No grounds for action

The CMA kills off the Sports Bras case

by John Schmidt and Marianne Charrier*

Resale price maintenance (RPM), long feared dead since the US Supreme Court’s decision in *Leegin*, has reared its head in the UK and Europe in a number of cases. At the sexy end of the spectrum are online cases involving Amazon, Expedia and some well-known price comparison websites looking, in particular, at most favoured customer clauses/reference pricing. At the perhaps less sexy end of the spectrum are sports bras and mobility scooters, involving more traditional RPM allegations.

Last month, the Competition and Markets Authority (the CMA) decided that it had no grounds for action in its sports bras investigation and closed the case which it had inherited from the now defunct Office of Fair Trading (OFT).

**Route to the finale**

By way of background, following a complaint from a third party, the OFT opened formal proceedings in April 2012 in respect of sports bras manufacturer DBA Apparel (DBA) and department stores Debenhams, House of Fraser and John Lewis. The statement of objections was issued in September 2013 and the case was finally dropped in June 2014 after the oral hearing.

In its case closure summary, the CMA found that, in the light of the parties’ explanations, the CMA can “no longer rely on the documentary evidence and the inferences the OFT had drawn pursuant to this evidence to reach a finding of infringement” without going into further detail on the facts of the case. This is perhaps understandable in a case closure decision but regrettable in that it limits the analysis that can be undertaken.

Nevertheless, the salient facts are that (1) the case arose out of a complaint by a third party that triggered the investigation; (2) that the OFT at the time found documentary evidence that caused it to open and pursue a case; (3) that the documents on the face of it did not demonstrate RPM but that the OFT drew inferences from those documents; and (4) that the parties provided an explanation or rationale that demonstrated that these inferences were wrong. The CMA is also clear in the case summary that it considers RPM to be a serious infringement and that it will continue to investigate suspected RPM activity, as appropriate.

**So where are we with RPM?**

In the UK and Europe, the law is very much settled. RPM constitutes a hardcore restriction, breaching article 101(1) TFEU/Chapter I Competition Act 1998. RPM cannot benefit from a block exemption and there is little prospect of gaining an individual exemption (see, for example, the PO/Yamaha decision - Case COMP/37,975).

By contrast, in the US, the emphasis has shifted away from a per se prohibition towards a rule of reason analysis (see the US Supreme Court in *Leegin Creative Leather Products Inc v PSKS Inc* 551 US 877 (2007)). Leaving aside the debate of whether an object restriction is identical to a US per se approach, it is clear that there is a significant difference between the US and Europe in the way RPM is assessed.

**But what is RPM?**

The law is very clear that an agreement between a supplier and a customer to fix the price the customer will charge constitutes illegal RPM. However, the law is also clear that mere discussions around actual or likely retail prices are not sufficient to amount to RPM: they are part of the normal commercial dialogue in a vertical relationship (see the Court of Appeal in *Argos and Littlewoods v OFT* [2006] EWCA Civ 1318 para 106 and the CAT in *Tesco Stores Ltd v OFT* [2012] CAT 31 para 59).

Even where a supplier goes beyond mere discussions and exercises a significant influence over the retail price, this does not necessarily amount to RPM. Key is whether such prices, despite being strongly indicative, remain nonetheless non-binding and are not supported by coercion from the supplier (see *JCB Service v European Commission* Case T-67/01 [2004] 4 CMLR 24).

There is ample economic literature (including an OFT research paper) on the procompetitive reasons for such discussions and influence in a vertical supply relationship where there is no market power at either level in the supply chain. In Sports Bras, for instance, the supplier’s market share did not exceed 15% and the customers’ combined shares were also significantly below dominance level. This means that any authority seeking to pursue a case that does not have a clear agreement at its core needs to take care and exercise caution in any investigation and to cross-check suspicions of infringement or theories of harm against the facts of the case. Does the theory fit the market context? Are there any other procompetitive explanations? Does the economic evidence show significant adherence to recommended retail prices or point the other way?

It seems to us that, following *Leegin*, there was little interest within the OFT at the time to investigate RPM cases where there was no significant market power. That emphasis seems to have shifted back to a more formalistic approach to RPM. Much, but not all of it, seems to be caused by the sexier online cases. Despite the Sports Bra case closure, therefore, there may well be more enforcement activity around RPM in future.

**Reference**


“When do retail price communications between retailers and manufacturers become RPM”, CRA Competition Memo: see www.crai.com/cap/assets/CRA_Competition_Memo_Vertical_Communications_and_RPM.pdf

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