COVID-19: BEWARE ILLEGAL USE OF PRICE MONITORING TOOLS

Date: 20 April 2020

Antitrust, Competition & Trade Regulation Alert

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It is increasingly common for brands to track the prices of their products online using electronic price monitoring tools. While the practice itself is unlikely to attract antitrust risk, as we have previously reported, in many regions (including the European Union) it can give rise to a temptation on the part of brands to engage in illegal vertical price fixing – or "resale price maintenance" (RPM) – such as pressurising retailers not to price below RRP. This temptation will be higher than ever due to the COVID-19 crisis, with brands seeking to curtail the downward spiral of their market prices from online panic selling by retailers with excess inventory (see our alert on the effects of COVID-19 on supply chains here).

A recent decision by the United Kingdom's Competition and Markets Authority (CMA), just one of several major RPM decisions by European antitrust enforcement agencies in recent months, provides a stark reminder for suppliers to beware the increased risks of RPM over this period, which almost certainly will lead to investigations and multi-million fines down the line.

At the same time, the crisis may also be the time for suppliers to leverage monitoring tools in legitimate ways that could prove extremely beneficial in mitigating potential damage to their brand equity and go-to-market strategy health.

RECENT DECISION BY CMA ADDS TO THE GROWING ENFORCEMENT

In late March 2020, the CMA announced that it had sent charge sheets to two manufacturers of electronic drum kits, hi-tech music equipment and synthesizers, Roland (U.K) Limited (Roland) and Korg UK Limited (Korg).

The CMA's provisional findings are that "Developments in software have … made it easier for suppliers and retailers to monitor online prices, with Roland and Korg both subscribing to these services. As a result, suppliers can use a 'Big Brother' approach to identify lower online prices and put pressure on retailers to bump them up. The use of this 'all-seeing' software is also likely to force more retailers to comply with pricing rules in the first place, for fear of being caught and sanctioned."

This development comes only months after the CMA imposed fines of GBP 4.5 million and GBP 3.7 million for similar illegal use of price monitoring tools by Fender Europe and Casio Electronics respectively (see our alert here), and echoes the accelerating trend across Europe to impose fines in the millions (sometimes tens of millions) for online RPM. In many, if not most, of the recent investigations involving pricing and online resale restrictions, price monitoring tools have played a central role.

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It is therefore essential that manufacturers approach the use of price monitoring tools with caution to ensure that these tools deliver the desired results without exposing the businesses to the risk of serious competition law infringement, and that they take advice before seeking enforcement measures against authorised and unauthorised resellers of their products on the basis of such results.

The above being said, it will be interesting to observe whether the authorities are prepared to adopt a more lenient approach to forms of resale price maintenance intended to protect brick and mortar resellers struggling following the lockdown. Earlier in April 2020, MEP Hilde Vautmans addressed a priority question to the European Parliament concerning fashion retail. She expressed the view that online fashion platforms should be required to sell goods at normal prices when brick and mortar store closures are lifted, and that such platforms are already exploiting the COVID-19 situation to offer massive discounts online to the detriment of physical retailers. In principle this argumentation could apply to any retail sector and we are monitoring developments for our clients.

PRO-COMPETITIVE AND DEFENSIBLE USAGE

Whilst price monitoring tools can create strong incentives to enforce RPM, they may also offer manufacturers highly efficient means to legitimately address some of the other risks their businesses may be facing during this economic crisis.

For example, they can be used by manufacturers to better analyse and respond to rapidly changing demand conditions, to identify market trends and opportunities, to understand and refine their brand positioning and brand voice, and to forecast future development, manufacturing, marketing and/or distribution costs.

These tools can also help to flag potential consumer protection threats and breaches of reseller obligations (such as selling on unauthorised websites or in non-compliance with the requisite quality standards and servicing).

Increased demand

In product segments where the crisis has led to increased demand, these tools can be used to identify and mitigate risks such as stockpiling and opportunistic price gouging by resellers. Numerous European competition authorities have acted quickly to stop unfair pricing practices and are themselves closely monitoring prices to identify these consumer threats. Manufacturers should therefore be proactive in evaluating whether their own prices and those of their network might expose them to the risk of investigations, fines and damages.

REACH OUT TO DISCUSS

Please reach out if you would like to speak with any members of our team about the do's and don'ts of price monitoring tools and your strategies over the coming months.

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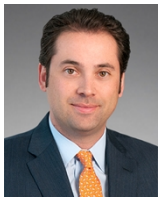
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