



Resale price maintenance and other pricing restrictions remain under scrutiny: Companies should ensure compliance with competition law

The Office of Fair Trading (“OFT”) and a number of other competition authorities around Europe have recently taken action against a number of practices that restrict or may restrict retailers’ ability to set their own prices, including resale price maintenance and pricing parity arrangements.

A number of companies remain under investigation and, if found to infringe competition law, are at risk of potentially significant fines. A number of others have revised, or have offered to revise, their business practices and models to close investigations without a finding of infringement.

These investigations are a reminder to all companies, large and small, of the need to ensure that their trading arrangements are compatible with UK and EU competition law. This includes manufacturers, brand owners, franchisors, suppliers, wholesalers, ‘bricks and mortar’ and online retailers, and operators of online platforms.

Application of competition law to pricing agreements

UK and EU competition law (Chapter I of the Competition Act 1998 and Article 101(1) TFEU, respectively) prohibit agreements and concerted practices that prevent, restrict or distort competition. Amongst the most important prohibited agreements and practices are direct or indirect price-fixing.

Whilst a cartel between competitors is the ‘classic’ price-fixing arrangement, it is also prohibited for companies in a vertical relationship (such as a manufacturer and a retailer) to enter into price-fixing arrangements: whilst this is known as ‘retail price maintenance’ (“RPM”), it applies to all levels of trade, including both wholesale and retail. Parties that engage in RPM and other practices that prevent or restrict price competition risk substantial fines if they are investigated by a competition authority.

Although the EU Vertical Restraints Block Exemption Regulation exempts many vertical agreements, it is a ‘hardcore’ restriction (and thus prohibited) for the supplier (e.g. the manufacturer) to

restrict the ability of the buyer (e.g. the retailer) to determine its own resale price. However, it is not prohibited for the supplier to impose a maximum or recommended retail price (“RRP”), provided that this does not amount to a fixed or minimum sale price as a result of pressure from or incentives offered by any of the parties.

The European Commission’s Vertical Restraints Guidelines provide further guidance on the prohibition of retail price maintenance. In summary:

- RPM may be accomplished by direct or indirect means
- ‘direct’ RPM is accomplished by an agreement or other practice by which the parties agree to fix the retail price of a good or service
- ‘indirect’ RPM can be accomplished by other contractual terms that create a disincentive for the retailer to set its own prices, for example by:
 - fixing the distribution margin
 - prohibiting discounts or fixing the maximum permitted level of discount
 - making promotional support conditional on respecting a specified price
 - the use of price reporting and monitoring systems
 - prohibiting the advertising of discounted prices, for example on the internet
- ‘indirect’ RPM can also be achieved by suppliers putting pressure on retailers to deter discounting, including threatened or actual delisting of discounters

Increasingly, and particularly in the on-line segment, ‘most favoured nation’ (“MFN”) or ‘price parity’ clauses are used to guarantee a distributor (such as a price comparison website (“PCW”) or a booking website) the lowest price offered to any retailer. These may soften price competition between retailers as well as from the supplier’s own direct sales channels.

Price competition may also be dampened by prohibiting retailers from selling via the internet (either at all or outside their allocated territory) or from advertising their prices (or discounts) on the internet. In its *Pierre Fabré* judgment of October 2011, the European Court of Justice confirmed that a general and absolute prohibition on internet sales was a prohibited restriction on competition and could not be justified by a need to maintain a 'prestigious' product image.

The OFT challenges RPM

The OFT has recently undertaken a number of investigations into suspected RPM, involving both 'bricks and mortar' stores and online retailers.

RPM found in mobility scooters

In August 2013, the OFT found that a manufacturer of mobility scooters and some of its online retailers had acted anti-competitively by entering into agreements that prevented the retailers from selling mobility scooters online and from advertising their prices online. This limited consumer choice and prevented them from easily comparing prices, so enabling wide variations to be maintained between retailers for identical products. The OFT did not, however, impose fines, given the parties' limited turnover.

RPM suspected in sports bras and, again, in mobility scooters

In September 2013, the OFT issued two Statements of Objections alleging RPM in the supply of both sports bras and mobility scooters. It considers that a manufacturer of sports bras and three well-known national department store chains unlawfully agreed to set fixed or minimum prices, with the aim of fixing retail prices. It has also alleged that a second manufacturer of mobility scooters and some of its retailers unlawfully entered into anti-competitive agreements that prevented the retailers advertising their prices online. The OFT's investigations are on-going.

Earlier OFT action against PRM

The OFT's action follows earlier investigations into RPM in respect of figurines and sunglasses.

In 2003, it found that a Spanish manufacturer of figurines, Lladró, had infringed competition law by entering into agreements with retailers that required them to observe RRP. Retailers were also prevented from discounting without Lladró's prior consent and from advertising discounts and price reductions. In order to prevent discounting, Lladró could repurchase products at cost price from retailers that wished to offer discounts. Lladró had also refused to and had ceased to supply suspected discounters. The OFT rejected arguments that these pricing restrictions were necessary in order to preserve the 'luxury image' of Lladró's figurines and to protect its trademarks.

In 2007, the OFT closed an investigation into suspected RPM in respect of Oakley sunglasses without making a finding of infringement, after Oakley revised its arrangements to allow retailers to set their own prices.

The OFT and Competition Commission also challenge other suspected on-line pricing restrictions

As well as investigating suspected RPM, the OFT has also investigated other pricing practices concerning on-line e-commerce, as has the Competition Commission ("CC").

OFT and German Federal Cartel Office act against Amazon's 'price parity' arrangements

In August 2013, after an OFT investigation (and a parallel one by the German Federal Cartel Office), Amazon agreed to end its 'price parity' policy for Amazon Marketplace in the EU.

Both authorities were concerned that this policy, which prevented sellers from offering lower prices on other online sales channels (including their own websites), restricted competition. In particular, the policy could have resulted in higher online platform fees, affected prices and created barriers to entry.

Sellers using Amazon Marketplace, which is one of the EU's biggest e-commerce sites, can now set their own prices. Given Amazon's change of policy, the OFT closed its investigation without making a finding of infringement. The German authority is presently considering whether Amazon's decision is sufficient for it to close its investigation.

OFT investigates limits on price discounting of sales of 'room only' hotel accommodation

The OFT is also investigating contractual provisions that may prevent online travel agents from discounting sales of 'room only' hotel accommodation. Although it is formally investigating only arrangements between International Hotels Group ("IHG", one of the UK's largest hotel operators) and two of the largest online travel agents ("OTAs"), Expedia and booking.com, it would appear that similar arrangements exist across the hotel industry and the OFT is using this as a 'test case'.

At present, the price of a room is set by the hotel company (usually using dynamic yield management pricing) and the OTA (which does not take title to the room) cannot discount that price. Therefore, OTAs cannot use part of their commission or margin to fund discounts, vouchers, loyalty schemes or 'cashback' arrangements.

The OFT considers that, as a result, there is no price competition between online sites or between those sites and other sales channels (such as a hotel operator's own website). The arrangements may also create barriers to entry by making it more difficult for new entrants to enter the online

travel agency market, as they cannot offer discounts or other innovative marketing models.

In order to terminate the OFT's investigation, the parties have offered commitments that will allow online travel agents to offer discounts to members of their loyalty schemes and other 'closed groups' (to which consumers may opt-in after one purchase of a hotel room from the relevant OTA) and to advertise generally that they offer discounts. However, OTAs will still not be able to advertise generally the specific discount offered for a specific room. The parties have argued that this is necessary in order to achieve efficiencies in the distribution of hotel rooms, including from the use of dynamic yield management pricing (which would be disrupted by unrestricted discounting) and to prevent free-riding by other OTAs. Whilst the OFT has not assessed in detail these efficiency claims, it does recognise that hotels should be able to set and control the 'headline' rate for their rooms, particularly as there is strong competition between different hotels.

If accepted by the OFT, these arrangements will be applied industry-wide by IHG (to all OTAs it uses) and by Expedia and booking.com (to all hotel groups they deal with, not just IHG). Therefore, it can be expected that the OFT's action will inject greater competition into the sector generally, in the UK.

Separately, the German Federal Cartel Office is investigating 'price parity' arrangements imposed by HRS, a leading hotel booking portal in Germany.

Competition Commission considering whether MFN clauses between price comparison websites and insurers restrict competition

In certain circumstances, MFN clauses – in which a supplier guarantees that a distributor or retailer will receive the best price offered to any distributor or retailer – can also lessen price competition (by providing a 'focal point' around which all retailers' prices will coalesce and reduce incentives to undercut rivals) and may also increase barriers to entry (by reducing new entrants' ability to compete on price).

As part of its market investigation into private motor insurance, the CC is presently considering whether MFN clauses in agreements between insurers (and brokers) and PCWs restrict competition. Some (but not all) PCW providers require an insurer to agree to an MFN clause as a condition of listing that insurer's products on its site. These take various forms, but fall into two groups: 'narrow' MFNs (which prevent the insurer from offering a lower premium on its own website) and 'broad' MFNs (which prevent the insurer from offering a lower premium on any website).

In its Annotated Issues Statement, which sets out its 'emerging thinking', the CC indicated that it considered that 'broad' MFNs

were likely to reduce price competition and promote excessive advertising-driven competition, leading to higher insurance premiums. It did not identify such concerns from 'narrow' MFNs. However, the CC also identified that MFN clauses might have beneficial effects, by improving the value of searches to consumers and by allowing PCWs to recover sunk investment costs incurred in creating their technology and sites.

In responses to the CC, insurers and brokers have largely argued that MFN clauses, broad and narrow, restrict price competition and create disincentives to innovation. PCW operators have argued to the contrary, considering that MFNs facilitate consumers in comparing prices, give them a 'guarantee' that they will save money and ensure they obtain the lowest prices available in the market.

The CC is expected to publish its Provisional Findings in late November 2013 and must publish its final Report by 27 September 2014.

Conclusions

Pricing arrangements are complex, as are their possible effects on competition and also any benefits that they may have.

However, it is clear that the OFT and other competition authorities (including those in Ireland, France and Germany, which have also recently taken action similar to that of the OFT), as well as the European Commission, regard RPM and other practices that prevent retailers from freely setting their own prices and from offering and advertising discounts as very serious infringements of competition law.

Competition authorities are keeping the online sector under close review, given the internet's ever increasing importance as a sales channel. The OFT has stated that it may conduct further investigations, particularly if it receives complaints from retailers or consumers. Whilst the OFT has not yet imposed fines for RPM practices, it may well do so in future cases, potentially on both suppliers and retailers. These fines could well be substantial.

It is therefore important that manufacturers, wholesalers and retailers alike ensure that their distribution arrangements are compatible with competition law and enable retailers to set their own prices. Suppliers should also take care when wishing to terminate arrangements with individual retailers, to prevent competition difficulties arising, particularly where the retailer is a known discounter.

Given the complexity of determining when pricing arrangements with retailers may restrict competition and the circumstances they may be justified (for example because they generate benefits for consumers, which must be assessed on a case by case basis), specialist advice should be sought if in any doubt.

Burges Salmon Competition Unit

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Should you require any further information on the issues described in this Briefing or on any UK or EU competition law matter, please contact your usual contact or one of the members of our Competition Unit.



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"hugely knowledgeable, with an impressive range of contacts at the UK competition authorities and a good grasp of Brussels cases"

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