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Polish competition authority: plans to launch a new product can hardly offer a justification for resale price maintenance

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The Polish competition authority (Prezes Urzędu Ochrony Konkurencji i Konsumentów, "PCA") has recently addressed the issue of resale price maintenance clauses ("RPM") (see PCA decision of 31 December 2012 in case no. DOK 9/2012). The matter merits some attention, what with interesting argumentation raised in defence of the challenged clause related to a launch of a new product.

PCA approach

Unsurprisingly, PCA said that RPM is among the gravest competition infringements and is prohibited by its object.

According to the Polish watchdog, that conclusion of itself does not, however, preclude an RPM agreement to be ultimately found compliant in specific circumstances. Naturally, an RPM clause generally cannot be justified by a finding that it is not anticompetitive (i.e., that it does not violate Art. 6 of the Polish Competition Act – equivalent of Art. 101(1) TFEU), because infringement is in such cases obvious. But the justification can come through, and only through, an individual exemption if the undertaking concerned is able to prove that the conditions of Art. 8.1 of the Polish Competition Act (equivalent of Art. 101(3) TFEU) are satisfied.

Explaining this approach, PCA wrote as follows: "In course of the investigation, the company offered broad argumentation designed to persuade us that the questioned clause did not restrict competition because its purpose was to increase non-price intra-brand competition and intensify inter-brand price and non-price competition. We have not gone along with that argumentation and hold that a restriction of intra-brand competition cannot be deemed not to infringe competition, and as such not to breach the prohibition under Art. 6.1 of the Act, merely because it can increase inter-brand competition. EU law and Polish law alike place an equal focus on the protection of both intra- and inter-brand competition. Moreover, EU and Polish case law considers price competition restrictions to be among the gravest infringements of competition law. Certain restrictions on intra-brand competition are acceptable in vertical agreements, but only where these restrictions are not hard-core restrictions involving prices, quotas or market sharing."

Conditions for individual exemption

PCA further examined whether the agreement could be exempted on an individual basis. This could have happened if the case had met the test under Art. 8.1 of the Polish Competition Act (equivalent of Art. 101(3) TFEU).

According to this law, the prohibition in Art. 6 of the Polish Competition Act will not apply to agreements which:

• contribute to improving the production or distribution of goods or to promoting technical or economic progress,

• allow the purchaser or user a fair share of the resulting benefit,

• do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, and

• do not afford such undertakings the possibility of eliminating competition in the relevant market in respect of a substantial part of the products.

As EU law, Polish law, too, requires that all these conditions must be satisfied and the burden of proving that they are is on the undertaking concerned. PCA's decision stopped at discussing only two of those conditions and concluded that since they are not satisfied, considering all the others would be moot.

Improvement of the production or distribution of goods/ promotion of technical or economic progress

Considering this condition, PCA agreed with the company that launching a new product is an objective fact which in principle can justify a restriction of competition ("a new product extends the pool of various products in the relevant market, thus giving consumers a wider choice and putting a stronger pressure on existing market players to increase their effectiveness").

However, PCA held that, in this particular case, there is no evidence of any relationship between maintenance of the product's resale prices and successful introduction of the product into the market.

Indispensability of restrictions

Considering this condition, PCA held that there are product launch methods that offered a viable alternative for the company and were at least just as effective and, importantly, not anticompetitive. According to PCA, instead of following solutions which restricted price competition among its distributors, the supplier would have found it more efficient to reward those of them which would make efforts and incur expenditure to help the supplier introduce the new product (such rewards could include outright cash or temporary grant of higher discount than for other distributors). This could support the product launch without at the same time restricting price competition among the distributors.

PCA also made a note of European Commission's argument that introducing a new product may provide a justification for maintaining minimum resale prices where the supplier does not find it easy to contractually require all its customers to make efforts to effectively promote the new product. According to PCA, this did not happen in case in question because the company under investigation had a sufficient market power and a sufficiently limited distribution network (below twenty distributors) to be able to impose and successfully enforce such requirements in its distributor agreements.

Following the European Commission, the Polish authority also held that RPM may be justified by a product launch only "during the introductory period of expanding demand" for the product. But the company's minimum RPM agreement with its

distributors has been in force for as long as ten years (since 2003).
Furthermore, reference was made to undertaking's defence that the maintenance of minimum resale prices helped prevent brand depreciation through understated pricing at the distribution level. PCA said that there are other, non-restrictive methods to position products in terms of prices. For example, the company could have applied higher prices in relations with its distributors while rewarding them for attainment of sales targets. A higher sale price would have triggered a higher resale price, thus limiting the brand depreciation risk. This solution would not have been more expensive than minimum RPM because the sales-related bonuses for distributors could have been funded with increased revenue the company would have derived from sale of its lubricant products to distributors at higher prices.

Conclusions

The present case confirms that competition authorities continue to exercise extreme caution before they can hold vertical RPM arrangements to be in compliance, although they do not rule out such an eventuality altogether. However, the standard to be met is very strict and businesses can find it extremely challenging to make an arguable case that there were indeed no other ways to achieve their business goals.
It is a pity that PCA focused solely on proving illegality and resigned from giving any guidance, if only rough, about when the Polish watchdog would be prepared to approve this kind of competition restraint. Nevertheless, some conclusions can be gleaned from the ratio for the decision. Above all, such a potentially acceptable RPM clause would certainly have to be limited in time. Another important matter emphasised by PCA was seller's lack of sufficient market power to impose effective promotion requirements on its distributors in relation to its new product. However, even satisfying these two conditions cannot certainly bring legal comfort, at least not until someone brave relies on them for a successful defence against competition infringement claims.

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