Retail Price Maintenance in Digital Economy

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Types of Vertical Restraints

- Single branding
- Exclusive distribution
- Exclusive customer allocation
- Selective distribution
- Franchising
- Exclusive supply
- Upfront access payments
- Category management agreements
- Tying
- Resale price restrictions

Intra-brand Restraint: Resale Price Maintenance

  - Non-Price Restraints (Territorial or customer allocation)
  - Price Restraint - RPM
  - RPM restrain the dealers (downstream firm) in a manufacturer's (upstream firm) product from reducing the price of that product.
- If a manufacturer of one brand adopts RPM, dealers in that brand cannot engage in direct price competition with other dealers carrying the same brand.

Competitive Harms of RPM

- Dealer also cannot use that brand to engage in direct price competition with other dealers carrying different brands – thus adversely affect interbrand competition
- Since, RPM directly interferes with both intrabrand and interbrand price competition, it result in **Higher Prices** for consumers across the relevant product.
  - Studies have shown when sellers ended RPM in major industries like light blubs, retail drugs, jeans – consumers realized substantial savings.

Competitive Harms

- Encourages collusion at the Manufacturer level
  - Because of RPMs adverse impact on interbrand price competition, it can facilitate price collusion at the manufacturer's level
    - RPMs makes resale price more stable and more visible, increasing the manufacturer's ability to coordinate their pricing strategies
    - Competitive pricing at retail level creates more pressure on manufacturers' factory prices than is present when they are able to set retail prices.

Competitive Harms

- Collusion at Dealer Level
  - Dealers use the RPM imposed by sellers to facilitate horizontal dealer collusion.
- Suppression of efficient/innovation dealers
  - Failure to get well-known manufacturer's brands free of RPM retard the ability of retailers to market the products more efficiently
- Misleading Promotions
  - Dealers would promote products wherein they have higher profit margins set by RPMs – even when there is no difference in quality of other brands.

EU Position on RPM

- Case AT. 40428 Guess (Dec. 2018)
  - Guess in its agreements concerning the distribution of clothing, shoes and accessories in the European Union and the EEA that contain
  - cross-border sales restrictions,
  - cross-selling bans among members of a selective distribution system,
  - internet sales limitations and
  - resale price restrictions

Guess RPM Clause

- General Sales Terms used for Guess' multi-brand retailers stated as follows:
- *"For each sample range GUESS EUROPE shall fix a minimum price for sale to the public of its own products, by means of a «recommended pricelist» inclusive of VAT,* ***for the purpose of making the product image uniform on the market****. The Purchaser undertakes to sell the goods purchased at prices that comply with those indicated on the aforementioned pricelist. <u>Failure to observe this obligation by the Purchaser shall give rise to the obligation to reimburse the damages incurred and shall entitle GUESS EUROPE to discontinue all future supplies</u>."*

The Commission view pertaining to RPM:

- pursuant to point (a) of Article 4 of the Vertical Block Exemption Regulation (VBER,) does not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object the restriction of the buyer's ability to determine its sale price, without prejudice to the supplier’s right to impose a maximum sale price or recommend a sale price, provided that the maximum sale price or recommended sale price do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.

USE of RPM in Online Sales (11/2018)

- The EU fined €111 million four consumer electronics manufacturers [Asus, Denon & Marantz, Philips, and Pioneer, for fixing online fixed or minimum resale prices.
- The four manufactures monitored the online sale of retailers and intervened when products are offered at low prices. Retailer who did not follow the prices suggested by the manufacturers face threats or sanctions such as blocking of supplies.

Use of Algorithms in Online Sales Aggravate the Problem!

- As a result of the actions taken by these four companies millions of European consumers faced higher prices for kitchen appliances, computers, headphone and so on…
- Many online retailer use algorithms, which automatically adapt retail prices of those of competitors. In this way, the price restrictions imposed on low pricing online retailer had a broader impact on overall prices for the respective consumer products.

UK –CMA: Casio Case (2019)

- Casio used software that makes its easier to monitor online purchases in real time and ensure widespread compliance with its pricing policy.
- It also meant that individual retailers had less incentive to discount for fear of being caught and potentially sanctioned.
- Casio's monitoring was also helped by retailers reporting to Casio other retailers which were discounting its instruments.
- The CMA fined Casio £3.7 million for breaking competition law by preventing online discounting.

Uber – Algorithmic Pricing

- Uber – declared as transport service provider by the ECJ.
- Uber’s price fixing is characterized as hub-and-spoke cartel
- In fact, Uber’s algorithmic pricing ensure RPM as driver are not free to charge what they want.
- Surge pricing – on the occasion of New Year’s eve Uber charged 6 to 7 time as much as normal price

Concluding Thoughts

- Price’s set by algorithms than humans have serious social issues
  - Algorithms are devoid of
    - Morality
    - Compassion
    - Ethics
  - The “invisible hand” of market forces driven by “human intelligence” is being replaced by “Artificial Intelligence”
  - The use of AI must be regulated !

Thank you for your Attention!