Kluwer Competition Law Blog

The Thin Line between Resale Price Restraints and Resale Price Recommendations: The Samsung Ruling of the District Court of Rotterdam of 13 November 2023

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Introduction

On 13 November 2023, the District Court of Rotterdam ("**Court**") handed down its judgment in the *Samsung* case. This ruling gives insights on whether a supplier, by actively pursuing its resale price recommendations can be held to restrict competition by object, even if its conduct does not involve any sanctions (or threat thereof) or incentives (financial or otherwise).

It is the first time that the Netherlands Authority for Consumers and Markets (**ACM**) imposed a fine for resale price restraints, and as such this is also the first time that the Dutch Court has had the opportunity to test a decision on whether competition law is applied correctly in this area. In doing so, the Court applied a variety of recent rulings of the European Court of Justice (**CJEU**) in *Super Bock (2023)* and *Visma (2021).* For competition law enthusiasts, the ruling of the Rotterdam Court in *Samsung* is a pleasure to read.

The Court held the appeal of Samsung Electronics Benelux B.V. (**Samsung**), on whether it had exercised undue influence on the online retail prices of television sets of seven retailers from January 2013 to December 2018. As such, Samsung violated the cartel prohibitions laid down in Article 6 of the Dutch Competition Act (**Mw**) and in Article 101 TFEU. With this judgment, the decision of the ACM to impose a fine of EUR 39,875,500 on Samsung was upheld. Samsung now has 6 weeks to file for higher appeal with the Trade and Industry Appeals Tribunal, the highest administrative court in the Netherlands.

Background of the case

In 2018, the ACM launched an investigation into price-fixing arrangements between consumer goods manufacturers and retailers (including online retailers). One of the undertakings subject to that investigation was Samsung. Samsung is a producer of (consumer) electronics and offers its products via retailers in the Netherlands. Samsung and its retailers have brick-and mortar-stores, but also web shops. On 29 September 2021, the ACM imposed a fine of over EUR 39 million on Samsung for violation of the cartel prohibitions.

The ACM held that Samsung actively exercised influence on the online resale prices of its retailers from January 2013 to December 2018 and therefore Samsung had committed vertical price 'influencing' by:

1. Monitoring the resale prices of retailers via price-comparison websites and the retailers' online stores. Samsung collected these pricing data by using a so-called spider software, and assessed whether the retailers followed the resale prices as recommended by Samsung;
2. Whenever Samsung noticed that the resale prices were diverging too much from its recommended resale prices, Samsung would reach out to those retailers urging them to adjust their resale prices to the level of the recommended prices;
3. Assuring competing retailers that Samsung had communicated the (importance of the) resale price recommendations to other retailers. This enabled Samsung's retailers to trust that they would not price themselves out of the market if they set their prices at the levels desired by Samsung; and
4. Following up on the complaints of retailers about the (reduced) resale prices of competing retailers. Evidence revealed that Samsung would follow up on those complaints by contacting the retailer and asking it to adjust its resale price to the level desired by Samsung. Samsung subsequently reported back to the complaining retailer.

The ACM argued that regardless of the definition of 'vertical price fixing', Samsung's practices were clearly intended to restrict retailers' freedom to set prices and thus qualified as a by object restriction violating Article 101 TFEU, as confirmed in Article 4a of the Vertical Block Exemption (**VBER**). For more information, please read our articles about the ACM's original decision and its administrative appeal decision of the ACM.

Ruling of the Court

In its appeal against the ACM's decision, Samsung argued, in a nutshell, that the ACM failed to adequately demonstrate that its conduct, either in isolation or as a whole, could have led to a restriction of competition. Based on the case law of the CJEU, the ACM should have concluded that, in the absence of coercion or financial incentives, sharing price recommendations with retailers does not qualify as a breach of competition law. Additionally, Samsung argued that there were no agreements or concerted practices between Samsung and its retailers and that the conduct of Samsung could not qualify as a restriction of competition by object.

Although the Court identified several grounds for appeal, we will focus on the core grounds (para 10.1 of the Samsung ruling):

1. Could Samsung's conduct have led to a restriction of competition?
2. Was there an agreement and/or concerted practice?
3. Should Samsung's conduct qualify as a restriction of competition by object?

These questions will be discussed below.

Could Samsung's conduct have led to a restriction of competition?

Samsung argued that, following market developments the conduct constituted usual behaviour and that Samsung had a legitimate reason to follow market developments in order to ensure the success of its products. Samsung is constantly renegotiating its wholesale price and, therefore, it needs to know which retailers lower their resale prices. Handling complaints from retailers about the resale prices of other competing retailers and providing feedback are part of these negotiations. Samsung argued it, thus, had a legitimate interest in being updated on and anticipating price developments in the retail market. Therefore, it argued that reminding retailers of its recommended resale prices was permissible.

The Court rejected Samsung's arguments. With reference to the CJEU's ruling in *Budapest Bank*, the Court held that even an agreement or measure that pursues a legitimate objective can restrict competition, given the context of the measure and whether the ancillary objective pursued by the agreement should be regarded as not legitimate. Samsung did not show the Court that the complaints Samsung received were relevant within the context of negotiating the wholesale price of Samsung. Neither did Samsung convince the Court that the results of following up on the complaints were relevant for the negotiation of the wholesale price. The Court held that the evidence of the ACM showed that Samsung was not advising recommended resale prices in general, but it was urging its retailers to increase their resale prices to meet the price recommendations by Samsung.

Was there an agreement and/or concerted practice?

Samsung argued that there was no agreement nor a concerted practice between Samsung and its retailers that led to resale price maintenance. Samsung argued that it had only given recommendations and that there existed a market dynamic whereby retailers constantly negotiated the wholesale price and complained to improve their own position in the market (para 11 of the Samsung ruling). Therefore, there was no agreement or concerted practice. The Court rejected this argument.

With reference to the CJEU's ruling in *Visma*, the Court reiterated that an agreement within the meaning of Article 101(1) TFEU exists when the undertakings have expressed their joint intention to conduct themselves in the market in a specific way (para 12). Referring to the recent CJEU ruling in *Super Bock* (para 48 of *Super Bock*), [1] the Court held that an agreement cannot be based on a statement of a purely unilateral policy of one party to a contract for distribution. An act or conduct which is apparently constitutive of '*unilateral will*', nevertheless, constitutes an agreement if it is the expression of the concurrence of wills of at least two parties.

The form in which that concurrence is expressed is not decisive by itself, but it may be derived from: i) the terms of the distribution contract where it contains an express invitation to comply with minimum resale prices or authorises the supplier to impose those resale prices; or ii) from the conduct of the parties; and iii) from any explicit or tacit compliance by the retailers (para 12 of the Samsung ruling and para 50 of *Super Bock*). As for concerted practices, the Court followed the standing case law (Case C-8/08, *T-Mobile*, para 51) and held that a concerted practice is any form of coordination between undertakings that basically lessens competition between them (para 13.1 of the Samsung ruling).

In terms of the evidence of an agreement/concerted practice, the Court reiterated the *Super Bock*

ruling by stating that the existence of an agreement or concerted practice can also be established on the basis of "*consistent coincidences and indicia*", that show the existence of the agreement or concerted practice, in the absence of an alternative explanation of those same "*consistent coincidences and indicia*" (para 13.2 of the Samsung ruling).

By applying this test, the Court held that the evidence showed that Samsung had actively reached out to its retailers asking them to adjust the resale price to the level of the recommended resale price of Samsung and that the retailers agreed and followed Samsung. For instance, evidence showed that:

- The retailers had informed Samsung about the price of a competing retailer that was lower than the price prescribed by Samsung;
- Samsung followed up on this information by asking the competing retailer in question to adjust its resale price;
- Samsung had requested retailers to take off certain models from its webshop or to only use certain discount offers in the brick-and-mortar shop and not online (para 15 of the Samsung ruling).

The retailers agreed with the requests of Samsung and, by doing so, there was a concurrence of wills between Samsung and the retailers and, therefore, an agreement. The Court also held that even if Samsung's requests and all of the calls and other methods of communication between Samsung and the retailers did not qualify as an agreement, this would be considered as a concerted practice (para 15). Samsung made it very clear what it expected from its retailers and its retailers acted accordingly.

As for Samsung's argument that its communications with its retailers should be assessed individually and not all together, and that Samsung only shared recommended resale prices, the Court held that i) those moments should be considered together in their entirety; and ii) the evidence unequivocally showed that Samsung instructed to follow the recommended resale price and that this was observed by its retailers (para 15.2).

Should the conduct of Samsung qualify as a restriction of competition by object?

Samsung argued that its conduct cannot restrict competition by object as its conduct did not involve any sanctions (or the threat thereof) or incentives (financial or otherwise). According to Samsung, vertical conduct can only constitute a restriction of competition when it involves either price fixing or market sharing (para 17). Samsung also claimed that the General Court's judgment in *JCB Service* shows that price influence must be accompanied by coercive measures in order to qualify as a by object restriction. In the case of Samsung, Samsung's retailers were free to set their own resale prices. Samsung, therefore, argued that its conduct could not even have the potential to restrict competition because its conduct was not coercive, and that the ACM did not show that "*more subtle forms of influence*" have the effect of restricting competition. In that context, the ACM disregarded the economic analysis that Samsung brought forward by Oxera that showed that Samsung's conduct could not distort competition in the retail market.

Are coercion, sanctions or financial (dis)incentives necessary conditions for finding an

infringement?

According to the Court, (contractual) coercion, imposing sanctions or providing financial incentives are just examples of means by which resale price maintenance can take place, but those examples are not prerequisites for establishing resale price maintenance (paras 18-1-18.2). The relevant criterion is whether it is genuinely possible for the reseller to set its own resale price independently. This was not the case in Samsung's case as it repeatedly requested its retailers to follow its recommended resale prices and the retailers followed up on that request. By doing so, the retailers voluntarily chose to give up their freedom to set the resale price themselves. In such a reciprocal agreement and/or concerted practice, coercion is not necessary to establish resale price maintenance (para 18.1).

The Court held that the reference to the General Court's ruling in JCB *Service* was not relevant. In the case of *JCB Service*, the retailers did not follow JCB's requests to increase the resale price, and there was no agreement or concerted practice between JCB and its retailers, which also meant that those resellers did not lose their independence. This is different in the case of Samsung. The Court quoted some evidence indicating that Samsung even exercised some pressure on its retailers.

Restriction of competition by object

In relation to the character of the conduct as a restriction of competition by object, the Court reiterated the standing case law of the CJEU (*Super Bock*, paras 30-31; Case C-345/14 *Maxima Latvija*, para 16; and *Visma*, paras 54-55), specifically the recent CJEU ruling in *Super Bock*: Article 101 TFEU prohibits all agreements between undertakings and concerted practices which may affect trade between Member States, and which have as their object or effect the restriction of competition within the internal market. The concept of restriction of competition by object must be interpreted restrictively and it only applies to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that there is no need to examine their effects on a market (para 19.1 of the Samsung ruling).

With reference to the *Super Bock* ruling, the Court held that the fact that an agreement is a vertical agreement does not exclude the possibility that it comprises a restriction of competition by object. Although vertical agreements are, by their nature, less damaging to competition than horizontal agreements they can also restrict competition. The legal criterion for assessing whether an agreement, whether it is horizontal or vertical, involves a restriction of competition by object is that the agreement in itself must present a sufficient degree of harm to competition. Regard must be given to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining the legal context, it is also necessary to consider the nature of the goods or services affected, as well as the actual conditions of the functioning and structure of the market or markets (para 19.2 of the Samsung ruling and paras 33-38 of *Super Bock*).

After setting out the legal framework, the Court established that the investigation of the ACM shows that Samsung restricted the ability of its retailers to independently set their own resale prices in violation of Article 101(1) TFEU (para 20 of the Samsung ruling). The Court considered that Samsung's conduct is a hardcore restriction within the meaning of the VBER. Following from the *Super Bock* ruling, a separate assessment is required to determine whether a vertical agreement fixing resale prices is considered a restriction of competition by object within the meaning of

Article 101(1) TFEU.

The Court agreed with the analysis of the ACM about the restraining influence Samsung had exerted over its retailers (para 22). Accordingly, Samsung was pinned on retaining its prices at a high level instead of encouraging competition between its retailers. This was done by Samsung by price monitoring, handling complaints of its retailers, and following up on those complaints by instructing the competing retailing to follow the resale price as set by Samsung and to give feedback to the retailer. This all negatively affected the competition at the retail level and hindered consumers from fully benefiting from retail competition. Therefore, the Court held that the agreement between Samsung and its retailers to observe the resale prices as given by Samsung was detrimental to competition, especially given that price is one of the important competition law parameters on the retail level, and, therefore, the agreement is considered a restriction of competition by object. The economic report of Oxera, submitted by Samsung, was found irrelevant by to the Court as the conduct of Samsung is to be qualified as a restriction by object (para 24).

As a result, the sanction decision of the ACM was upheld by the Court.

Takeaways from the *Samsung* ruling

The ruling of the Dutch Court of Rotterdam provides a good overview of the current state of play of the CJEU's case law on the question of when vertical agreements can be considered by object restriction of competition. A novum in the ruling of the Court is that retailers giving up their freedom to set their own resale price and following up on the recommended resale prices by their supplier can be considered to have concluded an agreement or concerted practice restrictive of competition. This means that a supplier should be more conscious about the way in which it communicates and monitors recommended resale prices.

Even though the ACM did not impose any fine on the retailer of Samsung, companies would do well to be aware of the fact that following up on a request to apply the resale price as set by the distributor can amount to price fixing.

We expect that the Samsung ruling will not be the last judgment of the Rotterdam Court on resale price maintenance. On 12 September 2023, the ACM also imposed a fine of nearly EUR 8 million on LG Electronics Benelux Sales B.V. (**LG**) for actively influencing the pricing of its products by retailers. See our previous post about this decision of the ACM.

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[1] In *Super Bock* the CJEU sets out the legal framework for assessing when vertical price-fixing agreements can restrict competition and, if so, if that restricting is 'by object'. In the judgment, the CJEU also addressed the interplay between the VBER and Article 101 TFEU.

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