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The Patent and Market Court of Appeal overturns the Swedish Competition Authority's RPM case against Tapwell

The Patent and Market Court of Appeal has overturned the Patent and Market Court's decision upholding the fines imposed on Tapwell for alleged resale price maintenance by the Swedish Competition Authority (the 'SCA'). The SCA alleged that Tapwell had restricted the ability of two of its retailers to determine their own online resale prices. According to the SCA, Tapwell's pricing policy required retailers not to sell Tapwell products online below Tapwell's recommended price minus 10%.

The lower court (the Patent and Market Court) had previously upheld the SCA's finding of an infringement and dismissed Tapwell's appeal. The Patent and Market Court of Appeal has now reached the opposite conclusion and set aside the lower court's judgment.

The evidence was not sufficiently robust to demonstrate an agreement or concerted practice

The Patent and Market Court of Appeal found that the SCA's case relied primarily on circumstantial evidence. There were no written agreements and no direct evidence that the parties had entered into oral agreements. The key issue was therefore whether the extensive communications between Tapwell and its retailers, viewed together with the other evidence on file, were sufficient to demonstrate a concurrence of wills between the parties.

As the authority alleging the infringement, the SCA bears the burden of proving the existence of an anticompetitive agreement or concerted practice.

The court acknowledged that the evidence showed that Tapwell had, at least unilaterally, expressed the view that retailers should not sell below a certain price level, namely Tapwell's recommended resale price minus 10%. At the same time, the court noted that communications between suppliers and retailers regarding pricing are often legitimate and commercially justified. For competition law purposes, however, an agreement exists only where such communications result in a concurrence of wills that restricts retailers' freedom to determine their downstream resale prices independently.

According to the court, several factors undermined the SCA's theory of an agreement. In particular, the evidence showed that not all retailers complied with the alleged pricing policy. The court also attached significance to the

fact that the SCA had neither alleged nor demonstrated that Tapwell imposed sanctions or retaliatory measures against retailers that deviated from the alleged pricing policy. Retailers therefore faced no adverse consequences for failing to follow the recommended pricing level.

The court further identified a number of alternative explanations for both the communications between Tapwell and its retailers and the retailers' pricing behaviour. These included the high degree of price transparency in online markets, the use of pricing algorithms, promotional discounts, and the downward pricing pressure exerted by the largest retailer, Bygghemma. The court also considered that retailers' complaints about competitors offering low prices did not necessarily amount to acceptance of an anticompetitive arrangement, but could simply reflect a commercial interest in avoiding price pressure.

Against that background, the Patent and Market Court of Appeal concluded that the evidence was not sufficiently robust to establish either that Tapwell had implemented a pricing policy binding on its retailers or that the retailers had consented to such a policy. As a result, the SCA failed to prove the existence of an anticompetitive agreement. On that basis alone, the court overturned the lower court's judgment and annulled the fines previously imposed on Tapwell.

Dissenting opinion

One of the three judges dissented and delivered a detailed dissenting opinion. In the dissenting judge's view, the evidence presented by the SCA was sufficiently robust to demonstrate that Tapwell had engaged in a continuous agreement or concerted practice with the retailers concerned throughout the relevant infringement period. The existence of lawful discussions concerning purchase prices and discounts did not, in her view, alter that conclusion.

The dissenting judge further found that the pricing policy imposed by Tapwell constituted a restriction of competition by object, namely resale price maintenance. Unlike the lower court, she considered that alleged procompetitive effects, such as brand protection and the prevention of free riding, were not relevant to determining whether the conduct constituted a by object restriction. As the majority concluded that the existence of an agreement had not been established, the court did not examine these aspects of the lower court's reasoning.

The future of resale price maintenance in Sweden

Following the European Court of Justice's (the 'ECJ') ruling in *Super Bock*, EU competition law has moved away from treating resale price maintenance as automatically constituting a by-object restriction and towards a more

economic assessment of vertical agreements. As the Patent and Market Court of Appeal found that the existence of an anticompetitive agreement had not been proven in the case at hand, it did not provide further guidance on how the competitive effects of resale price maintenance should be assessed. Nevertheless, the court's observation that Tapwell's alleged pricing policy had proven ineffective may suggest that it was reluctant to characterise the conduct as sufficiently harmful by its very nature to qualify as a restriction by object.

The judgment is nonetheless likely to have important implications for future antitrust enforcement by the SCA. The court appears to have set a relatively demanding evidentiary standard for establishing the existence of an anticompetitive agreement or concerted practice. At the same time, the judgment may be criticised for placing significant emphasis on the absence of direct evidence of a written or oral agreement. In practice, resale price maintenance arrangements, much like horizontal collusion, rarely take the form of explicit agreements. Nor does EU competition law require such evidence. According to settled case law of the ECJ, the existence of an agreement or concerted practice may be inferred from a body of consistent evidence and indicia which, taken together and in the absence of another plausible explanation, demonstrate an infringement of the competition rules.*

The judgment suggests that the SCA may need to present a more comprehensive and persuasive evidentiary record when seeking to establish the existence of an anticompetitive agreement before the courts.

*See e.g. Case C-74/14, *"Eturas" UAB and Others v Lietuvos Respublikos konkurencijos taryba*, EU:C:2016:42, para 36; and Case C-634/13 P, *Total Marketing Services v Commission*, EU:C:2015:614, para 26 and the case-law cited.

The official decision is available here.