HERBERT SMITH FREEHILLS

SUPPLIER TERMS AND PRICING ISSUES

14 February 2019 | Global
Guides

Pricing restrictions imposed by suppliers on resellers have increasingly come under the spotlight of the competition authorities in a number of jurisdictions. This series of guides looks at the approach and recent developments in a range of key jurisdictions.

EU

Following a period of limited enforcement of vertical restraints at EU level over the last decade the EU Commission is increasingly focusing its attention on vertical agreements. This is to some extent triggered by the rapid growth in e-commerce, which has led to old issues re-emerging in a new guise, but focus has not solely been on the online sector. Rebate schemes operated by suppliers with a dominant position have also been under the spotlight, with the recent Intel ruling by the Court of Justice of the EU (CJEU) providing helpful guidance in this area.

Read full article

FRANCE

Supplier terms and pricing issues are regularly scrutinised by French competition authorities – i.e. the French Competition Authority (Autorité de la concurrence) (the "FCA") and the Competition, Consumer and Fraud Directorate of the Minister of Economy (DGCCRF) –– and challenged in litigation before commercial courts. Recent enforcement in France focuses on pricing restrictions in the e-commerce sector and restrictions on online sales.

Read full article

US

The US Supreme Court overturned nearly a century of US case law regarding resale price maintenance agreements ("RPM") in its 2007 decision in Leegin Creative Leather Products v. PSKS, Inc. (2007) ("Leegin"). Consistent with the Court's general approach of making the evidence-based analysis of economic effects the focus of antitrust inquiry, economic analysis of RPM agreements was central to the Court's holding in Leegin. Recognizing the potential competitive benefits of RPM, Leegin abandoned the long-standing treatment of such agreements as per se illegal, thereby effectively eliminating any difference in treatment of price- and non-price- vertical restraints under the Sherman Act.

Read full article

SOUTH AFRICA

The practice of minimum RPM (i.e. where an upstream supplier attempts to control or maintain the minimum price at which a product is resold to its customer) is considered to be a vertical variant of price fixing, which is generally construed as the most anti-competitive of business practices, and is accordingly per se prohibited under Section 5(2) of the Competition Act 89 (the Act) i.e. no pro-competitive defences may be raised. In addition, the Act provides for the imposition of administrative penalties on first-time offenders.

Read full article

UK

UK competition law is currently very closely aligned with EU competition law and the UK competition authorities take the same approach as the Commission in their analysis of RPM which constitutes a hardcore restriction. The Chapter I prohibition of the Competition Act 1998, the prohibition on anti-competitive agreements, mirrors the wording of Article 101 TFEU and the Chapter II prohibition that of Article 102 TFEU. In addition, section 60 of the Competition Act 1998 requires the UK competition authorities and courts to ensure that the application of UK competition law is, so far as is possible, consistent with EU competition law.

Read full article

GERMANY

As a matter of principle, market participants in Germany are free to set their own prices based on supply and demand. However, pricing can be subject to regulatory intervention under competition and consumer protection laws, in order to protect competition and/or consumers. In addition, sector-specific pricing regulation applies for certain goods and services which are deemed important to the general public interest, such as books, pharmaceuticals, press products and tobacco.

Read full article

AUSTRALIA

Under Australian law, the provision of rebates can raise competition concerns particularly where the supplier has substantial market power. There has been relatively limited case law addressing this issue and the approach that the ACCC is likely to take is not as clear as the approach taken in the EU. Recent EU decisions including the Intel case are likely to influence the approach taken in Australia. There have also been recent amendments to the Australian law dealing with misuse of market power, which may influence the approach taken by the Australian regulator.

Read full article

ASIA

The majority of the legal systems in Asia that have a competition law regime include provisions similar to Article 101 TFEU encompassing vertical restraints. Such provisions are typically based on – or operate in a manner similar to – the EU competition law system. However, there are some important differences, most notably in Singapore, where absent dominance, vertical arrangements benefit from a broadly worded exemption from the prohibition on anti-competitive agreements.

Read full article

LEGAL NOTICE
