

CLIENT ALERT

RPM: Setting the Price Tag Costs €157m to Gucci, Chloé and Loewe

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The European Commission (Commission) fined Gucci, Chloé and Loewe for engaging in resale price maintenance (RPM)—a practice whereby suppliers impose the minimum price at which resellers (i.e. retailers) sell their products.

RPM is viewed as a serious restriction of competition as it undermines competition between retailers and can lead to higher prices. Under EU competition rules, RPM is a hard-core infringement of Article 101 of the Treaty on the Functioning of the European Union (TFEU), which can result in considerable fines.

The Commission conducted unannounced inspections in April 2023—just one year after the adoption of the revised Vertical Block Exemption Regulation (VBER) and accompanying Guidelines in 2022, which list RPM as a hardcore restriction.

The RPM infringement

The three fashion houses were found to have restricted the ability of their retailers—both online and offline—from setting their own resale prices of apparel, leather goods, footwear and accessories.

The RPM conduct consisted of:

- dictating retail prices;
- limiting maximum discount rates;
- controlling the timing of sales and promotions; and
- prohibiting, in some instances, retailers from offering discounts altogether.

This interference in the retailers' commercial policy limited their commercial freedom and resulted in:

- protecting the luxury brands' own sales from competition from their retailers: by dictating retailers' prices and sales conditions and keeping them identical to the ones applied by the brands in their own direct sales channels, the brands prevented competition from their retailers. To ensure compliance, the three fashion companies both monitored retailers' prices and retaliated against deviating retailers; and
- reducing competition among resellers as most retailers complied with the brands instructions, at the cost of their own pricing freedom.

Separately, Gucci also imposed on its retailers a full online reselling ban on a particular product line.

EU RPM precedent

In July 2018, the Commission adopted four e-commerce decisions in the consumer electronics sector. That same year, the Commission fined another clothing company €40 million for, *inter alia*, imposing resale prices. Taken together, the 2018 decisions showed a renewed Commission focus on RPM and how real-time price-scraping and monitoring tools, coupled with market-wide price-matching and dynamic pricing algorithms, can work as enablers of RPM by making deviations immediately detectable.

In a judgment dated 29 June 2023 involving a beer producer, the Court of Justice confirmed that RPM could be considered as a restriction “by object” but importantly clarified that the label of “hardcore restriction” used in the VBER does not automatically establish a by-object restriction; given this limitation, authorities and courts must still assess the content, objectives and context of the restraints, including the mechanisms for monitoring and enforcement.

The Gucci, Chloé and Loewe decisions build on the above precedent—new and old cases show that hybrid channel strategies (selective distribution, brand protection and online presentation standards) cannot be used to justify price control downstream, irrespective of brand positioning.

Lessons for luxury brands and retailers

The newly adopted Gucci, Chloé and Loewe decisions offer a number of takeaways for luxury brands and retailers:

- **RPM carries significant risk:**
 - recommended retail prices must remain genuinely non-binding in both form and substance: discount grids, mandatory sales calendars and informal or formal enforcement may turn allegedly benign guidance into full-fledged RPM;
 - monitoring retail prices is not unlawful as such, but retaliating on them by adding pressure, threats, supply limitations or supply incentives to it is. Distribution channel strategies should target objective quality and presentation standards, not price or de facto pricing outcomes; and
 - coordinated promotional activity should be narrowly defined, limited in time and clearly documented to avoid turning into RPM.

- **Cooperation – Fine reductions and faster process**

The decisions demonstrate that **early and constructive engagement with the authorities during the investigations is critical**. Meaningful cooperation may lead to a faster process and significant fine reductions even where the underlying practices are labelled as hardcore restrictions:

- Gucci and Loewe secured a 50% fine reduction. While Gucci revealed the infringement to the Commission, the information provided by Loewe extended the infringement's time frame.
 - Chloé received a 15% fine reduction.
 - All three fashion companies expressly acknowledged the facts and their infringements of EU antitrust rules, thus speeding up the investigation.
- **Compliance pays off**
 - Competition law applies across all industries, but bespoke compliance programs for particular industries and business models are essential.
 - Setting up dawn raid rapid response plans is critical to be prepared for unannounced inspections.

Litigation risks

Infringements of EU competition rules risk follow-on damages from retailers, who may initiate litigation in order to seek compensation for loss and damages suffered in national courts. These claims can rely on the Commission infringement decisions which are binding on EU national courts in order to establish liability, with claimants then only needing to prove causation and quantum of damages.

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