Competition - Portugal

Resale price maintenance can play a significant deterrent role in competition law

Contributed by **Morais Leitão, Galvão Teles, Soares da Silva & Associados**

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Introduction

In 2012 the Lisbon Court of Appeal rendered a judgment which concludes a long antitrust probe directed against a vertical agreement entered into in 2005 by Baxter and Glintt. The two companies were acting as exclusive supplier and exclusive distributor, respectively, of automated equipment for medicine dispensers, which is mostly sold to hospital pharmacies though public tenders.

The agreement contained a resale price maintenance obligation, according to which Glintt was to sell the equipment to hospitals at a fixed price. Concurrently, Baxter also applied for tenders launched by the hospitals, thus competing with its distributor.

Facts

The Competition Authority's investigation of the case commenced in 2006; it was triggered by a complaint lodged by a public hospital (Padre Américo Hospital), which contended that the two undertakings had offered a similar price in an international tendering procedure.

More than four years later in December 2010, the authority issued a decision concluding that between 2005 and 2009 Baxter and Glintt had competed in multiple tenders relating to the product at stake and had observed previously stipulated prices. The authority held that by fixing the resale price in the supply agreement, the parties to the vertical arrangement – which were also competitors downstream – had reduced intra-brand competition and increased price transparency.

Hence, Baxter and Glintt were found to have infringed Article 101 of the Treaty on the Functioning of the European Union and the corresponding provision of the national competition act on account of a vertical resale price restraint. The companies were fined a total of €530,768.01 (€145,296.77 for the supplier and €385,471.24 for the distributor).

Decision

The parties appealed the decision to the Lisbon Commercial Court, which in September 2011 largely upheld the authority's verdict – except for the existence of an effect on trade between member states. Accordingly, the court quashed the decision pertaining to the breach of Article 101 of the treaty and reduced the fine to €400,000 (€100,000 for Baxter and €300,000 for Glintt).

The undertakings subsequently appealed the commercial court's ruling to the Court of Appeal, which on July 10 2012 delivered the judgment under assessment and endorsed the commercial court's decision and the final fines.

Both instances of judicature considered the resale price maintenance clause to be a serious competition offence and qualified it as a *per se* infringement. Along with the obvious argument that the agreement prevented the distributor from setting its own resale price – which is a clear market distortion practice – both courts held as an aggravating element the fact that the supplier had competed with the distributor further downstream, which meant that the resale price maintenance amounted to a direct ban imposed on the distributor to offer lower prices to hospitals.

Comment

This case bears several points of interest for companies and practitioners.

First, although a vertical pact between two different undertakings is clearly an agreement for antitrust purposes, competition agencies are normally reluctant to penalise distributors given that they are typically the 'weaker' party within the relationship. However, in this instance, not only was the distributor fined by the Competition Authority, but it received the heavier penalty. This resulted essentially from the differences in size between the groups involved and the ensuing 10% fining cap, but nevertheless is an unusual outcome for resale price maintenance proceedings. This is all the more surprising since:

- the authority and the courts confirmed that in this case the supplier held all the market power, as it was the sole Portuguese representative of a product with unique features across the European Union; and
- it was the distributor which took the initiative to terminate the contract.

Second, it is rather odd for the first instance court to reverse the authority's finding that the agreement affected trade between

member states. The distribution of the hospital equipment:

- was covered by exclusivity for the whole of the Portuguese territory;
- provided for a fixed resale price; and
- imposed sales to final customers alone.

It seems that this could easily have qualified as a situation which hampered parallel exports and consequently had an appreciable impact on cross-border activities within the meaning of Article 101 of the treaty. However, the Lisbon Commercial Court held that the authority had failed to put forward compelling evidence to demonstrate such effects.

A final issue arising from this case involves the significance attached by Portuguese authorities to vertical restraints. It is not so much the level of the fines that mark the precedent, but instead the finding that resale price maintenance is a *per se* infringement of competition law.

There is a long-running debate in the antitrust field focused on the status and standard of review applicable to resale price maintenance. The most recent guidelines from the European Commission on the subject continue to take the view that contractual provisions and measures leading to resale price maintenance being observed by the buyer are treated as hardcore restrictions. In this sense, the *Baxter/Glintt* case would apparently square with a normal line of reasoning at the EU level.

Nevertheless, the fact remains that in practice, the commission's enforcement priorities in recent years with respect to vertical restraints do not correspond to a strict reading of this stance, and are influenced much more by the US approach. After extensive and conflicting case law, the 2006 landmark judgment of the US Supreme Court in *Leegin* set the path for a casuistic approach by competition authorities in the framework of vertical restraints of any kind, plainly establishing their review solely in the light of the rule of reason as opposed to a *per se* analysis.

This judgment had an enormous impact on the decisional practice of competition agencies across the world, which subsequently began to pursue the legality of vertical agreements on the basis of the facts particular to the case at hand, and which became more open to considerations of economic efficiencies. Conversely, *per se* prohibitions are increasingly being confined to serious horizontal restraints that:

- restrict competition;
- have manifestly anti-competitive effects; and
- lack any redeeming virtue.

In this context, the *Baxter/Glintt* case could be said to run counter to this modern trend. It sends an important message to the economic and legal community, in that resale price maintenance can still play a significant deterrent role in competition law.

For further information on this topic please contact Carlos Botelho Moniz or Luís do Nascimento Ferreira at Morais Leitão Galvão Teles Soares da Silva & Associados by telephone (+351 21 381 74 57), fax (+351 21 381 7411) or email (cmoniz@mlgts.pt or lnferreira@mlgts.pt).

Authors

Carlos Botelho Moniz

Luís Do Nascimento Ferreira