HEIGHTENED ENFORCEMENT AGAINST BRANDS' CONTROL OF RESALE PRICING BY COMPETITION AUTHORITIES WORLDWIDE

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Recent years have seen a surge in enforcement activity with national and supra-national antitrust regulators investigating and fining suppliers and manufacturers for the practice of imposing fixed or minimum resale prices and otherwise restricting the ability of their online retailers to set their own retail prices (see our previous alerts here and here). Resale price maintenance, or "RPM", clearly remains high on the agenda of EU competition law watchdogs, with continued enforcement against well-known producers of consumer goods, particularly in the context of online channels, and the total amount of fines imposed over the last year reaching tens of millions of Euros.

As outlined by the selection of cases identified below, the appetite of competition authorities to thwart RPM practices is certainly not limited to Europe, with antitrust enforcers around the globe taking action against non-compliant businesses.

RESALE PRICE MAINTENANCE: RECENT CASES

Resale price maintenance can either be achieved directly, through contractual provisions that establish the resale price, the maximum discount a retailer may offer or the margins it may enjoy; or indirectly, for example by applying pressure or threatening a retailer (e.g. with delayed or suspended supplies). Under EU competition law, such practices are considered a hardcore violation of the EU prohibition against anticompetitive agreements, as contained in Article 101(1) of the Treaty on the Functioning of the EU. Some recent examples of RPM infringements across the EU evidence the punitive measures competition authorities are willing to take against businesses.

European Union

In a very recent decision taken by the UK Competition and Markets Authority ("CMA"), the renowned guitar manufacturer *Fender Europe* received a fine of *GBP 4.5 million* for pursuing a policy aimed at limiting its retailers' ability to determine online prices of Fender's sought-after products. The guitar maker required from its downstream partners that its guitars be sold at or above a minimum price, occasionally applying pressure on non-

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compliant retailers to raise their online prices. Despite receiving a 60% discount under the CMA's leniency programme and a further reduction of 20% to reflect the firm's settlement with the regulator, the fine imposed against Fender is the highest RPM penalty levied by the UK enforcer to date.

This comes only months after the CMA fined *Casio Electronics GBP 3.7 million* for similar practices in relation to digital pianos and keyboards. The CMA's investigation concluded that Casio used price monitoring software to check compliance with the resale prices it set for the instruments, putting pressure on retailers to modify price levels when they fell below the specified minimum. The company was also found to have encouraged retailers to inform on others that were discounting against Casio's policy, thus creating a fear of retribution and denying retailers the opportunity to offer products at a discount.

Similarly, the Czech Competition Office determined that the company *Baby Direkt*, a supplier of childcare products such as pushchairs, car seats and baby carriers, had infringed both EU and Czech competition law by concluding agreements with its distributors which contained obligations to follow resale prices set by the manufacturer. The Czech regulator found that Baby Direkt enforced these contractual obligations by illegally threatening or sanctioning non-compliant dealers, such as by withholding supplies. The Czech Competition Office decided to impose a fine on Baby Direct of *EUR 1.6 million*.

In December 2019, the Danish High Court confirmed a fine of *EUR 130,000* against *Icon Hairspa* for requiring distributors of Kevin Murphy hair products to maintain a set of fixed resale prices. Although the prices were labelled by Icon Hairspa as recommended retail prices (which are allowed under EU and national competition laws), the company demanded that its downstream dealers actually follow such prices. A member of the management of Icon Hairspa was also *personally* fined *EUR 13,400* as part of the decision.

In the Slovak Republic, the children's goods distributor, AGS 92, was fined *EUR 20,632* as part of a settlement agreement with the Antimonopoly Office of the Slovak Republic which found that AGS 92 had engaged in anticompetitive conduct with its retailers by setting fixed resale prices of its *Chicco* brand of goods. The majority of AGS 92's goods were sold by the retailers on webstores.

Earlier this month, the Polish Office of Competition and Consumer Protection launched an RPM investigation against a sports equipment distributor, *Spokey*, a popular brand of rollers and scooters (including electric scooters). The Office is concerned that Spokey set minimum resale prices which its partners had to follow when selling the sports goods via online stores and on third party auction sites. The Polish regulator conducted a dawn raid of Spokey's headquarters and found evidence suggesting that the company actively monitored compliance with its minimum prices and employed a special rebate system which would penalise those resellers who sold below the minimum prices.

China

Chinese authorities have also been prevalent in their enforcement of antitrust rules prohibiting RPM. Since the Supreme People's Court landmark ruling in *Hainan Yutai* (published in June 2019, see our previous alert here),

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another RPM case of particular prominence is the recent decision against a leading Japanese carmaker, imposing a fine of approximately *EUR 11 million*. The State Administration for Market Regulation in the Jiangsu Province found that from June 2015 to February 2018, the Japanese manufacturer entered into anticompetitive agreements with local car deals with the aim of fixing resale prices for certain models of cars. The Administration concluded that the minimum prices had a strong binding effect because the carmaker would employ measures aimed an imposing price controls, such as limiting supplies to those suppliers which were selling at lower prices.

Australia

Bromic, an Australian distributor of outdoor heating products, has admitted to engaging in resale price maintenance through its 'minimum advertised pricing' policy which (i) restricted retailers from advertising Bromic branded heating products for sale at a price cheaper than a price determined by Bromic, and (ii) contained sanctions for retailers who did not comply, under a 'three strikes' policy.

South Korea

The Korean Fair Trade Commission ("KFTC") imposed a fine of approximately *EUR 90,000* on *Hankook Tire & Technology* for engaging in RPM practices which forced dealers to sell tires above certain minimum prices. The KFTC's investigation concluded that the tiremaker monitored its resellers' prices very closely and took action against dealers offering tires at lower prices, for example by threatening to limit or ceasing to supply them with tires.

VERTICAL BLOCK EXEMPTION REGULATION ("VBER") CONSULTATION AND RPM

In the context of the European Commission's ongoing review of the Vertical Block Exemption Regulation (see our previous alerts on this here and here) and the associated Guidelines on Vertical Restraints, questions have been raised by a number of stakeholders regarding the strict approach towards RPM in Europe. For example, many businesses are lobbying for a relaxation of the antitrust rules against minimum prices and bringing the law more in line with the rule of reason approach in the United States.

It remains to be seen how the European Commission will ultimately deal with such concerns. A two day workshop to discuss feedback received as part of the public consultation was hosted by the Commission in October 2019 and a Staff Working Document is expected to be published by the EU regulator at the end of the evaluation phase in the second quarter of 2020.

HOW K&L GATES CAN HELP YOU

It is our "bread and butter" to design and enforce modern, effective and legally compliant go-to-market strategies for product manufacturers worldwide, including in the EU, UK, US, Australia and Asia. We therefore have a deep

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understanding of the challenges brands are facing, including in particular as regards their pricing models and policies, and we pride ourselves in designing highly tailored, creative and pragmatic solutions to these issues.

Coupled with this we have broad experience in advocating our clients' interests before the Commission and national authorities, including in relation to the VBER consultation. Our Global Antitrust, Competition and Trade Regulation team would be happy to discuss your company's goals and tailor appropriate distribution solutions that can work internationally.

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