VOGEL & VOGEL COMPETITION NEWSLETTER

No3 - December 2020 - Vertical Restraints

EUROPE: NEW BER CONSULTATION

On Friday 18 December 2020, the Commission launched a consultation on the issues under discussion that it considers particularly important in the context of the review of the Vertical Restraints Regulation and its guidelines.

The objective of the consultation, open from 18 December 2020 to 26 March 2021, is to make advances in the preparation of the new legislation expected in the second quarter of 2022 in order to succeed the current Regulation and its guidelines.

It is of paramount importance for the future of all distribution contracts and more broadly vertical agreements in Europe since undertakings tend to shape their agreements according to the regulation in order to qualify for the block exemption and the guidelines provide them with additional elements enabling them to carry out a self-assessment of their agreements with regard to Competition law.

This consultation is particularly important because it addresses the most sensitive issues and focuses on the controversial matters that may or may not evolve under the new rules.

It is also of utmost importance to respond to it and our firm will participate in this consultation as it has done previously in order to defend the interests of businesses and the efficient functioning of distribution law.

How to respond to the fifty plus or so questions asked?

You will find our initial analysis below.

The consultation is focused on the 4 main themes identified during the evaluation phase by the stakeholders as not working well or not as well as they should:

- dual distribution by distributors and suppliers,
- active sales restrictions,
- indirect measures restricting online sales,
- parity obligations.

In addition to these four central themes, the Commission has included four other important issues:

- resale price maintenance (RPM),
- non-compete obligations,
- sustainability agreements, and
- impact of the COVID crisis.

We first note that the fundamental issue of agency contracts and the conditions under which they fall outside the scope of antitrust law is not directly addressed and that this point will have to be brought to the Commission's attention.

I. Key issues

1. Dual distribution

The term is open to various interpretations and should not cause confusion. It refers to the distribution of products or services by both network distributors and the headend supplier. Contrary to what is sometimes asserted in legal literature, this situation is neither new nor exceptional, even if it is perhaps taking on new forms today. This is the first falsehood to be challenged.

In many networks, there may be independent distributors and distributors that are subsidiaries or branches of the supplier, direct sales by the supplier to certain customers or competing sales by distributors and the supplier's website to end customers. All of these channels are complementary and if they exist, it is in order to best meet customer demand.

The block exemption in principle does not cover agreements between competitors but applies, by way of exception, to dual distribution as it is fundamentally a vertical relationship.

Some of the options considered by the Commission are quite alarming e.g. Option 2, which envisages limiting the exemption of dual distribution to cases that are unlikely to present horizontal problems, for example by introducing a market share threshold on the downstream market for distribution to final customers of less than 20%, or Option 4, which envisages nothing less than no longer block exempting dual distribution and subjecting it to an individual exemption.

To be very clear: making the block exemption for dual distribution subject to a market share threshold on the local resale market would lead to the block exemption being denied to almost all current distribution networks. Indeed, there are forms of dual distribution in almost all networks and the market share of distributors in their local catchment areas alone is often greater than 20% or is very difficult to estimate. This is what led the drafters of the vertical block exemption regulations to calculate the exemption thresholds for distributors in the upstream market in which they purchase the product. Option 2 is therefore impractical because it would require the calculation of thousands of market shares within a single network with enormous transaction costs, with the data often not even being available, and in any case would deprive almost all networks of the exemption, which is not the aim of a block exemption regulation.

Options 1 (make no changes) or 3 (extension of the dual manufacturer - distributor exemption to the situation of importers or wholesalers with their own network of distributors and selling parallel to their network) are more reasonable. Option 3 corresponds to a request from private importers handling distribution in a European country and who have a dealer network while making direct sales to final customers. Insofar as their situation is similar to that of manufacturers or manufacturers, confirmation of the benefit of the block exemption appears to be a legitimate claim.

2. Active sales restrictions

Restrictions on sales are prohibited in principle with certain exceptions; for example, active sales are prohibited in exclusive distribution to the territory of another distributor to whom exclusivity has been granted; similarly, active and passive sales are prohibited to non-members of the network in selective distribution. However, where there is a combination of exclusive and selective distribution, active and passive sales must in principle be permitted and cross-selling is possible at all levels in selective distribution. Moreover, in the event of a combination in the EU of exclusive distribution in some countries and selective distribution in others, selective distributors are not protected against sales from outside to off-network resellers in selective countries.

The present situation is unsatisfactory: it does not sufficiently protect selective distributors and does not allow the organization of exclusive distribution by country at the wholesale stage for importers responsible for running a selective downstream network. These problems need to be resolved in the future through recourse to Options 2 and 3 which can be combined, as Option 1 (no change) does not address the current problems.

3. Indirect restriction of online sales

Online sales are regarded as passive sales. Therefore, restrictions preventing distributors from selling through the internet are considered hardcore restrictions not exempted by the VBER. This also applies to indirect restrictions on online sales. Stakeholders have rightly criticized this rigid repression of all indirect restrictions on online sales. Two criticisms that the Commission takes note of and submits for assessment: the prohibition of dual pricing (selling at a different price to the same distributor depending on whether the product is to be resold online or in a physical store) and the equivalence principle (i.e. the criteria for online sales should be equivalent to the offline criteria).

Option 1 (make no changes) is certainly not the right one. Options 2 and 3 are worthy of approval provided that the limits envisaged by the Commission do not deprive the exemption of any useful effect.

Option 2 here consists in no longer defining dual pricing as a hardcore restriction and allowing it, although with limits and precautions so that it does not lead to restrictions on online sales. We have been campaigning for years to put an end to the absurdity of an absolute ban on dual pricing. Indeed, the distribution costs of the different sales channels are not the same and the services offered by the different channels differ and have different costs. It is completely reasonable to be able to pay for the costly services offered in-stores if an undertaking wishes to preserve some physical outlets.

The internet has long since won the battle, so it is no longer necessary to overprotect it with rules that disadvantage physical stores, which are undergoing an unprecedented crisis and have to face important charges that do not usually affect websites or not to the same degree. The preferential treatment granted to online sales by the rigid ban on dual remuneration as advocated by the German competition authority, the BKA, must be stopped as soon as possible. On the other hand, the safeguards envisioned by the Commission must not be such that they indirectly prevent dual remuneration. As long as it is justified and proportionate, there is no reason it should not be permitted.

Option 3 consists of no longer making non-compliance with the principle of equivalence a hardcore restriction. The initiative is welcome given the significant differences between channels. Here again, the safeguards devised by the Commission should not be such that they indirectly preclude the exemption.

4. Parity obligations

Parity obligations which oblige a company to provide the same or better terms to the other party (e.g. an internet-based booking platform) than it otherwise provides (e.g. on its own website or through other sales channels) are currently block exempted below the 30% threshold of the Regulation. Such obligations have been the subject of numerous rulings in the various Member States, with decision-making practices that are not necessarily uniform. The competition authorities of the Member States have analyzed the anticompetitive effects of these platforms demanding parity provisions, and also the pro-competitive effects, in particular to avoid free riding, with platforms having made investments not wishing them to benefit co-contractors or competitors offering better prices than those on the platform.

Responses from the competition authorities of Member States have suggested that a distinction may need to be made between general parity obligations (applicable to all channels, to the contracting firm's own sales and to other platforms or channels) and limited parity obligations applicable only in respect of the contracting undertakings own sales to avoid free riding but not preventing better terms by competing sites.

Option 2 reflects that analysis, while Option 1 defines the status quo (exemption when below the thresholds) and Option 3 no exemption for parity obligations.

II. Other key issues

1. Resale price maintenance

This is effectively a crucial issue which has been raised by many stakeholders in the responses to the consultations and at the workshop in Brussels in which we participated. The Commission acknowledges in its consultation that the conditions for the efficiencies of RPM and a possible individual exemption are not clear and that the directives are insufficient. The evaluation report went further and suggested that the conditions regarding RPM themselves were not at all clear. In addition, the rules regarding resale price maintenance as a restriction by object and hardcore restriction that may be subject to an individual exemption - that is never granted - do not correspond to the economic analysis or, moreover, to the recent requirements of case law regarding restrictions by object. As a result, the consultation is still very tentative on the efficiency gains of RPM, the conditions and how to improve the clarity of the rules. A total paradigm shift should be made in this area, following the example of the Leegin case law in the United States. It would be appropriate, when inter-brand competition is high, to exempt RPM below a market share threshold of, for example, 20 or 25%. This situation needs to get past the purely wishful thinking stage.

2. Non-compete obligations

Many stakeholders have pointed out that the absolute and rigid 5-year limit for benefiting from the block exemption for contractual non-compete clauses is too strict and that it should be possible to provide for renewable 5-year clauses where the contracting party has an option not to renew or to terminate the contract, also in order to avoid the transaction costs associated with renegotiation. The consultation has taken this into account and presented this recommendation to respondents.

3. Sustainability agreements

Here, the Commission asks respondents whether, in the light of the objectives of the European Green Deal, the current rules may have created obstacles to the implementation of the sustainability objectives pursued by European law.

4. Impact of Covid-19

The Covid-19 crisis has had important economic implications that have not spared the distribution sector. In particular, it has led to an increase in online sales. The Commission is therefore asking respondents whether the crisis has led to changes that should be taken into account in the revision of the regulation. It should be noted that the expansion of the Internet makes it all the more necessary to ensure absolute neutrality in competition regulation in relation to the various sales channels and to eliminate the current system of absolute preference for online sales, which ultimately has detrimental effects on physical commerce.

It is of course possible to alert the Commission by means of an attached document of any problems that have not been taken into account. This should be the case in particular for the arrangements for agents within the meaning of competition law or for shared exclusive distribution (several distributors for an exclusive territory shared between them).

by **Louis** and **Joseph Vogel**

CZECH REPUBLIC: RPM

Vertical restraints have long been somewhat overlooked by the Czech Competition Authority (CCA). In recent years, however, there has been a considerable increase in enforcement activity within supplier relationships. The previously sporadic discovery of prohibited vertical restraints rose to four cases both closed in 2018 and 2019. Meanwhile, fines imposed for concluding illegal vertical agreements in 2019 amounted to CZK 65,824,000 (almost EUR 2.5 million) and represented around 61% of the total amount imposed by the CCA´s first instance decisions that year for anticompetitive conduct, compared with the CZK 13,969,200 (roughly EUR 500,000) worth of fines imposed in 2018, which amounted to less than 10% of total fines.

The most prominent and legally interesting cases include a record fine of CZK 40,793,000 (approx. EUR 1.5 million) imposed on BABY DIREKT, a wholesaler on the relevant markets for prams, car seats, children's furniture and day-care products. The antitrust behavior assessed by the authority consisted in the obligation of the company's customers to respect minimum resale prices (RPM) for the childcare-based goods supplied. BABY DIREKT was also investigated in separate proceedings for limiting the resale of its goods only to the final consumer and for prohibiting any further exports outside of the territory assigned, i.e. prohibition of active and passive sales outside of the Czech Republic. While the company was found in violation of competition law again, no separate fine was imposed since the practice was performed in parallel with the RPM.

Following international trends, the CCA has also challenged the legality of terms and conditions governing the operation of digital platforms in the case of Booking.com. The case concerned the market for the online booking of short-term accommodation services in the Czech Republic. The fine imposed was CZK 8,336,000 (approx. EUR 314,000) and the crux of the case was the obligation of hotels and other accommodation service providers to supply Booking.com NV with pricing and room availability conditions at least equal to those presented on their own websites or via any other online/offline distribution channel.

Recently, the CCA has dealt with another case of RPM, consisting in the obligation agreed between a producer and its distributors active on the market for electronic cigarettes and e-liquid refills within the Czech Republic to sell the goods at a fixed price. While the CCA's decision has yet to become final and effective, this case also confirms the general trend towards more active enforcement of vertical restraints.

by **Martin Nedelka** and **Jakub Jošt**

NEDELKA KUBÁČ ADVOKÁTI

CYPRUS: EXCLUSIVE DISTRIBUTION

An appeal is underway against an interesting and controversial decision of the Cypriot Commission for the Protection of Competition (CPC) in which the CPC imposed a record fine of EUR 20,000,000 on Daimler AG (the well-known German car manufacturer and genuine parts supplier) and EUR 700,000 on CIC Ltd (a Cypriot company selling Mercedes-Benz cars and genuine parts).

The CPC found an exclusive distribution agreement between Daimler and CIC to be anticompetitive by its effects, infringing Article 3(1)(b) of the Competition Protection Laws 2008 and 2014 and Article 101(1)(b) TFEU.

The complainants, Kyros Ltd and Kapodistrias Ltd, both companies active in the import and after-sale of spare parts in Cyprus, had claimed that they had been cut off from the supply of genuine OEM car parts, as a result of the operation of the distribution agreement and the de facto monopolization of the after-sale market by CIC.

The CPC examined the distribution agreement within the scope of the wholesale supply market for genuine parts for Mercedes-Benz cars (OEM/OES) and its sub-market, that of wholesale supply of genuine parts carrying the manufacturer's logo (OEM).

The CPC first considered whether the agreement fell outside the scope of Article 101(1), namely whether it constituted a purely qualitative distribution agreement according to the Leclerc conditions. The CPC decided that the agreement was not purely qualitative. The factors cited for reaching this decision included:

1. The complainants' commercial success before the agreement,
2. The fact that any necessary skill required for the correct use of the car parts did not fall on the supplier of such parts but on the customer's mechanic,
3. Daimler's failure to inform the complainants of the possibility to enter a distribution agreement, and
4. The particularities of the Cyprus market, (an isolated island market), secluded from other markets.

Having regard to these factors, namely CIC's de facto monopoly post-agreement on the one hand, and the lack of any evidence demonstrating pro-competitive effects on the other, the CPC ruled that the respondents could not rely on qualitative exception. Nor could Daimler and CIC benefit from the block exemption since their market shares surpassed the 30% threshold.

The CPC therefore proceeded to examine the matter under Article 101(1). The CPC decided that the agreement restricted competition by effect, repeating considerations raised previously in the decision, namely CIC's de facto monopoly, the fact that Cyprus is an island, the lack of alternative supply routes for the complainants, and Daimler's failure to ensure that the operation of its agreement did not harm competition. The CPC finally ruled that Daimler and CIC had failed to meet the burden of proof demonstrating countering pro-competitive effects and were therefore found in breach of community law.

The decision has been appealed and while the appeal will not disturb findings of fact, it is expected to provide clarity and guidance on several important issues and especially:

1. The extent to which the isolated island market approach followed by the CPC is sound in law. The CPC seemed to suggest that if Cyprus was not an isolated island market, it would have reached a different outcome, noting that Daimler's distribution agreement was unique in its operation in Cyprus.
2. Whether the CPC had erred (as argued by Daimler) in limiting the relevant market to:
   a. Mercedes-Benz car parts,
   b. The Mercedes-Benz cars OEM market, as opposed to the broader market for genuine parts (OEM and OES) and rivalling quality parts.
3. The extent to which the record fine on Daimler was justified, for simply failing to actively supervise its distribution network.

The outcome of the appeal is eagerly awaited.

by **Charis Papachristodoulou** and **Xenia Kantouna**

ROMANIA: NEW RULES

With a new wave of rules applicable to business-to-business frameworks expected to be enacted in 2021 in Romania, many contractual arrangements will require further legal review and adjustment.

First, the unfair practices law will be amended to address, among other things, the "abuse of a position of superior bargaining power", covering the conduct of undertakings which are not dominant but have a strong position compared to their weaker counterparts. The proposal submitted for public consultation in 2020 includes an abundance of elements and criteria required in order for such a practice to exist, some of them (such as "considerably larger" dimension/ "significant" proportion of sales or acquisitions/ "significant" investment/ "difficulty" of an "equivalent" solution) being able to trigger debates in their interpretation and practical application.

This prohibition definitely constitutes a new limit to the contractual freedom that will in particular impact vertical agreements across all sectors. The proposal enables both administrative and private remedies against any practice amounting to an abuse of superior bargaining power position, such as refusal to supply or acquire goods or services, failure to comply with contractual clauses regarding payment, supply or acquisition, imposing unduly burdensome or discriminatory conditions considering the scope of the contract.

Second, on a similar path but with a more sectorial approach, the Romanian authorities started public consultations on the transposition of Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain. It is not clear yet whether Romania will extend the protection under this law in those areas in which Member States can opt to do so.

Third, in another field, the Competition Council submitted for public consultation a draft Government Emergency Ordinance providing national enforcement mechanisms in the context of the entry into force of Regulation No 2019/1150 on promoting fairness and transparency for business users of online intermediation services.

Under the currently available form, the Competition Council is the Romanian authority entrusted with the application of the provisions of the Regulation, and the sanctioning system envisaged comprises both warnings and fines of up to 1% of the turnover derived by the online intermediaries from the administration of the online platform in the year prior to the issuance of the sanctioning decision. Also, private enforcement may be pursued directly before national courts, without any need for formalities before the Competition Council.

Fourth, on a more general note, given the frequency of vertical restraints, in order to offer guidance and support for companies, the Romanian Competition Council submitted for public consultation a Draft Guide on vertical agreements.

The Guide mostly follows the EU Commission's approach and gives details on the rules applicable to some of the most frequently used vertical restraints (non-compete obligations, exclusive /selective distribution, restrictions on active/passive sales, resale price maintenance). At the same time, the Guide also provides relevant examples from the previous decision-making practice of the Romanian Competition Council, as well as specific recommendations.

In the context of the recent public consultations carried out by the European Commission in reference to the review of the Vertical Block Exemption Regulation, we can expect the Guide to be further developed in time as well.

by **Georgeta Dinu**

HUNGARY: PURCHASE AGREEMENTS

The Competition Authority (GVH) initiated a sector inquiry into the drinks purchases in the HoReCa (hotel/restaurant/catering) sector in October 2020. The GVH claims that current business practices prevailing in this sector led to a situation in which it became difficult for small suppliers to get into the portfolio of the HoReCa premises presumably rendering consumer choice more limited and prices higher. The inquiry aims to get known the conditions of supply of both alcoholic and non-alcoholic beverages.

The sector inquiry is based on two prior investigations of the GVH into the relevant sector. The first targeted the beer supply of HoReCa premises and was conducted in 2011-2014. This investigation focused on the exclusivity and other preferential agreements under which the three main beer manufacturers made access to HoReCa premises for small breweries more difficult.

As established by the GVH in 2014, the beer producers concluded agreements stipulating different levels of exclusivity at HoReCa premises. Some of the contracts ensured full exclusivity, meaning that the buyer was only allowed to purchase beer from a given supplier. Other agreements set minimum quantities to be purchased from the supplier in a given month or year. Again, certain agreements requested that a minimum percentage of the purchases made by the buyer over the whole or a particular (e.g. premium) beer product range had to be from the supplier. Some of these contracts set the minim percentage at 80% in which case the agreement was considered by the GVH to be equal to full exclusivity.

The GVH considered back in 2014 that while the exclusivity agreements concluded by the beer suppliers did fall under the relevant block exemption regulations since there were no hardcore restrictions and the market shares of each of the three main producers did not exceed 30%, the network of beer supply agreements containing similar vertical restraints covered more than 50 % of a relevant market and significantly restricted access to a relevant market. The GVH thus considered that the benefit of the block exemption regulation could be withdrawn.

In order to address the issues raised by the GVH the parties submitted commitments, which were accepted by the GVH, imposing the obligation on the three manufacturers to reduce the quantity of sales made under such conditions by 19% within two years. The GVH has recently examined the fulfilment of the conditions and established that all three beer suppliers achieved the required level of reduction in such sales, but imposed a fine on one of the suppliers for not providing the necessary data in the form required in the 2014 decision.

The other case which was contributed to the triggering of the current sector inquiry is an ongoing investigation into the soft drinks market concerning an alleged abuse of dominance. The GVH published no details about this investigation.

The sector inquiry should be closed with a public report, and the GVH is entitled to initiate individual investigations if it identifies anticompetitive behavior on the market under scrutiny. The primary objective of the sector inquiry seems to be the identification of barriers to market entry for small, mostly national drinks producers and to remove such barriers.

by Balázs Csépai

oppenheim

SINGAPORE: ABUSE OF DOMINANCE

In Singapore, the Competition and Consumer Commission Singapore ("CCCS") administers the Competition Act (Cap. 50B) (the "Act"). Under the Act, vertical agreements are generally exempted from the prohibition against cartel activities but are instead regulated under the prohibition against the abuse of a dominant position.

Section 34 Prohibition

Generally, cartel activities are prohibited under Section 34 of Act, which provides that agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore are prohibited (**"Section 34 Prohibition"**).

Paragraph 8 of the Third Schedule to the Act stipulates that the Section 34 Prohibition does not apply to vertical agreements unless the Minister otherwise specifies by order.

A "vertical agreement" is defined under the Act as any agreement entered into between 2 or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services and includes provisions contained in such agreements which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions do not constitute the primary object of the agreement and are directly related to the use, sale or resale of goods or services by the buyer or its customers

To date, the Minister has not specified any vertical agreement to which the Section 34 Prohibition will apply.

Section 47 Prohibition

The prohibition against the abuse of dominance is caught under Section 47 of the Act which prohibits any conduct of one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore is prohibited (**"Section 47 Prohibition"**).

For the purposes of the Section 47 Prohibition, conduct may constitute such an abuse if it consists in

(a) predatory behaviour towards competitors;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading partners, thereby placing them at a competitive disadvantage; or

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

Vertical restraints that may be caught under the Section 47 Prohibition include the following:

(a) refusals to supply essential products or services and refusals to allow access to essential facilities in order to foreclose competitors;

(b) tying which makes the purchase of one product conditional on the purchase of another product;

(c) exclusive dealing which requires buyers to buy only from the dominant supplier and not from its competitors; and

(d) loyalty-inducing discounts which incentivises buyers to not purchase from the dominant supplier's competitors or to buy their entire or most of their requirement from the dominant supplier.

SISTIC Case

On 4 June 2010, the CCCS issued an infringement decision against SISTIC for abusing its dominant position through a series of exclusive agreements. SISTIC was the dominant ticketing service provider in Singapore and had entered into exclusive agreements with venue providers and event promoters which requires them to use SISTIC as the sole ticketing service provider for all their events. The CCCS imposed a financial penalty and directed SISTIC to remove any clause that requires SISTIC's contractual partners to use SISTIC exclusively.

by Chong Kin Lim

DREW & NAPIER

UKRAINE: UPFRONT PAYMENTS

Enforcement practice of the Antimonopoly Committee of Ukraine (AMC) in relation to vertical restraints has been quite scarce. So far, the AMC has looked at them only in a few cases and in a somewhat unconventional manner.

One of the first cases where the AMC specifically focused on vertical restraints was the so-called "Kiev retail cartel" case back in 2015, where the AMC alleged collusion among retailers to impose (among others) upfront access payments on small and medium producers. In another 2018 case, the AMC imposed fines on several pharmaceutical companies and their distributors for alleged vertical concerted practices that enabled excessive pricing at public tenders. In this case, the AMC also pointed out, although briefly, that export bans may be potentially anticompetitive. Finally, in an ongoing investigation against a Ukrainian poultry producers, part of the blame for the suspected abuse seems to be attributed by the AMC to vertical restraints allegedly imposed by the producer on its distributors. This investigation is in the active fact-finding stage and no further details are publicly available.

While the above cases of the AMC cannot be compared to the recent revival of enforcement against RPM at the EU level and in many Member States, it still demonstrates some changes in enforcement priorities in Ukraine and the AMC's growing interest to such practices. Given that the AMC is increasingly reliant on the EU approaches, they are likely to allocate more resources to detect and prosecute vertical hard-core restrictions. From the legislative perspective, the AMC is well equipped for this purpose, as Ukraine implemented Commission Regulation (EU) No 330/2010 in late 2017 as a part of country's commitment under the EU-Ukraine Association Agreement.

Albeit limited, the AMC's current practice may also be helpful, as it has generated substantial case law and legal tests. By way of example, in the "Kiev retail cartel" case mentioned above, the retailers successfully contested the AMC's allegations in courts on various grounds. One of them was that the AMC did not prove that the upfront access payments were onerous and unfavorable for the SMEs. The courts have developed a test, which distributors may invoke to prove that specific market conduct is in fact the unilateral market policy of a dominant supplier, rather than a vertical agreement.

by **Sergiy Glushchenko**

Asters

UNITED KINGDOM: RPM/DIGITAL

Resale Price Maintenance (RPM) and enforcement of vertical agreements in digital markets continue to be key focus areas for the UK Competition and Markets Authority (CMA). Enforcement activity looks set to remain active, with the potential for significant change in the way digital markets are regulated in the UK from 2021.

Resale Price Maintenance

There has been a large amount of enforcement activity relating to RPM in particular. Much of this focusses on online sales practices. A significant investigation looked at the musical instruments sector in June 2020, where the CMA issued fines for RPM on high tech musical instruments (such as electronic drums and synthesisers) to Roland, Korg, Yamaha and online retailer GAK across three separate cases, with fines totalling £5.8m. This followed on from two other RPM cases concerning the musical instrument sector, including a record £4.5m fine for Fender guitars in January 2020 and a £3.7m fine for electric keyboard manufacturer Casio. The Fender guitars case in particular has a good lesson on what not to do with your documents and evidence when the CMA arrives for an investigation – with Fender suffering an increased fine as a consequence.

So widespread has the issue of RPM been in the sector, the CMA has issued an open letter to the industry, and has sent warning letters to 70 different suppliers and retailers where the CMA already has sufficient evidence that they may have broken the law.

Most of the CMA's focus has been on online sales. Interestingly, the CMA has developed and launched an in-house price monitoring tool to detect RPM activity. This appears to have been deployed in relation to musical instruments so far, but not doubt will be capable of adaptation to monitor other markets (if not done already). Given the CMA's increasingly activist approach in consumer protection, we can expect this to continue to be a focus area. The CMA's case study page is rife with examples of RPM, together with useful guidance materials for businesses.

The CMA's RPM enforcement activity continues into 2020, with the Authority in November 2020 launching a fresh investigation into Dar Lighting for RPM in the domestic light fitting sector – a sector which also has a history of enforcement action, where a 2017 case resulted in a £2.7m fine for the National Lighting Company Limited (a fine which was increased by 25% when the company ignored a CMA warning letter).

Digital markets and vertical agreements

The CMA has been actively looking at digital markets, with a particular focus on online platforms and digital advertising. A wide ranging market study was completed in July 2020, however this resulted in a decision not to make a more detailed market investigation reference – an instrument within the CMA's toolkit under the Enterprise Act 2002, which allows the CMA to closely examine a particular market and impose structural remedies to address competition issues.

However, the CMA did find that there was substantial consumer harm due to lack of competition in digital markets, and recommended the creation of a new Digital Markets Unit, and a new regulatory regime for the sector – something that would require new primary legislation. In November 2020, the government announced the creation of the new unit and will consult on its form and functions in early 2021, and legislate as soon as possible after that.

Meanwhile, earlier in November, the CMA published the results of an investigation into the practices of ComparetheMarket – a significant online price comparison site for home insurance, where it found anti-competitive vertical agreements in place between the platform and its suppliers. ComparetheMarket was fined £17.9m for imposing wide 'most favoured nation' clauses in its contracts with suppliers – preventing suppliers from offering cheaper quotes through rival platforms.

With the creation of the Digital Markets Unit, we can expect the CMA to continue to focus its enforcement efforts, with the potential for a significant change in the way these markets are regulated in the UK from 2021.

by **Scott Rodger**

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