Kluwer Competition Law Blog

Australia experiments with a "third way" on resale price restrictions

Nick Taylor, Prudence Smith (Jones Day) · Monday, October 3rd, 2016

Resale price maintenance (RPM) occurs when a manufacture or distributor and a wholesaler prevents a retail or distributor from selling below a specified price Since the US Federal Courts decided *Leegin* in 2007[1] there has been vigorous debate about whether and in what circumstances RPM should and might be permissible. A proposed new law in Australia offers a different approach from other countries.

What other countries do and why the approach is not ideal

Around the world there are two predominant approaches to RPM. At one end of the spectrum some legal systems have maintained a "hard line" that RPM is always illegal or, at least, that there should be an almost conclusive presumption of anticompetitive effect and therefore illegality. These systems focus on the general proposition that RPM has been shown to facilitate collusion between retailers, exclude innovation and dynamism in distribution and drive up prices for the brands concerned. Even some US states responded to *Leegin* by enacting specific laws to make resale price maintenance "per se" illegal such as Maryland which passed its specific prohibition in 2009.

At the other end of the spectrum, some systems are very accommodating. The same year that Maryland passed its a specific prohibition, Singapore adopted a competition law with a specific exemption for vertical restraints. Most of the permissive jurisdictions, however, still start with a presumption that RPM is likely to be anticompetitive but enable the presumption to be rebutted when distributors need margin protection to enable them to invest in pre or post sales service and other forms of inter-brand competition.

Although European regulators recognise the potential for efficiency benefits[2], in practice there has been little tolerance for the conduct. For example, the Bundeskartellamt's 2012 decision to fine Tooltechnic Systems €8.5 million for RPM can be contrasted with the Australian consideration of RPM conduct by the same company, discussed below.

The practical problem in most "permissive" jurisdictions is that *until a competition agency investigates or, in some cases until litigation and appeals are concluded*, manufacturers do not know whether the economic justification for RPM for their particular brand in their particular circumstances will be found to sufficient to avoid liability.

Even more problematic are cases where the economic justification are not based on "tangible" efficiencies (such as investments in providing distributor education and advice, stocking parts or providing repairs). Where the justification relies on "intangible" concepts such as the benefits consumers derive from luxury or Veblen goods or, for example, in wine distribution, where price is an important means by which a manufacturer can communicate their quality proposition amongst a multiplicity of competing brands with a broad range of quality.

Responsible risk averse manufacturers naturally shy away from adopting what may be pro-competitive distribution practices that are dependent on RPM policies. This can result in a range of consumer detriments such as under-investment in inter-brand competition over after sales service or overly expensive approaches to inter-brand competition if the manufacturer feels it needs to run its own distribution and retail outlets so that it can maintain pricing discretion to the 'last mile'.

The Australian experiment

The genesis of the latest Australian experiment occurred in 1977. From 1906 until 1977 Australia's competition law closely mirrored the US Sherman Act but from then on Australia enacted a series of *per se* prohibitions (including one of the world's toughest prohibitions against RPM) but at the same time borrowed, and built on, a European idea to soften the "hard edges" of the *per se* prohibitions.

Under what is now Article 101(3) of the TFEU, otherwise illegal conduct can be justified where certain conditions are met. The European Commission initially attempted to offer a 'pre-clearance' service by which parties could obtain an *ex ante* assessment of whether their conduct fell within the exception. However, by 2003 the ex ante approval system was abandoned and replaced by a self-assessment approach which in practice means that where the applicability of the exemption is highly debatable, the provision becomes the refuge of the desperate or the fool-hardy.

By contrast, Australia embraced the *ex ante* assessment approach. Under the Australian *Competition and Consumer Act*, a range of exemptions are available where conduct is of "net public benefit" provided that parties take action to trigger exemption *before* the conduct occurs. The ACCC uses three main strategies to manage the workload:

First, published guidelines and an extensive body of reasoned decisions provide strong signals to repel applications where conduct is to be discouraged.

Second, there are two channels by which exemptions are considered – a highly publicised "authorisation" process for the kinds of conduct that are likely to be most significant which can involve a public hearing in a quasi-court setting and a simplified "notification" procedure available for less contentious kinds of conduct by which immunity commences automatically after 14 days unless the ACCC acts to disallow the conduct. All authorisations and notifications are published on an easy-to-search public register.

Third, there are application fees which are graduated based on the type of applicant and the type of application.

With strong ACCC discouragement, there were no RPM exemption applications until 2014 when the ACCC granted authorisation to Tooltechnic Systems for RPM after an extensive process of investigation, assessment and analysis of claims by the company that the conduct was a legitimate

mechanism to protect the margins necessary to prevent free-riding that would undermine pre-sales service associated with the sale of complex, high quality power tools. Indeed, pre- *Leegin* the ACCC had extracted undertakings from Tooltechnic Systems to desist from engaging in alleged RPM. The 2014 authorization decision established the 'ground rules' by which manufacturers could predict when they might have success in applying for an exemption.

The Government now proposes a competition law amendment that would enable "notification" for RPM. Manufacturers will be permitted to engage in RPM from the 14th day after lodging a form with the ACCC. In cases of little merit the ACCC can immediately take action to disallow the notification or at any time subsequently it can commence a revocation process if the conduct turns out not to be of net public benefit. The history of 'notification' for third line forcing and collective bargaining by small businesses has demonstrated that notification can provide valuable commercial certainty by offering an important, and not over-used, "safety valve".

The draft text of the amendments can be found here: https://consult.treasury.gov.au/market-and-competition-policy-division/ed_competition_law_amendments. Comments are due 30 September 2016.

[1] *Leegin v PSKS* (US Court of Appeals, 5th Circuit) June 28, 2007

[2] Guidelines on Vertical Restraints (2010/C 130/01) at paragraph 223

This entry was posted on Monday, October 3rd, 2016 at 9:00 am and is filed under Australia
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.