UK COMPETITION AUTHORITY WARNS ONLINE SELLERS ABOUT UNLAWFUL PRICING

Date: 11 November 2016

Antitrust, Competition & Trade Regulation Alert

By: Gabriela da Costa

In the lead up to "Black Friday", one of the busiest times of the year for online sales, the UK's Competition and Markets Authority (CMA) has launched a campaign to remind online sellers of products that discussing and agreeing price levels with their competitors is illegal, and can result in serious penalties.

This most recent campaign reiterates the CMA's current focus on investigating and sanctioning violations of competition law committed in the context of the online sale of goods. The CMA is committed to instilling a wide-spread understanding and culture of compliance both regarding sellers' relationships with their competitors, as well as restrictions by suppliers on the online resale of their products (as previously reported here).

The CMA's campaign follows its recent decision to impose a fine of over £160,000 on an online seller of posters and frames, Trod Ltd (in administration), for agreeing with a competitor, GB eye Ltd (trading as 'GB Posters'), not to undercut each other's prices when selling on an online marketplace, except where another seller on the marketplace was cheaper. This case serves as a reminder that the competition law rules apply to small businesses as well as large ones: the two sellers in this case were small businesses, each with an annual turnover of under £16 million. GB eye only escaped a fine because it reported the cartel under the CMA's leniency programme.

The CMA's key warnings are that online sellers should not:

- agree with competitors that they will not undercut each other, or at what prices each will sell its products; or
- discuss their pricing strategies with competitors.

The CMA has reminded online sellers that breaching the above rules could result in being fined up to 10% of their turnover, whilst individuals involved in cartels can face personal fines, director disqualification and even jail.
At the same time, the CMA has noted it is writing to a number of online companies "which may be denying customers the best available deals" and reminding them of their obligations under competition law. The CMA has also engaged with online marketplaces which are helping to make the CMA's advice available to online sellers.

RE-PRICING SOFTWARE

The sellers in the Trod / GB eye case used automated re-pricing software to enable the price-fixing agreement to operate. The CMA has indicated that re-pricing software can be used to encourage healthy competition amongst online sellers, but that it is illegal to use it as part of a price-fixing agreement. In addition, the CMA has issued a

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warning to software providers that they too risk falling foul of competition law if they help their clients use software to facilitate illegal price-fixing agreements, although that was not a feature of the Trod/GB eye case.

Separately, the European Commission (Commission) recently noted in its Preliminary Report on the e-Commerce Sector Inquiry that a significant number of suppliers in the EU use price monitoring software to track their resellers' online prices. Although the Commission did not go so far as to condemn such tools, it did express a potential concern that the increased price transparency through price monitoring software enables easier detection of retailers that deviate from suppliers' pricing recommendations and can therefore facilitate manufacturers in retaliating against retailers that do not "comply" with those recommendations. The Commission also noted that increased price transparency through price monitoring software may facilitate or strengthen (both tacit and explicit) collusion between retailers by making the detection of deviations from the collusive agreement easier and more immediate.

HOW K&L GATES CAN ASSIST

Our Antitrust, Competition and Trade Regulation team regularly advises both suppliers and resellers in a wide range of sectors on their competition law obligations specifically when applied in the online context.

We have extensive experience in auditing clients' practices and agreements to assess competition risk, including responding to whisteblower alerts, conducting internal investigations into alleged illegal agreements, advising companies on the best strategies to minimise their legal exposure, and representing clients before the authorities in cartel investigations (both on the civil and criminal side). In addition, we regularly assist clients in developing and implementing effective price maximising strategies whilst avoiding allegations of resale price maintenance. We also prepare and deliver tailored compliance training to clients' staff to assist them in avoiding high risk situations.

KEY CONTACTS



GABRIELA DA COSTA
PARTNER

LONDON
+44.20.7360.8115
GABRIELA.DACOSTA@KLGATES.COM

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