

RECENT CASES OF SUGGESTED RETAIL PRICE SANCTIONED BY ANTITRUST AUTHORITIES BECAUSE REGARDED AS VERTICAL AGREEMENTS ON PRICES

Maurizio Iorio, Attorney at Law

From the examination of some recent decisions by European antitrust authorities, we can deduce important information on what is permitted and what is forbidden in the case of recommended retail prices.

Retail price maintenance (i.e. the agreement between operators – whether competitors or not – on the price to be charged to purchasers, and thus not subject to the full play of market forces) is expressly prohibited by the EU legislation on competition (Article 101, Para 1, Treaty on the Functioning of the EU) and by the Italian one (Article 2, Para 2 (a), Law 287/1990).

This prohibited practice can be implemented both horizontally (through agreements between competing operators according to a *Producer-Producer* or *Wholesaler-Wholesaler* horizontal scheme) and vertically (through agreements between operators at different levels of the supply chain, according, for example, to a *Producer-Wholesaler* or *Wholesaler-Retailer* scheme).

In this article I shall focus on vertical agreements.

(1) Maintenance of prices in its various forms

In this respect, the producer may in no way pursue the aim of fixing prices either directly (e.g., by bluntly imposing a minimum selling price to its dealers, or face various forms of retaliation), or indirectly (e.g., by implementing a policy of discounts on products supplied to its dealers in exchange for the adoption of the minimum ‘suggested’ price policy). In fact, such conducts do nevertheless constitute prohibited practices within the meaning of the abovementioned legislation, known as Retail Price Maintenance Agreements.

With regard to this phenomenon, also recently there have been cases of violations which were duly sanctioned by the Italian Competition and Markets Authority (AGCM) and by various antitrust authorities of other Member States.

(2) The case of discounts granted only to dealers who comply with the ‘suggested’ price and that of prices imposed by an actual contractual clause

I shall first highlight a fairly recent measure issued by the Italian Competition and Markets Authority (**Decision No. 24619 of 20/11/2013 – Ref. I718**) concerning a producer of nutritional supplements (Enervit), which had concluded an agreement with one of its own dealers (the owner of a pharmacy and a website) under which the latter was granted an extra discount of 10-20% on the price of the delivered products, in exchange for his compliance with the ‘suggested’ minimum resale price. In addition, the producer sent some communications advising the dealer to “*carefully and objectively read the official price list...*” and keep discounts to the public within a preset limit. This is a classic example of pursuing the aim of indirectly maintaining prices by means of extra discounts on products supplied to the dealer in order to obtain his compliance with the suggested price.

The second Italian case that I would like to bring to the reader’s attention (**Decision No. 24577 of 22/10/2013 – Ref. I766**), concerns a producer of photovoltaic systems which had

entered into an agreement with one of its dealers under which “*during the sale the dealer must strictly apply the sale prices quoted in the Producer’s price list...*”. Also in this case the agreement was followed by communications with which the supplier’s management advised the dealers to follow the ‘*minimum reselling price*’ shown in the ‘*price list*’.

Both the cases mentioned above ended with the acceptance by the Competition and Markets Authority of binding commitments from the investigated companies to take steps to ensure compliance with competition law.

(3) UK: Resale price imposed by means of threats to revoke a license on the use of advertising images

During this year (i.e., on 10/05/2016), the British Competition and Markets Authority (**Case CE/9857-14**) imposed a fine of 2.2 million pounds to a producer of bathroom fittings which had threatened to revoke the license on the online use of imagery, to which it owned the rights, to all those resellers who did not comply with its «*guidelines*» for online sales, including, inter alia, a clause of ‘recommended’ prices to the public whose objective was to actually put a ceiling on the maximum discount resellers could offer.

In this case, therefore, the clause on minimum ‘suggested’ prices was in fact mandatory, as noted by the Competition and Markets Authority (CMA) in the grounds for its decision: *However, despite being described as a ‘recommendation’, the evidence demonstrates that the key objective of Ultra’s online trading guidelines was to prevent resellers from selling or advertising Hudson Reed or Ultra branded products online below the ‘recommended’ online price* (.....) *“Ultra made it clear to resellers that there would be consequences for failure to comply with the maximum discount, including reducing resellers’ wholesale terms and withdrawal of Ultra’s permission to use its copyrighted images on resellers’ websites.”*.

The British CMA addressed also the resellers conduct, stressing that some of them had clearly understood that the clause included in the guidelines actually represented a constraint on the minimum resale price and they were party to it, thus constituting a **concerted practice** prohibited and punishable under antitrust law.

(4) France: Mixed vertical and horizontal agreements and evidence gathered by the antitrust authority

In another recent French case (**PVG France and Ligne Plus, Decision No. 16-D-17**), the *Autorité de la concurrence* has on 21 July 2016 imposed a fine for a form of anti-competitive conduct that we could call ‘mixed’, in having identified horizontal agreements between two competing companies operating in the backup heating units sector and resulting vertical agreements between them and their respective distributors.

The documentary evidence gathered by the French antitrust authority includes: the correspondence exchanged between the companies, the signing of a «non-aggression pact», statements from the employees of the companies involved, internal emails, agendas, and even notes handwritten by the employees and managers involved.

The French authority noted in this case, the existence of a communication on ‘suggested’ selling prices and highlighted that the producers under investigation held an actual surveillance of the distributors’ resale price in order to ensure that the pricing policy was being adhered to (“*De nombreux éléments au dossier attestent que les produits de marque et premiers prix de PVG France ont fait l’objet d’une communication de prix de vente conseillés à l’intention des distributeurs entre 2005 et 2008 et que PVG France a exercé,*

durant la même période, une surveillance des prix de revente des distributeurs au moyen, notamment, de la collecte des publicités comportant les prix des produits, des rappels et communications des prix conseillés adressées aux distributeurs.”). The French competition authority also noted that some distributors had expressly agreed with this policy and that several of them had even urged their supplier to more aggressively pursue a policy of minimum prices (“Certains d’entre eux ont explicitement acquiescé à ses demandes et d’autres ont même sollicité PVG France afin qu’il fasse respecter sa politique tarifaire à l’égard de points de vente concurrents.”) and/or that had reported competing distributors who did not comply with it (“Certains distributeurs l’ont sollicité sur le niveau de prix qu’il conviendrait de pratiquer et lui ont également signalé les tarifs « déviants » de points de vente concurrents.”). These findings are important as they confirm the existence of a concerted practice between producer and distributors necessary for configuring a prohibited conduct and apply the relevant sanction.

The overall fine was in this case of EUR 9,013,000.

(5) Germany: Fines for granting incentives to resellers who comply with the ‘suggested’ resale prices and retaliation against those who do not

Also the German competition authority has recently concluded (June 2016) some proceedings for antitrust violations regarding price maintenance, which resulted in issuing fines amounting to about EUR 150 million for conducts involving discounts and other incentives, or deliveries at particularly favourable prices only to those resellers who complied with the suggested price, as well as reduced deliveries or, sometimes, refusal thereof to resellers who did not apply the recommended retail price.

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