

УДК 341

DOI: 10.18384/2310-6794-2019-1-132-139

ТРУДНОСТИ КОНКУРЕНЦИИ РОЗНИЧНЫХ ОНЛАЙН ДИЛЕРОВ В УСЛОВИЯХ ОГРАНИЧЕНИЙ В ЦЕНОВОЙ ПОЛИТИКЕ, НАВЯЗЫВАЕМЫХ ПРОИЗВОДИТЕЛЯМИ

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Аннотация. Целью данной статьи явилось изучение юридических особенностей установления цены на товары, подлежащие перепродаже. Под перепродажей автор понимает соглашение или согласованные действия независимых участников рынка по установлению минимальной фиксированной цены. В статье утверждается, что в настоящее время увеличилось число розничных онлайн дилеров, которые не удовлетворены тем фактом, что производители диктуют им размер минимальной или рекламной цены за товар. Они полагают, что такая регламентация ограничивает их конкурентные преимущества и не даёт возможности снизить цену. С другой стороны, производители выдвигают ряд причин для такой политики, в числе которых желание защитить статус бренда, а также необходимость предотвратить поглощение традиционных форм распространения товара онлайн торговлей. *Методы исследования:* автор использует сравнительный метод и метод моделирования. *Результаты исследования:* автор обобщил результаты обсуждения учёными и участниками процесса вопроса о том, могут ли производители влиять на розничные цены путём установления оптовых цен для розничных дилеров в зависимости от способа продажи (традиционная или через интернет). *Теоретическая и практическая значимость исследования:* автор утверждает, что установление различных цен для различного рода продаж – это обычный элемент конкуренции, а введение двойной ценовой системы для гибридных розничных дилеров предусмотрено Положением о групповых исключениях в Вертикальных Ограничениях (VBER).

Ключевые слова: электронная торговля, установление цен перепродажи, розничные дилеры электронной торговли, традиционная уличная торговля, гибридные розничные дилеры, рекомендуемые розничные цены, конкурентное право европейского союза, Положение о групповых исключениях в Вертикальных Ограничениях, двойное ценообразование.

THE CHALLENGES TO COMPETITION OF PRICE RESTRICTIONS IMPOSED BY MANUFACTURERS ON ONLINE RETAILERS

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Abstract. The purpose of the paper was to study the legal features of maintaining the price of goods during resale. By this design, the author understands the agreement or concerted ac-

tion of independent market participants on the establishment of a minimum or fixed price. The author argues that currently there is an increase in the number of online retailers who are dissatisfied with the fact that manufacturers indicate to them what minimum price should be set for the product or what advertised price to use. They believe that such recommendations hinder the realization of their competitive advantages, limiting the possibilities of offering lower prices for goods. On the other hand, manufacturers provide various rationales for price recommendations, for example, the desire to protect the image of a brand and the need to avoid cannibalization of traditional distribution channels with online stores. Procedure and research methods: the author used a comparative approach and modeling method. Results of the study: the author summarized the discussion of scientists and practitioners about whether manufacturers can influence retail prices by setting different wholesale prices for retailers depending on the intended product sales channel (traditional trade or via the Internet). Theoretical /practical value: the author argues that charging different (wholesale) prices from different retailers is generally considered as a normal element of competition. The use of a double pricing system for the same (hybrid) retailer is generally considered an explicit (classic) restriction according to VBER.

Keywords: e-commerce, resale price maintenance, e-commerce retailers, brick-and-mortar sale channel, hybrid retailers, recommended retail prices, EU competition law, Vertical Block Exemption Regulation, dual pricing.

Introduction

Resale price maintenance (RPM) is agreements or concerted practices between independent undertakings that establish a minimum or fixed price.

An increasing number of e-commerce retailers¹ complain about the fact that they receive indications from manufacturers of what minimum price they should apply or which advertised price they should use. They argue that such recommendations hinder their competitiveness limiting their ability to offer lower prices.

On the other hand, manufacturers tend to justify the existence of pricing recommendations out of various considerations such as image and brand protection, return on R&D investments or the necessity to

avoid the cannibalization of the brick-and-mortar sale channel by the online one².

However from a marketing standpoint well justified RPM might be. There's currently a debate as to whether price restrictions imposed by manufacturers on e-retailers comply with EU competition rules.

More specifically, the question arises as to whether manufacturers can influence retail prices by charging different wholesale prices to retailers depending on the channel where the product is intended to be resold.

Elements of answer to this question can be found in the Sector Inquiry into trade of consumer goods («goods») and digital content in the EU³ published by the European Commission on May 10, 2017. The inquiry was carried out within the frame-

¹ In 2017, 5% of retailers interviewed in the EU reported receiving indications of what minimum price they should apply. Only 3% of them indicated such practices in a survey carried out two years earlier.

See European Commission; COM (2017) 229 Final report on the E-commerce Sector Inquiry, May 10, 2017. URL: http://ec.europa.eu/competition/antitrust/ecommerce_decision_en.pdf (accessed: 07.10.2018).

² *Ibid*, Paragraph 562.

³ European Commission; Commission decision of 6 May 2015 initiating an inquiry into the e-commerce sector pursuant to Article 17 of Council Regulation (EC) No 1/2003 (HT.4607), C (2015) 3026, final URL: http://ec.europa.eu/competition/antitrust/ecommerce_decision_en.pdf (accessed: 07.10.2018).

work of the Commission's 'Digital Single Market Strategy for Europe'¹. One of the objectives of the sector inquiry is to better understand the prevalence and characteristics of pricing recommendations by manufacturers to online retailers and the importance of dual pricing depending on the channel (offline or online) where the product is intended to be resold. In order to collect the relevant data, manufacturers and retailers were asked about their pricing policies and their respective roles in setting those policies. The respondents operate on markets of 14 Member States². According to the findings of the sector inquiry, there's a widespread use by manufacturers of pricing recommendations to retailers across the EU (I). It remains to be seen whether such practices are compatible with EU competition rules (II), particularly when they imply the charging by manufacturers of different (wholesale) prices to the same hybrid retailer, depending on whether he sells those products via the online or offline channel (III).

I. The widespread use of pricing recommendations to retailers by manufacturers

The EU Commission has asked retailers to provide information concerning their pricing policies and the role of manufacturers in their price setting. Manufacturers, in turn, were asked about their input to retailers' pricing policies.

¹ European Commission; COM(2015) 192 final [Электронный ресурс]. URL: <https://ec.europa.eu/digital-single-market/en/news/digital-single-market-strategy-europe-com2015-192-final> (accessed: 06.10. 2018).

² European Commission; COM (2017) 229 Final report on the E-commerce Sector Inquiry, May 10, 2017. Paragraph 100. URL: http://ec.europa.eu/competition/antitrust/ecommerce_decision_en.pdf (accessed: 07.10.2018).

A. Price setting at retail level

38% of retailers report that manufacturers recommend resale prices, while less than 10% report being provided with a discount range or receiving indications from manufacturers to apply the same retail price both online and offline³. A smaller proportion of retailers receive indications of what minimum price they should apply or which advertised price they should use⁴.

The proportion of retailers reporting recommendations from manufacturers on resale prices varies according to the category of product in question.

At least a third of the retailers in each product category (with the exception of house and garden) receive some form of price recommendations from manufacturers. The highest proportion of retailers that do so are those active in clothing and shoes, followed by those selling sports equipment and then consumer electronics⁵.

Manufacturers report about an even more widespread use of recommended retail prices: four out of five manufacturers use price recommendations to distributors⁶.

B. The reasons put forward by manufacturers to justify the use of pricing recommendations

To better understand why pricing recommendations are so widespread, manufacturers were asked to explain the main

³ 8% of retailers reported to be provided with a discount range while 7% retailers reported receiving the indication from manufacturers to apply the same retail price online and offline. Proportions are calculated out of all 1051 responses to the questionnaire.

⁴ 5% of retailers reported receiving indications of what minimum price they should apply while 3% stated they received indications about what advertised price they should use.

⁵ Proportions are calculated out of all retailers active in a given product category.

⁶ Proportions are calculated out of all manufacturers (251) that responded to the questionnaire.

considerations behind the decision to recommend retail prices to distributors.

Manufacturers express the view that the price of a product is the most immediate way to communicate its quality to the customers and have provided a number of reasons for recommending retail prices. These are as follows:

a) Image protection and brand positioning.

First of all, manufacturers explain that level of recommended retail prices is chosen in order to reflect a certain brand/product image or to strengthen the image or its perceived value. This is reported to be particularly true for premium products and for luxury brands, although manufacturers active in all product categories have argued that there is a strong link between recommended retail prices and brand/product positioning¹.

b) Return on R&D investments

Manufacturers further explain that products tend to be designed and manufactured taking into consideration an estimated retail price level. Therefore, their investments in research and development as well as other manufacturing costs are inextricably linked to a given recommended retail price².

c) Marketing strategy.

Recommended retail prices are set also on the basis of market studies that allow manufacturers to gauge customers' willingness to pay. Manufacturers state that they have a better understanding than retailers of the price a customer would be prepared to pay for their products and, therefore, are better placed to evaluate

¹ European Commission; COM (2017) 229 Final report on the E-commerce Sector Inquiry, May 10, 2017. Paragraph 562. URL: http://ec.europa.eu/competition/antitrust/e-commerce_decision_en.pdf (accessed: 07.10.2018).

² *Ibid.* Paragraph 563.

market conditions and develop a marketing strategy, which includes the price of the products. Market knowledge, manufacturers explain, is particularly important when a product is launched³.

d) Avoiding cannibalization of the brick-and-mortar sale channel by the online one

Manufacturers explain that recommended retail prices may help avoiding or reducing cannibalization across channels and geographies. Some manufacturers consider it important to support the brick-and-mortar channel by preventing online prices from falling below a certain level⁴.

Having highlighted the widespread use by manufacturers of pricing recommendations to retailers, the Commission then assessed whether and under what conditions those recommendations violate EU competition rules.

II. Pricing recommendations under EU competition rules

Resale price maintenance (RPM), i.e. agreements or concerted practices between independent undertakings that establish a minimum or fixed price (or price range), are considered restrictions of competition by object under Article 101(1) TFEU⁵.

Under Article 4(a) of the VBER, the block exemption provided by the VBER does not apply to vertical agreements that,

³ *Ibid.* Paragraph 564.

⁴ *Ibid.* Paragraph 567.

⁵ See judgment in *SA BinonCie v SA Agence et Messageries de la Presse*, 243/83, EU:C:1985:284, Paragraph 43; judgment in *ASBL Vereniging van VlaamseReisbureaus v ASBL SocialeDienst van de PlaatselijkeOverheidsdiensten*, 311/85, EU:C:1987:418, Paragraph 17; judgment in *SPRL Louis ErauwJacquery v La Hesbignonne SC*, 27/87, EU:C:1988:183, Paragraph 15.

either directly or indirectly, have as their object RPM. This is without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties¹.

Any efficiencies RPM may lead to in particular cases, are to be evaluated on the basis of the specific circumstances of the case².

The practice of recommending a non-binding resale price or requiring the retailer to respect a maximum resale price is covered by the VBER provided that the market share thresholds set out in the Regulation are not exceeded³ and that the recommended price or the maximum price do not amount to a fixed or minimum sale price as a result of pressure

from, or incentives offered by, any of the parties⁴.

As explained in the Vertical Guidelines, in the case of contractual provisions or concerted practices that directly establish the resale price, the restriction is strictly forbidden⁵. However, RPM can also be achieved through indirect means. When providing pricing recommendations it is important that manufacturers do not take actions, such as providing financial or other business incentives to retailers that follow the recommended prices or, on the contrary, apply measures discouraging or threatening retailers not to follow such prices, as this would interfere with the freedom of retailers to set their final prices to customers independently. This type of interventions may entail the recommended retail price or make the maximum retail price become equivalent to a minimum or fixed price.

Another aspect of the ongoing debate on the compatibility of pricing recommendations with EU competition rules concerns the question of whether manufacturers can influence retail prices by charging different wholesale prices to retailers depending on the channel where the product is intended to be resold. This question will be examined in section III.

III. The practice of dual pricing in the light of EU competition law

EU competition rules distinguish the situation where the manufacturer sets a different (wholesale) price for the same product, to the same hybrid retailer (selling both online and offline), depending

¹ Vertical Block Exemption Regulation No 330/2010 on the application of Article 101 (3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [Электронный ресурс]. URL: <https://eurlex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:32010R033&from=EN> (accessed: 30.09.2018).

² Some examples of efficiencies that could be potentially generated by pricing restrictions are outlined in Paragraph 225 of the Notice on the Guidelines on Vertical Restraints, SEC (2010). Paragraph 52. URL: http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf (accessed: 29.09.2018).

³ The market shares of the supplier and the distributor on their respective market should not exceed 30%.

Vertical Block Exemption Regulation No 330/2010 on the application of Article 101 (3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [Электронный ресурс]. URL: <https://eurlex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:32010R033&from=EN> (accessed: 30.10.2018).

⁴ Vertical Guidelines, Paragraph 226. For the assessment of those pricing practices when they are not covered by the VBER, see Paragraphs 227-229 of the Vertical Guidelines.

⁵ Vertical Guidelines, Paragraph 48.

on whether that retailer sells those products via the online or offline channel and the case where the manufacturer sets a different (wholesale) price for the same product to different retailers.

Charging different (wholesale) prices to different retailers is generally considered a normal part of the competitive process¹.

Dual pricing for one and the same (hybrid) retailer is generally considered as a hardcore restriction under the VBER.

In other words, if a manufacturer forbids a hybrid retailer to sell a product for a different price depending on whether he sells it via the online channel or the offline one, such a practice will be considered as a breach of Article 101 (1) TFEU as it limits the possibility of the retailer to sell the product via the Internet.

Nevertheless, Paragraph 64 of the Vertical Guidelines explicitly envisages the possibility for dual pricing agreements to fulfill the conditions of Article 101(3) TFEU where, for instance, sales via one of the sales channels lead to substantially higher costs for the manufacturer than sales via the other channel.

This, for instance, could be the case, where it can be shown that a dual pricing arrangement is indispensable to address free-riding between offline and online sales channels in the case of hybrid retailers that are part of the distribution network of the manufacturer.² While hybrid retailers may internalize part of the externality occurring across sales channels, they may nevertheless remain subject to free-riding by other retailers. Their

¹ Unless different wholesale prices to (online) retailers have the object of restricting exports or partitioning markets.

² Free-riding by pure online sellers on services provided offline can be addressed by other means, such as price differentiation.

incentives to invest in costly sales effort in the offline channel may therefore be negatively affected, similarly to the case of pure brick and mortar retailers.

The example provided is not the only possible situation in which the criteria of Article 101 (3) TFEU could be fulfilled. Let's take the case of a product which would require a quite complicated installation. If it's sold offline, such a sale may require the services of a professional in charge of the installation. There's a good chance that the client may be satisfied and that he won't make any claim. If it's sold online, the client may have to make the installation himself. In case he doesn't do it well, he may believe that the product is at fault and ask for its replacement. Since dealing with such an after sales claim implies extra cost for the supplier, EU competition authorities admit that, in such a case, the supplier can set a higher price for the sale online than for the sale offline. Such a tolerance is an exception to the rule according to which there shouldn't be any dual pricing depending on the type of channel where the product is intended to be resold.

Conclusion

Resale price maintenance is one of the practices manufacturers may make use of in response to the increased online price competition and, in particular, to the high online price transparency and low search costs for customers, allowing them to swiftly compare prices³.

By observing a minimum retail price, both manufacturers and retailers may minimise the impact of quick online price

³ European Commission; COM (2017) 229 Final report on the E-commerce Sector Inquiry, May 10, 2017. Paragraph 987. URL: http://ec.europa.eu/competition/antitrust/e-commerce_decision_en.pdf (accessed: 07.10.2018).

erosion, thereby protecting both the level of the wholesale price the manufacturers can ask for the product, and the profit margins retailers can expect¹.

At least a third of the retailers in each product category covered by the sector inquiry report to receive some form of price recommendations from manufacturers².

Agreements that establish a minimum or fixed price (or price range) are a hardcore restriction according to Article 4(a) of the VBER³ and a restriction of competition by object under Article 101(1) TFEU⁴.

Non-binding pricing recommendations or maximum resale prices are covered by the VBER as long as the market share thresholds are respected and they do not amount to a minimum or fixed resale price as a result of pressure from or incentives offered by the parties involved in the vertical relationships⁵.

Nearly 30% of manufacturers indicate that they systematically track the prices of their products sold via independent retailers. Others do so in a targeted manner (on certain products, key markets).

67% of the respondent manufacturers use manual tracking, while nearly 40% make (also) use of price-tracking software to track prices. Almost a third of respondent retailers report that they normally comply with the price indications given by the manufacturers while slightly more than a quarter say that they do not comply⁶.

The increased price transparency through price monitoring software may facilitate or strengthen collusion between retailers and thereby impact a competition⁷.

While manufacturers often voice their intention to create a level-playing field between online and offline sales channels, taking into consideration potential differences in cost levels, dual pricing (setting different wholesale prices depending on the sales channel) is rarely considered as a viable option due to the risk that a dual pricing strategy could be in breach of Article 101(1) TFEU⁸.

Charging different (wholesale) prices to different retailers is generally considered a normal part of the competitive process. Dual pricing for one and the same (hybrid) retailer is generally considered as a hardcore restriction under the VBER. Nevertheless, the European competition authorities admit the possibility of exempting dual pricing agreements under Article 101(3) TFEU on an individual basis, for example where a dual pricing arrangement would be indispensable to address free-riding or where the after sale cost might be higher for the sale of a product online than for its sale offline .

¹ *Idem*. Paragraph 988.

² *Idem*. Paragraph 989.

³ Vertical Block Exemption Regulation No 330/2010 on the application of Article 101 (3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [Электронный ресурс]. URL: <https://eurlex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:32010R033&from=EN> (accessed: 30.10.2018).

⁴ Council of the European Union, Article 101 (1) of the Treaty of Functioning of the European Union (TFEU) [Электронный ресурс]. URL: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E101:EN:HTML> (accessed: 10.12.2018).

⁵ European Commission; COM (2017) 229 Final report on the E-commerce Sector Inquiry, May 10, 2017. Paragraph 990. URL: http://ec.europa.eu/competition/antitrust/ecommerce_decision_en.pdf. (accessed: 07.10.2018).

⁶ European Commission; COM (2017) 229 Final report on the E-commerce Sector Inquiry, May 10, 2017. Paragraph 991. URL: http://ec.europa.eu/competition/antitrust/ecommerce_decision_en.pdf. (accessed: 7.10.2018).

⁷ *Ibid*. Paragraph 992.

⁸ *Ibid*. Paragraph 993.

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ПРАВИЛЬНАЯ ССЫЛКА НА СТАТЬЮ

Ючинсон К. С. Трудности конкуренции розничных онлайн дилеров в условиях ограничений в ценовой политике, навязываемых производителями. // Вестник Московского государственного областного университета. Серия: Юриспруденция, 2019, № 1. С. 132–139. DOI: 10.18384/2310-6794-2019-1-132-139

FOR CITATION

Youchinson C. S. The challenges to competition of price restrictions imposed by manufacturers on online retailers. In: *Bulletin of Moscow Region State University. Series: Jurisprudence*, 2019, no. 1, pp. 132–139.
DOI: 10.18384/2310-6794-2019-1-132-139