



25.11.2015

NOTICE TO MEMBERS

Subject: Petition No 2383/2014 by Norbert Perstinger (Austrian), on the introduction of the Minimum Advertised Price (MAP) in the European Union

1. Summary of petition

The petitioner advocates the introduction of the American pricing system of Minimum Advertised Prices (MAP) in the EU. The minimum advertised price is set by the manufacturer/provider of goods or services. Retailers/resellers of these goods or services must not advertise these at a lower price. The companies which use MAP prices do not set a minimum selling price, they merely set a minimum amount for the price which may be communicated by the retailer/reseller. Merchants are permitted to sell at a lower price. The petitioner claims that, especially in the current situation where online shops are playing an ever greater role, MAP prices could help to prevent a race to the bottom, in which (online) merchants set ever lower prices and eventually no longer make a profit, their businesses fail and jobs are lost. The petitioner urges the introduction of MAP prices because they are a good way to create and maintain a stable price so that all parties can obtain a healthy profit in principle.

2. Admissibility

Declared admissible on 13 July 2015. Information requested from Commission under Rule 216(6).

3. Commission reply, received on 25 November 2015

Under EU competition rules, retailers must generally be free to determine their resale prices. If suppliers oblige retailers to sell their products for a fixed or a minimum price such a practice is considered to be restrictive of competition within the meaning of Article 101 TFEU and amounts to a hard-core restriction contrary to Article 4(a) of the block exemption

regulation on vertical restraints¹. Conversely, price recommendations are permissible, if they are truly non-binding and if there is no pressure, threat or economic incentive to actually charge the recommended price².

Where an agreement includes resale-price maintenance (RPM) provisions, it is presumed to restrict competition within the meaning of Article 101(1) TFEU. While there remains a possibility for companies to plead an efficiency defense under Article 101 (3) TFEU to justify their agreements, the arguments put forward need to be very convincing, as there is a presumption that the conditions of 101 (3) TFEU are not fulfilled for such restrictions.

Not allowing RPM is beneficial to consumers and warranted by a number of considerations. Resale price maintenance may facilitate collusion between different suppliers by increasing price transparency on the market and making deviations from agreed prices easier to detect. It may soften competition between manufacturers and/or between retailers and lead to higher prices for consumers. It can also reduce dynamism and innovation at the retail level. Conversely, absent RPM consumers can benefit from price competition between different distributors of the same product and are enabled to obtain better value for money.

While MAPs leave the final decision on what price a retailer charges to the retailer, they aim at influencing retail prices by limiting the possibility of retailers to inform potential customers of available discounts. A key incentive for price competition between retailers is removed. Retailers will not be able to attract additional consumers by advertising lower prices. Advertising is an important element of the competitive process as it increases the information available for consumers. Retailers will frequently have no incentive to deviate from the minimum advertised price. Therefore, MAPs will likely amount to a restriction of competition within the meaning of Article 101(1) without any credible efficiency defense under Article 101(3). The Commission has analyzed restrictions on advertised prices in a case where they formed part of a wider strategy of influencing retail prices by manufacturers and concluded that such agreements have the object of restricting or distorting competition³. While no case law exists yet, it can be expected that MAPs, when analyzed on their own, would also be considered to constitute (indirect) RPM and thus a by object restriction.

Under federal US antitrust law, MAPs and other RPM related restrictions have to be assessed under the "rule of reason" rather than being considered *per se* as illegal. Thus an individual analysis is required in order to assess -based on the fact of the individual case and the economic context- whether they unreasonably restrain trade. MAPs are therefore not generally permissible under US antitrust rules. While some MAPs may be permissible, others have been challenged by the US competition authorities to constitute unreasonable restraints of trade⁴.

Conclusion

¹ See Case 161/84, Pronuptia de Paris GmbH v. Schillgalis, ECR 353 [1986] para. 25 and Commission Regulation 330/2010/EU of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, (OJ L 102/1, 23.4.2010).

² See for further guidance on RPM the Guidelines on Vertical Restraints, (OJ C 130/1, 19.5.2010), para 48 and 223 to 229.

³ See Case COMP/37.975 PO/Yamaha of 16 July 2003, at para. 124 and 133 to 135 – accessible at http://ec.europa.eu/competition/antitrust/cases/dec_docs/37975/37975_91_3.pdf.

⁴ See for example <https://www.ftc.gov/news-events/press-releases/2000/05/record-companies-settle-ftc-charges-restraining-competition-cd>

Under European antitrust rules, MAPs will likely be restrictive of competition within the meaning of Article 101(1) TFEU. While efficiency defenses under Article 101(3) for such clauses are in principle not excluded, it will be very difficult for companies to demonstrate in a particular case that pro-competitive effects of the clauses outweigh the negative effects. These principles are beneficial for European consumers. They ensure competitive markets with low prices and a wider choice.

The increase of sales on online shops and online marketplaces leads to an intensification of competition, which is to the advantage of consumers as it allows them to easily and almost at no costs compare prices across a large number of retailers to find the best value for their money. The Commission does not consider it appropriate to allow companies to take away these benefits by practices aimed at aligning retail prices to the detriment of consumers.