EU Competition Webinar Series (Part I)
Achieving A Successful Product Launch

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PRESENTATION OF TODAY’S PANEL AND TOPIC
Today’s Panel

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PRODUCT LAUNCH - SETTING THE SCENE
Novel Product: Positioning is Key

- **Choice of distribution model**

- **Attention to product life cycle**
  - Distribution model may evolve with the cycle
  - Calling for dynamic review

- **Today’s main focus is on margin/price**
  - Goal: position the product at retail level to ensure initial take-up and endorsement
  - Importance of reconciling distributors’ interests with supplier’s
Interests of Supplier

- **Ensuring that reseller:**
  - Adopts and endorses the product
  - Invests in promotion and after-sale
  - Secures product visibility with consumers before and during launch

- **In order to:**
  - Generate critical mass in terms of demand and
  - Reach break-even at the earliest possible time
Reseller’s Interests

- Recoup investment in promotional efforts and inventory

- Retail market price predictability

- Positive customer experience and satisfaction
Interests Usually Aligned but…

- Quality, sophistication, innovation may not be well understood

- Some resellers pursue business models that may not fit well with the novel product launch strategy/positioning
  - Free riding problem: price-cutters, “mavericks”
  - Product launch used to draw traffic to its shop/website
  - New product treated as “loss leader”

- E-commerce has amplified the phenomenon
PRODUCT LAUNCH - ANTITRUST PITFALLS
Route to Market Issues

- How much control do suppliers need? How long will control be needed?

- How much control is allowed by EU competition law?
  - Low levels of control – open distribution
  - Intermediate – exclusive purchasing; exclusive territoriality; customer segmentation; franchising; selective distribution
  - High levels – vertical integration or agency

- Avoid restrictions ‘by object’ under Art. 101(1) TFEU
Territory - The Dividing Line

- When can you use territorial restrictions?

- How much can you constrain extra-territorial reach?
  - Active vs. passive sales
  - The Internet as a passive sale

- Admixture of territorial and selective criteria – latter must dominate
Price Influence Versus Fixed Prices

- What forms of price influence are lawful?
  - Reminder on resale price maintenance (RPM)
  - When does recommended resale price becomes RPM?
  - How much price guidance can you give?
  - What sort of language can you use?

- Resale and advertised prices – the distinction

- Imposing reseller obligations *in lieu* of price
  - Service requirements versus margin-maintenance
  - Qualitative versus quantitative criteria

- Bilateral or multilateral engagement with resellers
  - Watch out ‘hub-and-spoke’ cartel
PRODUCT LAUNCH - CASE STUDIES
Case 1 - Revolutionary Consumer Product Launch

- **Setting the scene**
  - New concept for high-end consumer product
  - Technological revolution
  - Significant R&D investment
  - To be sold through specialized retailers

- **Repeated history of failed product launches**
  - Succession of failed product launches over several years
  - Price positioning destroyed by pure online players
    - Open distribution model
    - Lack of promotional investment obligations
  - Product did not reach consumers, causing lower consumer choice and availability

- **Revolutionary product in pipeline and looming risk of failure**
Case 1 - Options Available

- Options
  - Change distribution model: selective distribution with strong qualitative obligations imposed on distributors
  - Minimum promotional investments
  - Minimum inventory requirements

- Raise wholesale price?
- Appoint a few like-minded distributors for a short-time?

- The above did not resolve the free-rider problem and the risk of price downward spiral
- RPM as solution of last resort?
Case 1 - RPM as Solution of Last Resort?

- RPM illegal by object

- However new product exception
  - Limited guidance and rarely tested
  - Only for a short duration
  - Monitoring post RPM period to ensure resale price freedom

- Not risk free, but robust self-assessment and careful implementation

- Outcome
  - Successful product acceptance and take-up
  - Market demand exceeded expectations
Case 2 - Launch of a New Food Product

- **Setting the scene**
  - Development of a new food product by a JV between Y and Z
    - Y newcomer to this food product category, but project leader + main shareholder
    - Z already active in neighbouring markets
  - Distribution model initially envisaged
    - Z better positioned to market/sell new product (expertise / contacts / credibility)
    - So initially envisaged that Z would purchase / resell JV products

- **But constraints on resale price control in a classic purchase for resale-distribution model (RPM prohibition)**

- **Y unwilling to relinquish control over resale price**
  - Y project leader
  - Price positioning of new product essential to success of launch
  - Especially in a very competitive nascent product category
Case 2 - Can’t Change the Rules? Change the Model!

- Proposition to switch to an agency model

- Advantage? Under EU Guidelines on Vertical Restraints, « true agency » agreements can escape art. 101 constraints
  - “True agent” does not bear any (or negligible) financial and commercial risk
  - Regarded as forming part of the same economic unit as the principal
  - Principal can set the prices and conditions of resale without constraints

- PROs / CONs for principal
  Bears risks
  (commercial risk + indemnification of agent upon termination)
  vs.
  Free to set price / conditions of resale
Case 2 - Take-aways

- Solution allowing Y to achieve its price control goal
- Again, not risk free
  - Need to ensure that agent is a “true agent”
  - Careful and thorough tailoring of the contract terms
  - Qualitative analysis of the risks borne in practice by the agent in light of the market circumstances
- Agency model is not for everyone and every situation
- But may have merits in early stages of product launch
  - Control over price positioning
  - Test customer appetite for product
Final Thoughts on the Case Studies

- Contradict general wisdom about relinquishing control over product
- You can launch novel product AND retain control over price positioning and resale conditions
- Early involvement with client to discuss goals and best approach
  - No template or standard solutions
  - Requires client engagement and understanding of risks
  - Tight monitoring during implementation of launch strategy is key
Questions?
Thank You for Joining Us

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