on cross-border supply across the European Union (EU) at competitive prices. As a result, EU antitrust authorities have long stepped in, and continue to act, against practices which they consider to be liable to maintain higher prices or inhibit intra-European trade. Regulatory activity over the past 12 months makes it clear that brand owners need to be vigilant in ensuring that price guidance does not cross the line to become resale price maintenance ("RPM"). Since October 2013, EU national regulators have imposed fines in at least 15 RPM cases involving luxury/branded goods. In addition, a number of other investigations involving products as diverse as sports bras (in the UK), mattresses (in Germany), sport nutrition (in Italy), and skiing gear (in Poland), for example, are underway. Similarly, scrutiny of arrangements that impermissibly restrict Internet sales is intensifying. In the past 12 months, antitrust enforcers in the EU have secured fines or commitments in at least six probes targeting restrictions on sales of branded goods over the Internet, and there are a number of ongoing investigations.



Bang & Olufsen's prohibition of sales of its products online was deemed anti-competitive

1. RPM - Still a fashionable target

Imposing minimum or setting resale prices in distribution arrangements -- RPM -- is a "hardcore" violation of EU competition law. In short, RPM is presumed to be anti-competitive because it can have a range of effects: it can push up prices (and slow the decline of prices where competition would otherwise lead to reductions); facilitate collusion (among both brand holders and distributors); and/or reduce incentives for innovation or dynamism in distribution. That said, brand owners are permitted to set maximum resale prices or communicate non-binding price recommendations to their retailers.

The challenge is to stay on the right side of the line between these (permitted) practices and anti-competitive price-setting (like setting actual or minimum resale prices). In particular, brand owners have to be watchful that conduct on the ground does not transform "recommendations" into de facto instructions. For instance, the Danish competition authority found, in October 2013, that clothes maker Vila engaged in RPM as Vila employees required certain retailers to treat its suggested prices as minimum resale prices. The investigation was initiated after a TV broadcast reported that Vila was dictating resale prices to its retailers. In August 2014, the German FCO reached a €8.2 million settlement with mattress manufacturer Recticel for allegedly setting minimum resale prices for retailers, using threats of delivery disruption, and conditioning the use of its logo by retailers, to ensure strict adherence to the minimum price.

The European Commission's 2010 Guidelines on Vertical Restraints, while maintaining the hardcore status of RPM, acknowledged the possibility that efficiencies might provide a justification for RPM in certain situations, namely: (i) in connection with the launch of a new product; (ii) to run short-term price-based promotions in franchise-type distribution networks; and (iii) to address free-riding on presale services.

However, despite this apparent softening, competition regulators in the EU have continued to treat RPM as per se illegal. For example, last winter, the Danish competition authority fined hair product supplier Coss for imposing resale prices on one retailer for a two month period. Further, experience in the few cases (e.g. Orlen Oil, Poland, 2012) where efficiency arguments were made and addressed to date suggests that brand owners will face a significant burden in making an efficiencies case. At present, national regulators appear to be minded to consider such defense only if, in the particular circumstances, there is no less restrictive means open to a brand holder to create the incentives sought for distributors -- quite a bar to clear.

2. Internet sales restrictions - A new addition to the capsule line-up

EU regulators view Internet commerce as a particularly effective way to boost intra-EU trade -- increasing the variety of branded goods available, and providing new channels for competitive pricing (not least because the Internet facilitates price comparisons with a few clicks). Reflecting this, arrangements prohibiting or unnecessarily restricting a distributor from selling via the internet are hardcore violations of EU competition law. Such arrangements are unlikely to be justifiable, and the EU Court of Justice has made it clear that the protection of a brand's image is not a justification for a complete bar on online sales.

Arrangements that inadmissibly impede Internet trade are currently high on antitrust regulators' enforcement priorities. The German FCO, for instance, has prioritised fighting such impediments, releasing a report last autumn on the issue and recently securing commitments from Bosch Siemens and Gardena to stop their respective dual rebate systems that provided for higher rebates on sales made offline. It also investigated headphone manufacturer Sennheiser's prohibition of sales via third-party platforms (closing the investigation after the prohibition was removed), and restrictions by both Adidas and Asics on sales through third-party platforms and participation in price-comparison websites.

In a similar vein, earlier this Spring, the Paris appeals court confirmed that Bang & Olufsen's absolute prohibitions on sales of its products (from headphones to high end audio/video equipment) online were anti-competitive. While the court appears to suggest that it may be possible to prevent Internet trade of certain highly technical products that necessitate in-store demonstration, it is far from clear how such products will be identified and the types of measures intended to address such free riding concerns will be found to be acceptable. In fact, in a 2006 investigation, the French competition authority obtained commitments from Focal JM Lab that it would allow Internet sales of its most sophisticated and complex audio-video equipment, provided that customers could certify that they tested the equipment in a physical store. As the law in this area continues to evolve brand owners with restrictions in place on ecommerce will need to monitor developments to ensure that restrictions of a similar type are not found to be anti-competitive.

Taking stock of the current trends

In this context of intensifying scrutiny, brand owners should regularly review their distribution systems to ensure that pricing recommendations to distributors do not become something more and that restrictions on Internet sales are not anticompetitive.

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