Recommending Retail Prices: How Far Can You Go?

This note considers how EU and UK competition law affects:

- the extent to which a supplier and retailer can discuss recommended retail prices (RRPs);
- the circumstances in which a retailer complaining to its supplier about the pricing policies of another retailer may be considered to be anti-competitive; and
- the extent to which a supplier may seek to persuade a retailer to follow RRPs.

In particular, direct contact is not required between competitors for them to be found to have engaged in an anti-competitive arrangement, whether that is to fix prices or to exchange future pricing information. Such anti-competitive arrangements can be found to exist where retailers use an intermediary (e.g. a common supplier) to implement their arrangement. As a result, great care needs to be taken when a retailer discusses its retail prices with its supplier.

A 'concerted practice' in breach of EU and UK competition law is likely to be deemed to arise if Retailer A discloses details of its future pricing intentions to its Supplier B, in circumstances where Retailer A "may be taken to intend" that Supplier B will pass that information on to other retailers, and the supplier then does so, and where Retailer C may be taken to know the circumstances in which the information had been passed to the supplier by Retailer A1. If Retailer C then uses that information in determining its own future pricing intentions, then Supplier B and Retailers A and C would all be considered to be parties to an anti-competitive concerted practice.

The case for a concerted practice being considered to exist would be even stronger if the exchanges were bilateral. In other words, if Retailer C had also disclosed its future pricing intentions to Supplier B, in circumstances where C may be taken to intend that B will make use of that information to influence market conditions by passing that information to (amongst others) A, and B does so.

Resale Price Maintenance (RPM) is generally prohibited, but permitted in limited circumstances

It is a long established principle that EU and UK competition law generally prohibits an agreement between a retailer and a supplier under which the retailer agrees to resell goods or services either at a price:

- fixed (directly or indirectly enforced) by the supplier or above a minimum price level set by the supplier, or
- which has been agreed between the supplier and the retailer.

Nevertheless, the Commission's guidelines on vertical restraints now recognise that RPM can sometimes facilitate new market entry, prevent free-riding and provide incentives to offer pre-sale services. Therefore, if it can be shown that RPM would lead to these benefits, the individual exemption conditions of Article 101(3) may be met. For example:

- where a manufacturer introduces a product, RPM may be permitted where it provides retailers with the means and incentives to increase promotional efforts and expand overall demand for the product, so making the entry a success; and
- where RPM may be necessary to organise a coordinated short term (e.g. two to six week) low price campaign in a franchise system or similar distribution system.

1. JJB sports Plc v OFT and Argos Ltd and Littlewoods Ltd v OFT, [2006] EWCA Civ 1318.
Suppliers can generally use non-binding recommended or maximum resale prices

A supplier can still issue non-binding RRPs for its products or impose maximum prices above which its retailers or distributors may not resell the products. If both the supplier’s and the buyer’s market shares do not exceed 30%, these will be automatically exempted under the Vertical Agreements Block Exemption. However, in each case the RRPs or maximum retail prices must not be disguised minimum resale prices or fixed resale prices. In particular, retailers must be allowed to resell products at prices below the RRPs or maximum resale prices.

Suppliers and retailers generally should not discuss resale prices with their competitors

Suppliers and retailers should not generally discuss resale prices with (nor disclose details of their current and future resale prices to) their competitors. The exceptions to this principle are limited, for example, to situations where the discussion occurs in order to give effect to a genuine supplier/customer relationship between them.

Can suppliers discuss RRPs with their retailers?

A supplier may wish to collect the opinions of its retailers about whether its RRPs are set at appropriate levels. However, there is a risk that such discussions might be interpreted as an attempt by the supplier to ensure that the retailer will observe the RRPs, or as an agreement on future resale prices between them. These risks are increased if there are regular discussions on RRPs between retailers and their supplier, especially if the retailers generally adhere to the RRPs.

The Court warned that any party to such vertical discussions needs to be aware of that risk and to avoid it, but in practice this is often difficult to achieve unless very carefully managed. The easiest way of course to minimise the risk is by not engaging in the discussions in the first place.

By way of general guidance, a supplier should only discuss the level of RRPs with its retailers in exceptional circumstances, for example where the supplier is introducing a new product line and wishes to know how appropriately to price it for the market. Even then, the process needs to be managed very carefully as a series of independent bilateral consultations between the supplier and each retailer.

Can a retailer complain to its supplier about other retailers’ prices?

It is not uncommon for Retailer A to complain to Supplier B about the low prices charged by a competing retailer, Retailer C, with the intention or expectation that the supplier will pressurise C to increase its prices or in some way punish C. However, if, following the complaint, the supplier does take that action against Retailer C then Retailer A and the Supplier B may well be considered to be party to an agreement or concerted practice in breach of EU or UK competition law. In addition, if Retailer C does change its pricing policy following the supplier’s approach, then it may well also be considered to be part of a tripartite anti-competitive arrangement with Retailer A and the Supplier B.

What does "intent or expectation" mean in practice? In practice, the test is whether:

- Retailer A complained to Supplier B with the intention that the supplier would take action against Retailer C (or with the expectation that the supplier would do so), or
- Retailer A provided details of its future pricing information to Supplier B with the intention that the supplier would pass that data to Retailer C (or with the expectation that the supplier would do so)?

It is important to consider the context in which these issues often arise. It is well established that, in a cartel-type situation, a competition authority may reach a finding of infringement by using fragmented or circumstantial evidence and/or by drawing inferences or presumptions from the available evidence. In addition, in the real world, competition investigations usually take place in the context of communications, especially e-mails, which are often unfortunately or ambiguously drafted and which are frequently unhelpful to a defendant seeking to prove its innocence.
As a result, if, following Retailer A’s approach, the supplier does take some form of anti-competitive action then it may in practice be very hard for Retailer A to disprove an allegation that it had originally contacted the supplier with that objective in mind.

Imagine Retailer A’s defence that, when it complained to Supplier B about Retailer C’s pricing policy, it did not intend the supplier to act in an anti-competitive way - even though that supplier did so act and even though Retailer A accepts that it was reasonably foreseeable that the supplier would react to the complaint in that way. As a practical matter, a competition authority or court is likely to be deeply sceptical about such an argument and may reach a conclusion that there has been an infringement. In the circumstances described above, it may be very difficult for a defendant to prove its innocence. Similar considerations would apply to a situation where information about a retailer’s future pricing had been supplied to a competing retailer through a common supplier.

Legitimate responses – but be careful

In principle, it is likely to be legitimate for Retailer A to ask the Supplier B, referring to its general market intelligence that Retailer C is selling products more cheaply, if it is receiving the best commercial terms from the supplier, and to seek to obtain a lower input price from the supplier on a purely bilateral basis. However, if following that discussion, the supplier takes adverse action against Retailer C or seeks to encourage Retailer C to raise its prices, then it may well be difficult for Retailer A to prove that it did not intend that result to occur (see above).

Likewise, a supplier may generally take a unilateral decision to cancel or reduce sales of a product to Retailer C because of the latter’s discounting policies. However, if the supplier’s action follows a complaint from another retailer, or if it follows previous discussions between the supplier and Retailer C about the latter’s pricing policies, then the supplier’s action may well be construed as anti-competitive. In any event, care would need to be taken to ensure that the refusal to supply, or reduced supplies, did not give rise to an abuse of a dominant position if the supplier has a market share of 40% or more.

If you would like further information about the issues discussed in this Guidance Note, then please contact the Partners in our EU & Competition Group.

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