HEARING ON ACROSS PLATFORM PARITY AGREEMENTS

-- Note by Romania --

27-28 October 2015

This document reproduces a written contribution from Romania submitted for Item 7 of the 124th OECD Competition Committee on 27-28 October 2015.

More documents related to this discussion can be found at www.oecd.org/daf/competition/competition-crossplatform-parity.htm

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1. In 2009, the Romanian Competition Council\(^1\) completed a sector inquiry in the food retail market, when it has considered that the existence of MFN clauses, combined with the practice of shelf taxes, can lead to artificial supplementary costs for the traditional commerce, thus impeding their capacity to compete.

2. The retail case (2015) – RPM combined with promotional clauses similar to APPAs

3. Following the completion of the sector inquiry, the RCC opened, in September 2009, an infringement procedure against 4 retailers active on the food retail market.

4. Following the investigation, the RCC found that, during the period 2005-2009, these retailers\(^2\) and some of their suppliers concluded complex anticompetitive agreements, through which they have mutually restricted their behavior on the market and agreed on fixed and minimum sale and resale prices through:
   - RPM clauses initiated by the supplier
   - Promotional clauses initiated by the retailer

5. The restrictions on the sale and resale prices were achieved through several types of documents, such as contracts and promotional forms. The promotional forms were sent by the retailers to the suppliers for the confirmation of the promotional events conducted in the retailers’ shops involving the suppliers’ products.

6. Some of these promotional forms included also a resale price level, minimum or fixed, at which the retailer was to sell the products to its customers, during the promotional periods. These constituted the hindering of the retailer’s ability to set its own price, and therefore a direct setting of the price levels made by the supplier.

7. In practice, the supplier agreed with the retailer that, during a certain promotional period, the products delivered by the supplier will not be sold below a certain price threshold, or they will be sold at a certain price. The supplier actually inserted the desired resale price on the promotional form.

8. In the same time, some contractual documents concluded between certain suppliers and the retailers\(^3\) contained a clause through which the supplier was bound not to undertake promotional activities in other retailers’ shops in the same time as the ones being made with the first retailer. Some of these clauses also contained mentions regarding the names of the retailers with whom the suppliers was forbidden from advertising in for the duration of the promotional event carried out in the shops of the first retailer. In other cases, the restriction applied to all competing retail chains.

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\(^1\) “RCC”;

\(^2\) Metro (Metro AG), Selgros (formerly Fegro/Selgros, now Transgourmet CEE), Mega Image (Delhaize), Real (formerly Metro AG, now Auchan);

\(^3\) With the exception of Selgros.
9. In practice, the supplier guaranteed a retail chain that, during the promotional period, some of the products will have a smaller price than the list price only for the involved retailer and not for any other competing retail chain. In this situation, the customers of other retail chains, competitors of the involved chain, could not benefit from the price discounts that were applied to the supplier’s products, except in the case when they chose to shop in the outlets of the first chain.

10. Thus, taking into consideration that a promotion represents a discount of the supplier’s list price during a certain period, it can be concluded that the retailer and the supplier have agreed that certain prices charged by other retail chains should not drop below a certain level. These prices should have been set as a result of an independent action taken by the supplier.

11. Therefore, through this promotional clause, the supplier agreed to sell some of its products at a certain minimum price to other retail chains that are competitors of the retail chain where the promotional event was taking place.

12. Following the analysis of the documents from the case file, it was found that the supplier agreed not to perform promotional events in the same time in the involved retail chain and its competitors, therefore agreeing not to offer discounts to competing retail chains. In the majority of analysed cases, the promotional event for a certain product was made, in a certain period, only in one retail chain. Promotional activities were taken up in another retail chain only after the first promotion was ended.

13. The RPM clauses combined with the exclusive promotions clauses represented an incentive for both the suppliers and the retailers. The suppliers did not feel the pressure to lower their margins and the retailers did not feel the competitive pressure of other retailers promoting the same products.

14. In the present case, the exclusive character of the clause was temporary, valid only for promotional periods and alternatively allocated to a certain retailer, thus the incentive to achieve specific investments disappeared and, therefore, the possibility of creating efficiencies disappeared as well.

1. The possibility of monitoring and applying sanctions

15. These agreements were accompanied by contractual clauses that introduced sanctions that might be applied by the retailer, if the supplier did not follow the above-mentioned rule of not conducting simultaneous promotions. For example, the supplier pledged, in the case the exclusive promotions clause was not respected, to pay damages up to 50% of the value of products delivered for the promotional event. The assessment of compliance with the promotions clause could easily be carried out, by monitoring the promotional leaflets of the competing retailers. Also, the retailers have admitted that a special department is created for monitoring competition prices.

16. According to the information sent by the suppliers, if the contract was breached, the retailer would impose mainly financial sanctions, and subsequently, depending on the situation, return of the products, reception refusal, delisting of the products undelivered in the agreed time interval and the halt of orders until the clarification of the situation. These penalties can reach even the unilateral dissolution of the contract.

17. In conclusion, a customer of one retail chain bought the products at a price agreed between the supplier and the retailer. Also, through the fact that the retailers requested that a promotional event should be exclusive to their chain insured that there was no price competition between the chains. The fact that the supplier accepted not to perform simultaneous promotions combined with the fact that the retailer accepted

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4 Due to the promotional discount;
to sell the supplier’s products at a certain minimum or fixed resale price, as agreed upon with the supplier, led to a faulty functioning of the promotional mechanism, from a competition point of view.

18. If both the retailer and the supplier would have had a behaviour expected on a competitive market, the consumers could have benefitted from lower prices, and the benefits incurred by the retailers and the suppliers from the promotional events would have been transferred, to a greater extent, to the final consumer. If the retailer did not restrict the supplier’s liberty of setting prices and deciding on promotional activities in the relations with other retailers, the customers of other retail chains could have benefitted from lower prices and a wider choice.

19. The setting of resale price level, together with the retailer, was an advantage for the supplier. The supplier made sure that the retailer did not lower the price below a certain level, which could have determined another retailer to request lower prices. The natural effect would have been the creation of a competitive pressure on prices and the general decrease of the supplier’s prices, which would have led to a decrease in the supplier’s revenues. The positioning of prices at an artificial level was only hurting the competition, and, implicitly, the final consumer.

20. Price promotions aim for an increase in customer demand, which leads to higher volumes sold by the retailer. Taking into account that the procurement price for the products being promoted is generally lower than the usual one, both before the promotional period and during it, it can be assumed that the retailer will register an increase in its margin per product unit, which originates from the supplementary discount offered by the supplier.

21. Therefore, the margins will be bigger and also the volumes will be bigger, all of these leading to an overall increase in the retailer’s profits. Also, the costs for stocking the products are smaller during the promotional periods, due to the fact that the stock rotation is faster than normal. Moreover, the costs for promoting the products, offering supplementary shelf space, editing of flyers and other services are already paid for by the supplier, therefore only a small portion of them can be considered as a cost incurred by the retailer.

22. A promotional event also generates more sales of the products that are not in a promotion, due to the fact that generally, the basket bought by a customer will satisfy its weekly needs.

23. Therefore, considering the existence of a promotional discount, that higher volumes are sold during the promotional periods, that there are smaller costs for stocking merchandise and also that marketing costs are mainly supported by the supplier, it can be reasoned that this advantage obtained by the retailer should be transferred, at least partly, to the end-consumers.

24. It follows that the retailer is the one most likely to have the knowledge of a price setting that would guarantee that some of the benefits are transferred to the end-consumers and to decide which margins should be set during the promotional period. Moreover, the retailer is the one that holds the information regarding the price positioning of products on its shelves, taking into account that it offers several products in the same category, that are similar to the ones being promoted. Therefore, the price decision should remain a prerogative of the retailer.

25. A supplier cannot know the sustainable level, from an economic point of view, of the price the retailer can charge for products during a promotional period, because it does not have information about the costs incurred by the said retailer. The minimum and fixed prices hinder the freedom of the retailer to independently establish its commercial policy and will not allow for a greater benefits transfer towards the end-consumer.
Some of the benefits of a promotion, such as discounted shelf prices, are considerable and have effects mainly on the price-sensitive consumers. In the absence of minimum or fixed prices, the retailer could have transferred more of the benefits towards the end-consumer.

Promotions represent an attraction point for the Romanian consumer. An AC Nielsen study for 2012 showed that approximately 58% of the consumers actively seek promotions. 15% of the interviewed persons will switch shops in order to get the best promotions, while 24% of the consumers usually buy different brands that are being promoted.

This is due to the fact that the buying power of the Romanian population is a low one, compared with other European countries. Approximately 42% of the Romanian household income is spent on food and beverages.

RPM and exclusive promotions in the context of the MFN clause

The decrease of a product’s shelf price can generate a chain reaction, due to the MFN-type clauses contained by the commercial contracts between the suppliers and the retailers. These clauses force the suppliers to match the prices given to one retailer with the prices given to other retailers. This can be one of the causes why the suppliers choose to set minimum or fixed resale prices, in order to better conserve their margins.

By setting minimum resale prices, the suppliers can keep their overall profitability, thus protecting themselves against the price discounts that should be offered to other retail chains that benefit from an MFN clause. Also, the promotional exclusivity clause, which obliges the supplier not to have simultaneous promotions with different retailers, also benefits the suppliers, by allowing them to offer smaller promotional discounts. In the case of simultaneous promotions, the competitive pressure would erode the margins and would lower the profitability.

The RCC only incriminated the agreement between the suppliers and the retailers regarding the exclusive promotions. It does not follow that a certain supplier should promote its products concomitantly on the whole retail market, but that the final decision of promoting the merchandise in certain shops should ultimately by the suppliers’ decision.

Following the completion of the sector inquiry, the RCC found that up to 7 retailers, including the 4 sanctioned by RCC, were using MFN-type clauses.

The suppliers argued that the clause was applied in the cases when a retailer observed lower prices than its procurement price in other competing stores.

This situation can arise when a competing retailer is promoting a certain good, for a limited period of time, at a low margin (1-2%). The corrections are generally required on the existing stock at retailer level. In fact, the correction represents almost the same discount as the one offered to the retailer that is promoting the item.

Therefore, even for a certain period of time, the need arose for RPM, due to chain-reaction caused by the MFN clause. RCC sanctioned the 4 retailers and 21 suppliers for restricting each other’s liberty of setting the commercial policy regarding prices, thorough setting of sale/resale prices for the suppliers’ products. The fines applied were around EUR 35 million.