THE PITFALLS OF PRICE MONITORING IN THE EU

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EU Antitrust, Competition and Trade Regulation Alert

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In an ever-growing online retail environment, brand owners are increasingly becoming concerned with tracking their brand's online presence and ensuring consumers' experience of their brand continues to be positive. At the same time, price monitoring software and tools are used by market participants across the world to better understand market trends, brand positioning and to calculate future manufacturing, marketing and/or distribution costs.

In the United States, manufacturers often use price monitoring tools as a direct measure to protect their image in the market and the quality nature of their products by ensuring that resale prices are reflective of their brand's value. In the European Union ("EU"), the use of price monitoring is also prevalent, with the European Commission's ("Commission") e-commerce inquiry identifying that at least 30% of manufacturers track the online prices of their products.

However, businesses relying on price monitoring software in the EU need to be especially wary of how they use such tools, especially in connection with their distribution networks. While the use of price monitoring is not in itself legally problematic in the EU, there are strict rules on how price monitoring may be employed in practice, with non-compliant businesses risking investigations by the Commission or national antitrust regulators, as well as the imposition of substantial financial penalties. This is in particular important because of the EU competition authorities' recent focus on price algorithms. For example, the EU Commissioner for Competition recently remarked that "*businesses need to think when they design and use algorithms*" and that "*pricing algorithms need to be built in a way that doesn't allow them to collude*."

RESALE PRICE MAINTENANCE

The key pitfall for manufacturers and brand owners to avoid when employing price monitoring within the EU is using the price information gathered to influence resellers' pricing of their products. In the EU, if a brand owner takes steps to increase or secure the retail price at which its products are to be resold, they will likely have committed a serious violation of EU competition law and be at risk of incurring fines of up to 10% of worldwide group turnover in the preceding financial year.

Employing price monitoring tools increases the likelihood that decisions made by manufacturers regarding their go-to market strategies and the way in which they instruct or influence their resellers to sell their products will, even unconsciously, be based on price. This fact is expressly recognised by the Commission in the 2017 e-commerce sector inquiry report, which notes that the use of price monitoring tools increases price transparency in the market, which in turn increases the likelihood that actions taken by manufacturers vis-à-vis their resellers,

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including removing their right to sell the manufacturer's products, will be based on the price at which the reseller is selling the products. As outlined above, this will amount to resale price maintenance, an illegal practice under EU competition law.

These risks are amplified even further where manufacturers employ a selective distribution system.

SELECTIVE DISTRIBUTION

The Commission found in its e-commerce sector inquiry that the majority (56%) of EU manufacturers surveyed by the Commission are currently using selective distribution systems for their products, with this figure likely to have risen since the publication of the Commission's report.

Under EU competition law, manufacturers may legally restrict which resellers are authorised to sell their branded products through a selective distribution system. In brief, this involves the manufacturer establishing a set of objective criteria (not related to price) which resellers must meet in order to sell the manufacturer's products. This system must be managed, monitored and enforced by the manufacturer in an objective manner, solely with reference to a reseller's compliance with the criteria.

There is also substantial risk that, from monitoring prices in the market generally, manufacturers may, even unknowingly, make decisions on which resellers may become part of their selective network by reference to price and not the objective criteria. Enforcing or managing a selective distribution system with the aid of price monitoring software could render the entire system invalid and make the resale restrictions imposed on the resellers by the manufacturer under its selective distribution system unlawful.

ENFORCEMENT AND PENALTIES

As set out above, the use of price monitoring tools creates a risk that the manufacturer may misuse pricing information to improperly influence the price at which resellers sell their products. As can be seen from recent investigations carried out by the Commission, this is particularly the case where manufacturers operate a selective distribution system.

For example, in July 2018 the Commission issued fines to two leading consumer electronics manufacturer of approximately €30 million and €8 million, finding that both had used price monitoring software to improperly influence resale prices in the context of selective distribution, resulting in illegal resale price maintenance.

In two other EU cases decided at the same time against consumer electronics manufacturers, the Commission found that, while the manufacturers had not been operating a selective distribution system, they were relying on price monitoring as a tool to affect resale prices charged by their retailers. This resulted in the Commission issuing fines of approximately €64 million and €10 million.

CONCLUDING REMARKS

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In light of recent enforcement in the EU and the substantial fines issued over the past year, while business should not interpret a ban prohibiting the use of price monitoring tools given the beneficial effects stemming from such tools, they ought to tread a careful line when monitoring the price of their products in the market, especially when also employing a selective distribution system.

Global companies employing international distribution strategies are in particular at risk because price monitoring practices are treated differently, and sometimes more leniently, in certain jurisdictions outside the EU (including in the United States).

It remains to be seen whether any further guidance on this issue would be provided following the ongoing Commission consultation into the need for revising the current version of the EU block exemption regulation dealing with vertical restrictions, as well as its accompanying guidelines (see our alert here). However, any changes would not be introduced before the expiry of the regulation, i.e. before 31 May 2022.

Our global antitrust, competition and trade regulation team has extensive experience advising branded products manufacturers on optimising, implementing and enforcing their international distribution models, including developing legally compliant selective distribution and online marketplace strategies that maximise our clients' commercial objectives. The team also regularly provides training and guidance to businesses on a wide variety of antitrust matters, including in relation to the global distribution of products. We would be happy to discuss your company's goals, tailor appropriate distribution solutions to meet them and ensure the legal risks surrounding the monitoring and enforcement of your distribution system are managed effectively.

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