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I. THE EUROPEAN COMMISSION'S APPROACH

The European Commission's (the "EC") 2010 Vertical Restraints Block Exemption Regulation (the "VBER") and accompanying Guidelines on Vertical Restraints (the "Guidelines") created a certain amount of excitement with the new approach towards resale price maintenance ("RPM"). However, for all of the discussion about the EC's new, softer approach to RPM, little has come of it.

The only recent remarkable EC proceeding that touches on RPM is the *E-Books* investigation where the main culprit was a retail price Most-Favoured-Nation ("MFN") clause.[2] While MFN clauses are not strictly RPM clauses, it appears that these second cousins of RPM can help create the same types of restrictions on competition. In *E-Books,* Apple entered into agency agreements with five publishers that included *inter alia* retail price MFN clauses, maximum price grids, and the level of commission to be paid to Apple. The MFN clause stated that if another retailer—other than Apple—were to offer a lower price for a particular eBook (regardless if that retailer was able to independently set the retail price or if the publisher did) the publisher had to lower its price for that eBook in the iBookstore to match that lower retail price.

As explained in the Guidelines, the EC does not like RPM clauses because they may restrict competition by: (i) facilitating cartel behavior; (ii) softening competition through "interlocking" relationships; (iii) causing prices to go up; (iv) committing a supplier to follow a pricing path it would not otherwise follow; (v) foreclosing competing suppliers; and (vi) foreclosing innovative retailers. The MFN clause in *E-Books* may have at least covered (i), (ii), (iii), and (vi).

The EC's preliminary assessment considered that the MFN clause acted as a "joint commitment device" which gave the publishers the power to force Amazon to accept a change to the agency model—where it could not set its own retail prices—or risk being cut off. As part of their commitments both the publishers and Apple had to undertake not to include wholesale price and commission or revenue share MFN clauses for five years. The EC's main objective was to eliminate the possibility of recreating the effects of the retail price MFN clause.

Unfortunately, in *E-Books* the EC missed an opportunity to discuss MFN clauses specifically and how they fit into EU competition law. Since MFN clauses and RPM clauses can create the same effects (e.g. facilitate cartel behavior, soften competition, cause prices to go up, foreclose innovative retailers), should suppliers avoid using them? What about the limited

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[2] Documents relating to the proceeding are *available at*: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39847.

instances where an RPM clause may meet the conditions of Article 101(3) of the Treaty on the Functioning of the European Union ("TFEU")?

What the EC's commitment decision tells us is that five publishers knew what each other was doing, i.e. signing agreements that included the same restricting clauses that would hopefully raise the retail prices of eBooks in the European Economic Area ("EEA") or prevent the emergence of lower retail prices for books in the EEA (thanks to Amazon). Part of the reason for the paltry analysis may be that the EC's decision is a commitment decision rather than an infringement decision. The former tend to be rather lean on analysis since, among other things, they are supposed to be less resource-intensive than the latter.

Alternatively, or in addition to that, it may be that the EC has decided not to take up the issue of RPM. However, this does not appear to put a damper on enforcement since, as we discuss below, National Competition Authorities ("NCAs") have taken the matter to heart.

II. NATIONAL COMPETITION AUTHORITIES SHOW NO SUPPORT FOR RPM AND MFN CLAUSES

The EC may not be saying much about RPMs and MFNs, but NCAs are quite vocal about the anticompetitive effects of such restraints on vertical relationships.

A. RPM Clauses

In the area of true RPMs, there is no doubting the NCAs' position on the matter. They do not like them. The Irish Competition Authority clearly states on its website that it "takes a very serious view of RPM and will take enforcement action against anyone engaging in the practice."[3] The United Kingdom's Office of Fair Trade ("OFT") commissioned a 189-page tome on the matter, entitled "Anti-Competitive Effects of RPM (Resale Price Maintenance) Agreements in Fragmented Markets," which was published in February.[4]

While the EC's Guidelines say something about there being certain times when RPM may be justified and meet the conditions in Article 101(3) TFEU, it appears that such justifications almost never arise. Furthermore, it is not just minimum resale prices that may run afoul of Article 101(1) TFEU; maximum and recommended prices may also infringe EU competition law. Thus, it is no wonder that NCAs' knee-jerk reactions is to settle cases involving RPM clauses, as illustrated in the sampling of national cases that have been completed this year.

The Irish Competition Authority received binding commitments via a court order in an RPM case in February 2013.[5] The exclusive distributor of FitFlop brand footwear in Ireland, Double Bay Enterprises Ltd, (known as Brazil Body Sports) imposed RPM on retailers. Retailers were not permitted to sell the products at prices other than those determined by the distributor. As one would anticipate, the commitments include a requirement that the distributor drop the RPM.

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[3] Quote *available at*: http://www.tca.ie/EN/Whats-The-Story/Resale-Price-Maintenance.aspx.

[4] *Available at*: http://ww*w.oft.gov.uk/OFTwork/research/economic-research/completed-research.*

[5] *Press release* available at: http://www.tca.ie/EN/News--Publications/News-Releases/Competition-Authority-welcomes-High-Court-Order-following-FitFlop-investigation.aspx; Enforcement Decision *available at*: http://www.tca.ie/EN/Enforcing-Competition-Law/Notices-Declarations-and-Guidance-Notes/Enforcement-Decisions/Decisions/E1301--Resale-price-maintenance-of-FitFlops-branded-footwear.aspx?page=1&year=0.

In June 2013, the Polish NCA, Prezes Urzędu Ochrony Konkurencji i Konsumentów ("UOKiK"), levied a fine on Sfinks Polska, which is a franchisor of a number of casual dining restaurant chains, including Sphinx, for *inter alia* RPMs.[6] Sfinks, as franchisor, determined the resale prices that had to be applied by its Sphinx franchisees. There has been some commentary on the fact that, in the case, the UOKiK has taken the position that a fixed or minimum resale price is a restriction by object under Polish and EU competition law rather than by effect. Why all of the fuss? The Guidelines say that fixed resale prices, as well as maximum resale prices, may be necessary in a franchise system or similar distribution system that applies a uniform distribution format to organize a coordinated short-term low-price campaign (e.g., two to six weeks).

The OFT has been engaged in commitment discussions with Booking.com B.V. ("Booking.com") and its parent company, priceline.com, Incorporated ("Priceline"), Expedia, Inc. ("Expedia"), InterContinental Hotels Group plc ("IHG"), and Hotel Inter-Continental London Limited ("IH London"), the previous owner of the Intercontinental London-Park Lane Hotel ("ILPL").[7] Allegedly, Booking.com and Expedia entered into arrangements with IHG and ILPL that restricted each online travel agent's ability to discount the rates for Room-Only hotel accommodation bookings.

IHG-branded hotels offer accommodation for booking in a number of ways, including through online travel agencies and IHG-branded websites. Expedia, IHG, and ILPL were parties to an agreement under which Expedia agreed to offer hotel accommodation at ILPL at a day-to-day room rate set and/or communicated by ILPL and not to offer rooms at a lower rate, for instance by funding a promotion or discount from its own margin or commission. Booking.com entered into a similar agreement with IHG and ILPL.

The OFT maintains that, as a result of these restrictions, competition for the offer of room rates between (i) online travel agents and (ii) travel agents and hotels' direct online sales may no longer exist. Furthermore, these restrictions may create barriers to entry since a new entrant may want to offer further discount rates for room accommodation to get a foothold in the market. The parties have offered commitments that include removing the restriction on discounting under certain conditions.

The OFT also issued a Statement of Objections in September of this year alleging that three U.K. department stores and a sports bra manufacturer infringed U.K./EU competition law by entering into RPM agreements that set a fixed or minimum resale price for a specific brand of sports bras.[8] The OFT believes that the agreements, which applied on a nationwide basis, were meant to increase the retail prices of the brand of sports bras in each of the department stores. This may have resulted in price-fixing that, as a result, artificially increased the prices consumers paid.

Smaller Member States' NCAs have been just as busy as the larger ones: in March 2013, the Austrian Cartel Court imposed a fine of EUR 2.9 million on Philips Austria GmbH

[6] Sfinks Polska, Decision DOK-1/2013 of 25.06.2013.

[7] Case file *available at*: http://oft.gov.uk/OFTwork/competition-act-and-cartels/ca98-current/online-booking/.

[8] Case file *available at*: http://oft.gov.uk/OFTwork/competition-act-and-cartels/ca98-current/leisure-goods/.

("Philips") for RPM among Philips and a number of online retailers.[9] The products affected were part of Philips' "consumer lifestyle" product group, which includes kitchen and personal care appliances. In May, the same court imposed a fine of EUR 20.8 million on the REWE Group for entering into a number of agreements with suppliers concerning *inter alia* final selling RPMs and promotion prices.[10] Also in May, the Portuguese Competition, Regulation and Supervision Court issued a judgment upholding a fine against a dairy producer, Lactogal, for imposing minimum resale prices for the distribution of its products to hotels, restaurants, and cafes.[11]

In July and September 2013, the Bulgarian Commission for the Protection of Competition ("CPC") went after sunflower oil producers and distributors because of RPM.[12] And, finally, Denmark's Competition and Consumer Authority (Konkurrence-og Forbrugerstyrelsen) has completed at least five RPM investigations thus far in 2013. In January, it settled an RPM case with the Danish design company, Georg Jensen A/S.[13] In April, it settled one with BSH Hvidevarer A/S,[14] a domestic appliances company and one with Unilever Danmark A/S (concerning ice creams).[15] In June, it settled one with HG Agencies, a Danish distributor of leisure weaponry—that was an RPM that prevented a dealer from independently pricing resale Browning products.[16] And, in July, the Danish Public Prosecutor for Serious Economic and International Crimes settled a case that had been referred to it concerning *inter alia* RPMs that Miele A/S was imposing on some of its dealers.[17]

It would appear that the EC has left the NCAs to their own devices, which is not necessarily an illogical position to take. At least in looking at the above examples, RPM clauses tend have a national element to them. National producers (or national subsidiaries of international subsidiaries) impose RPM on national distributors and retailers. The effects of the restrictive measure are felt by national consumers.

While it is very likely that there are EEA-wide distribution agreements that include RPM clauses, as exemplified by *E-Books*, things seem to be working well with national authorities'

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[9] ECN Brief 02/2013; BWB press release *available at*: http://www.en.bwb.gv.at/News/Seiten/29millioneurofineinelectronicsindustry.aspx.

[10] ECN Brief 03/2013 and BWB press release *available at*: http://www.en.bwb.gv.at/News/Seiten/BWB208millionEURfineagainstREWE.aspx.

[11] Press release *available at*: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201314.aspx?lst=1&Cat=2013.

[12] Press release *available at*: http://www.cpc.bg/default.aspx.

[13] Press release *available at*: http://en.kfst.dk/Indhold-KFST/English/Judgements/20130118-Georg-Jensen-pays-fine-in-settlement-for-resale-price-maintenance?tc=692AD7D591D6476987F8892493423A2E.

[14] Press release *available at*: http://en.kfst.dk/Indhold-KFST/English/Judgements/20130508-BSH-pays-fine-in-settlement-for-resale-price-maintenance-and-prevention-of-parallel-imports?tc=692AD7D591D6476987F8892493423A2E.

[15] Press release *available at*: http://en.kfst.dk/Indhold-KFST/English/Judgements/20130430-Unilever-Denmark-pays-fine-in-settlement?tc=692AD7D591D6476987F8892493423A2E.

[16] Press release *available at*: http://en.kfst.dk/Indhold-KFST/English/Judgements/20130704-Distributor-of-leisure-weapons-pays-fine-in-settlement-for-resale-price-maintenance?tc=692AD7D591D6476987F8892493423A2E.

[17] Press release *available at*: http://en.kfst.dk/Indhold-KFST/English/Judgements/20130725-Miele-pays-fine-in-settlement-for-resale-price-maintenance-and?tc=692AD7D591D6476987F8892493423A2E.

active involvement in dealing with RPM at the local level. The problem, which is not new and has been raised several times in the past, is that the EC lacks practical experience and know-how. Hopefully, the information sharing at the ECN level provides some scope for the EC to be appraised of the evolution of enforcement and national court case law in relation to RPMs.

B. MFN Clauses

MFN clauses, particularly those relating to online sales, have been getting a certain amount of attention from the NCAs. For example, both Germany's Bundeskartellamt ("BKartA") and the OFT have taken issue with Amazon's "price parity" policy. The BKartA has also raised concerns about pricing policies for online hotel booking services. France's and Switzerland's competition authorities have also been looking into online hotel reservation services.

The BKartA[18] and the OFT[19] have raised concerns about Amazon's "price parity" policy, an MFN clause that prevented sellers on Amazon from offering the same products on other platforms at lower prices than those applicable to Amazon. The NCAs raised concerns that the clause may *inter alia* curtail entry by potential entrants and directly affect the prices that sellers apply on other platforms, including their own websites, which would result in higher prices for consumers. Amazon decided to drop the clause. While the OFT seems relatively happy with this result and is contemplating closing its investigation, the BKartA is still in negotiations with Amazon.[20]

Hotels have also come under scrutiny recently, with investigations being initiated by a number of NCAs, including the BKartA. The BKartA has gone after the hotel-pricing portal, Hotel Reservation Service ("HRS").[21] In its contracts with hotels, HRS obliged hotels to always offer their lowest room price, maximum room capacity, and most favorable booking and cancellation conditions on the internet, also through HRS. As stated by the BKartA, hotels were even prohibited from offering potential guests better conditions if they booked directly at the hotel's reception.

The BKartA believes that such clauses: (i) restrict competition for lower prices among hotel booking websites; (ii) prevent the entry of new suppliers who may want to offer innovative services (e.g., last minute offers by smartphone) at lower prices; and (iii) prevent hotels from setting their prices and independently reacting to new competition developments. The BKartA and the parties involved have been in discussions to resolve the matter.

In the OFT's hotels case discussed above, the OFT chose not to investigate an MFN clause, although it does mention it in its Notice of Intent to accept commitments.[22] In the Notice, the OFT explains that, through the MFN clause, a hotel agrees to provide an online travel agent with hotel accommodation for offer by that online travel agent to end-users at a booking rate that

[18] Press release *available at*: http://www.bundeskartellamt.de/wEnglisch/News/press/2013_08_27.php.

[19] Case file *available at*: http://oft.gov.uk/OFTwork/competition-act-and-cartels/ca98-current/online-retail/.

[20] *See*: http://www.reuters.com/article/2013/10/20/amazon-germany-idUSL5N0IA0E320131020; http://www.dw.de/german-cartel-office-ups-pressure-on-amazon-to-drop-price-parity-policy/a-17171805.

[21] Press release *available at*: http://www.bundeskartellamt.de/wEnglisch/News/press/2013_07_25.php.

[22] *Supra* note 7.

is no less favorable than the lowest booking rate displayed by other online distribution outlets. This ensures that the online travel agent cannot be undercut.

The OFT acknowledges that restrictions on discounts, which its investigation focused on, could also include this type of MFN obligation. But, it chose not to look into the matter. That said, in their proposed commitments, the parties have committed to amend/remove/not include any provision between them that could frustrate the removal of the restriction on discounting, including MFN clauses. Furthermore, the OFT has clearly stated in its Notice that MFN clauses may come under scrutiny if they create obstacles to achieving the objectives of the commitments.

Both the BKartA and OFT, in addition to the EC, have tackled MFN clauses head-on. It would seem that the OFT is also satisfied with the marker it has laid down in the hotels case, although it has not directly addressed the MFN clause. As the NCAs build-up experience in dealing with RPM clauses, it is possible that they will then turn their attentions to MFN clauses. Both types of vertical restraints affect prices down the supply-chain. RPM clauses may clearly negatively control prices, but MFN clauses can accomplish similar results, e.g. facilitating cartel behavior, softening competition, causing prices to go up, and/or foreclosing innovative retailers.

III. WHAT IS NEXT?

With the economic situation being what it is, consumers are feeling financially strained. They believe that the prices they are required to pay are constantly increasing, but that there is nothing that they can do about it. NCAs have stepped in, probably for political as well as legal reasons, to address the situation. They are going after vertical restraints in agreements that directly affect their citizens. Consumers purchase everything from soup to nuts on Amazon. They buy sports bras, book hotel rooms, and eat ice creams.

NCAs are taking very public positions on RPM clauses (and to a certain degree MFN clauses)—we see this with the investigations they have initiated and the press releases and studies/consultations that they are issuing. The Irish Competition Authority issued a press release entitled, "Competition Authority reminder to businesses: resale price maintenance is against the law."[23] In addition to the OFT's recent study on RPM, the Austrian Federal Cartel Authority published for public consultation Draft Guidelines regarding Vertical Price Fixing.[24] NCAs are going after supply chains, particularly those that relate to food or online sales.

Businesses and practitioners should be prepared for more investigations into allegedly anticompetitive RPM clauses and MFN clauses. The fact that the EC may not be extremely vocal about the RPM (or MFN clauses) should not be taken to mean that these are non-issues. The EC has taken the position that an MFN clause amounts to a restriction by object. Its position is quite similar to the one it has taken in the VBER's discussion about RPM. As a result, any attempt to defend an MFN clause on the basis efficiencies is going to be a difficult battle to win. Such a defense is unlikely to succeed at the national level, too. NCAs and national courts appear to have limited appetites for in-depth Article 101(3) TFEU reviews.

[23] *See:* http://www.tca.ie/EN/News--Publications/News-Releases/Competition-Authority-reminder-to-businesses-resale-price-maintenance-is-against-the-law.aspx.

[24] ECN Brief 3/2013.