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DIFFERENCE BETWEEN RECOMMENDED RETAIL PRICE AND AGREEMENT BETWEEN PRODUCER AND DEALER ON THE RESALE PRICE

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This section originates from the partnership between MarketPlace and ANDEC, and it is edited by Maurizio Iorio, in his dual role of Professional Attorney at Law in Milan and President of ANDEC. On each issue he will address legal matters with a specific focus on the electronics sector. Further details can be obtained on the website: www.andec.it, while on Maurizio Iorio's web page (www.avvocatoiorio.it) this section is also available in Italian and French.

Glancing through newspapers or catalogues of this or that product, or while surfing the web, it often happens to come across terms like "*on sale at EUR.... (recommended retail price)*". I would therefore like to take the opportunity of this issue of MarketPlace to explain the origin and meaning of this distinction and shed some light in this regard.

LEGAL BACKGROUND

I will begin by describing the basic legislation of reference. The Italian antitrust law (Law 287/1990, Art. 2) and the EU provisions (Treaty on the Functioning of the European Union or TFEU, Art. 10) prohibit "*... all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market...*"; these practices include also the prohibition to: a) directly or indirectly fix purchase or selling prices or other trading conditions.
By contrast, it is not prohibited for the supplier (at least in Italy, other countries like the UK have different laws) to recommend to its customers the retail prices, provided of course that resellers are free to comply or not.

RECOMMENDED PRICE AND IMPOSED PRICE

The question arising in the practical application of this provision is this: when is a price the actual suggested retail price (as a result of the supplier's unilateral and legitimate decision which can be adopted or not) and when is it instead an imposed price (corresponding therefore to a prohibited agreement between supplier and reseller).
To make some examples, the supplier who threatens to discontinue trade relations with retailers who do not apply his "suggested" prices (thus obtaining compliance) or allocates discounts, incentives, co-advertising, particularly favourable prices or other benefits only to the retailers who comply with his suggested prices and not to the retailers who instead do not apply them, breaches such provision since this constitutes a form of agreement through which he imposes to the reseller (or "maintains" as they say) the retail prices.

CASE-LAW: THERE MUST BE SOME FORM OF PRICES AGREEMENT IN ORDER TO PROVE AN UNLAWFUL CONDUCT

Some previous desisions:

- In 2001, the EU Commission condemned Volkswagen for having made an agreement with its dealers whose purpose was to fix the resale price of the Passat model in Germany (Commission. 29-06-2001, Case COMP/F-2/36.693; more specifically Volkswagen, which with a confidential" circular had threatened its dealers of negative consequences on the existing agreement if they did not comply with its "suggested" prices: according to the Commission, given that the admission to join the Volkswagen's network of dealers entailed acceptance by the same of the company's policies, the adoption by the dealers of the "suggested" retail prices in reality forms the basis of an agreement prohibited by antitrust law. In fact, according to the Commission, on the one hand we have a retaliatory threat, and on the other the silence of the dealers to whom the threat is addressed. The decision of the Commission was, however, later reversed by the Court of First Instance (Judgement of 3 Dec 2003, Case T-208/01, Volkswagen AG v. Commission) according to which it is not sufficient the passive conduct of the dealers but, in order for there to be a prohibited price-fixing, must be established some form of agreement, even if based on the assumption of a "grudging" acceptance by one of the parties: "*The concept of agreement within the meaning of Article 81(1) EC centres around the existence of a joint intention between at least two parties, with the result that a decision of an undertaking which constitutes unilateral conduct escapes the prohibition in that article, unless it receives at least the tacit acquiescence of another undertaking. The Commission cannot therefore hold that apparently unilateral conduct on the part of a manufacturer, adopted in the context of the contractual relations which it maintains with its dealers, in reality forms the basis of an agreement between undertakings within the meaning of Article 81(1) EC if the Commission does not establish the existence of an acquiescence, express or implied, on the part of the dealers, in the attitude adopted by the manufacturer. In that regard, while it can be envisaged that a contractual variation of a dealership agreement which complies with the competition rules could be regarded as having been accepted by the dealers in advance, upon and by the*

"It is necessary to understand when we are facing a suggested retail price (as a result of the supplier's unilateral decision to be adopted or not) and when a price is instead imposed".

"If there are no retaliatory threats, targeted incentives, or coercive behaviours from the supplier, we are facing a unilateral conduct of the supplier which is entirely legitimate".

signature of that agreement, where it is a lawful contractual variation which is foreseen by that agreement, or is a variation which, having regard to commercial usage or legislation, the dealer could not refuse, it cannot, by contrast, be accepted that an unlawful contractual variation of a like dealership agreement, such as a request by the manufacturer to its dealers to cease giving discounts, could be regarded as having been accepted in advance, upon and by the signature of that lawful agreement. In the latter case, acquiescence in the unlawful contractual variation desired by the manufacturer can occur only after the dealers have become aware of that variation".

- In the AEG case (ECJ 25 Oct 1983, Case 107/82, AEG-Telefunken Ag v. Commission), the Court concluded that the refusal of AEG – which pursued the goal of only having resellers willing to comply with the retail prices "suggested" by it – to admit to an exclusive distribution network resellers having the qualitative requirements to be part of it did not constitute a unilateral action (lawful) but "*it forms part of the contractual relations between the undertaking and resellers*"; in particular "*... in the case of the admission of a reseller, approval is based on the acceptance, tacit or express, by the contracting parties of the policy pursued by AEG which requires inter alia the exclusion from the network of all resellers who are qualified for admission but are not prepared to adhere to that policy".*

- Instead, if there are no retaliatory threats, targeted incentives, or coercive behaviours from the supplier and the reseller believes that he does follow the retail price suggested by the first, we are facing a unilateral conduct of the supplier, entirely legitimate and with no imposition of prices; in this respect, it is worth recalling the following passage from the judgment issued by the Court of First Instance on 26 Oct 2000, Case T-41/96 Bayer AG v. Commission: " *... where a decision on the part of a manufacturer constitutes unilateral conduct of the undertaking, that decision escapes the prohibition in Article 81 of the EC Treaty..., now Article 101 TFEU, ...since the legal concept of agreement conferred by this provision... centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention*".

CONCLUSION:

The expression "suggested retail price" is lawful as it is a unilateral act of the entity marketing a given product in bulk, which the reseller can, in whole or in part, decide to adopt or not. Any form of agreement – consider in this regard the broad examples provided above – between supplier and resellers meant at ensuring that the prices recommended are actually applied, is unlawful. Any authority wishing to challenge an agreement on prices must at least provide evidence of a consensual conduct of the reseller in not being sufficient the mere fact of his being part of the sales network set up by the supplier.

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supplier.