UK COMPETITION AUTHORITY CHALLENGES ONLINE RESALE BAN

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On 9 June 2016, the UK's Competition and Markets Authority (CMA) announced that it had sent a statement of objections to Ping Europe Limited, a golf equipment manufacturer, alleging that Ping had breached EU and UK competition law by banning the sale of its golf clubs online.

Ping now has the opportunity to respond to the CMA's allegations, before a final decision is taken. If the CMA determines that Ping's online resale ban is not justified, it may order Ping to pay a fine and will almost certainly order it to remove or modify the ban.

This case comes in the wake of increasing appetite and action on the part of European competition authorities to sanction manufacturers who try to prevent the resale of their goods over the internet or through certain online channels. It serves as an important reminder to manufacturers and service providers to carefully evaluate their distribution policies and agreements as regards the resale of their products or services online, to ensure these do not expose them to potentially significant legal risk.

BANS ON ONLINE RESALE

In this most recent case involving Ping, the CMA has reiterated its growing concern that "*[w]here traditional businesses operating through high street shops face intense competition from online sales, suppliers may be tempted to respond by introducing practices, like online sales bans, that can restrict such competition. The internet is an increasingly important distribution channel and retailers' ability to supply via this channel should not be unduly restricted.*"

The Office of Fair Trading (OFT), the CMA's predecessor, has previously ruled that an online resale ban by a manufacturer of mobility aids was not justified by the objectives of ensuring pre- and post-sales services for customers. The OFT concluded in that case that "*in the context of a distribution system that is selective, and where intra-brand competition has therefore already been limited, a prohibition on online price advertising and a prohibition on online sales undermine benefits of consumer search and choice brought about by the internet.*"

The CMA's preliminary view in the Ping investigation and the above decision are consistent with a ruling by Europe's highest court, the EU Court of Justice, in 2011 (the *Pierre Fabre* decision). In that case, the Court ruled that resale requirements that effectively prevented resellers from selling premium cosmetic products online violated EU law prohibiting anti-competitive agreements. The Court held in that case that the de facto internet sales ban could not be justified by customer protection (e.g., by the need to provide individual advice to customers) or by the need to maintain the prestigious image of the products.

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The competition authorities of other EU countries, including Germany and France, have also taken a similar stance regarding restrictions which contractually or in practice restrict resellers from selling online. For example, in 2012, a manufacturer of speakers and headphones was fined EUR 900,000 by the French Competition Authority for banning “distance selling” by its approved distributors, interpreted to mean internet sales.

RESTRICTIONS ON HOW GOODS ARE SOLD ONLINE

It is also important for companies to remember that, even if they do not ban online resale altogether, they still need to tread carefully if they impose restrictions on who can sell their products on the internet in Europe and how they are allowed to do so. There have been significant developments in this area, with key laws currently in a state of flux and authorities increasingly seeking to investigate and sanction companies whose agreements or practices they find overly restrictive.

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