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EU Competition Law

Online Sales: Casio fined £3.7m for restricting online discounts

Casio's £3.7m record fine for resale price maintenance is clear evidence of the increased scrutiny by the CMA on anti-competitive practices in online sales.

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1. Casio Electronics case

On 1 August 2019 the Competition and Markets Authority ("CMA") announced that it had fined Casio Electronics Limited ("Casio") a record £3.7 million for resale price maintenance ("RPM"), following an investigation by the CMA into anti-competitive arrangements in the musical instruments and equipment industry.

Casio was found to have knowingly implemented a policy intended to prevent retailers from setting their own prices in the resale of digital pianos and keyboards, in breach of Chapter I of the Competition Act 1998 ("Act") and Article 101 of the Treaty of the Functioning of the European Union ("TFEU").

In particular, the CMA found that between January 2013 and April 2018 Casio operated an illegal pricing policy, requiring resellers to advertise and sell Casio products at or above a minimum price and prohibiting them from offering online discounts. Casio monitored the policy using software and threatened to withdraw marketing contributions and other incentives where resellers failed to comply.

Casio admitted its involvement in illegal price maintenance in a settlement agreement with the CMA.

2. Resale Price Maintenance

Article 101 TFEU and Section 2 of the (UK) Act (Chapter I prohibition) prohibit agreements and/or concerted practices between parties which may affect trade, and which have as their aim the prevention, restriction or distortion of competition.

In particular, competition law prohibits agreements and/or concerted practices, which 'directly or indirectly fix purchase or selling practices'. This includes direct price fixing via contractual provisions, as well as resale price maintenance (RPM).

RPM involves setting a minimum resale price – for example where a supplier (or manufacturer) agrees with a retailer that the latter will not resell the supplier's products below a specified price. It can also involve setting a fixed resale price where the reseller has to sell at a specified price.

RPM can also be achieved indirectly, for example where a supplier imposes restrictions on discounting or where there are threats or financial incentives to resell at a specified price.

RPM is illegal because it stops resellers setting their prices independently to attract more customers, which is considered to be the essence of free competition.

3. Recent RPM fines

The decision to fine Casio follows a recent trend of RPM fines by the regulators around the world:

In April 2016 Ultra Finishing Ltd ("Ultra") were fined £786,668 for online price fixing. The CMA found that Ultra breached competition law by preventing resellers from offering online discounts. Although Ultra presented minimum prices as being 'recommended' rather than fixed, the CMA found that Ultra threatened to impose penalties on retailers who did not advertise products at or above the 'recommended' price. These penalties included charging higher prices for future supplies, not allowing the use of Ultra's brand images online or ceasing supply. This meant the "recommendations" were a sham and that it was RPM in practice.

In May 2016 the CMA fined fridge supplier ITW Ltd £2.2 million for its policy of restricting resellers from advertising ITW products below a minimum price. The CMA found that ITW's minimum advertised price policy constituted RPM because, by restricting the price at which its goods were advertised online, it prevented dealers from deciding the resale price for those goods. ITW was also found to have actively encouraged resellers to report non-compliance by other retailers in the network.

In June 2017 a light-fittings company, National Lighting Company ("NLC"), was fined £2.7 million by the CMA for online price fixing. In particular, the CMA found that NLC imposed a minimum price on online resellers, who then had to retail goods at, or above, this price. This was despite the fact that the NLC tried to avoid scrutiny by ensuring that it had no written agreements in place with its resellers, which underlines another important point that the offence can be committed without a written agreement to confirm it.

Additionally, in October 2019 the CMA issues a Statement of Objections to guitar maker Fender stating that Fender has been involved in illegal RPM by preventing retailers from offering online discounts on its guitars. A final decision as to whether Fender has breached competition law is expected by the end of the year.

Similarly, the European Commission appears to have RPM in focus in recent years. In July 2018, following its e-commerce sector inquiry report, which identified RPM as a area of competition comcern, the European Commission imposed a fine of €111 million on four consumer electronics companies – Asus, Denon & Marantz, Philips and Pioneer – for restricting retailers' ability to set their own prices to consumers. The companies had used sophisticated algorithms to monitor prices set by resellers and allowing them to intervene quickly if there were any price discrepancies.

4. Commentary

Although the CMA's investigation into Casio focussed solely on the musical instruments and equipment sector, the level of fine imposed should be taken as a clear indication of how seriously the CMA takes RPM. The steep increase in RPM fines in the last three years demonstrates that online retail is a priority area for the CMA and companies should expect to see a step-up in policing of online pricing, as the CMA struggles to catch up with technological developments.

In particular, companies should exercise caution when using computer software to monitor pricing. While the use of such software is not illegal in itself, companies who use software as a means to identify and ultimately drive down pricing could be guilty of RPM. This was the case with Casio, where their use of artificial intelligence ("AI") to monitor retailer compliance was the subject of significant scrutiny by the CMA. It is likely that the use of AI will be an ongoing focus for the CMA going forward.

Companies should also carefully review their operational procedures to ensure that the use of price monitoring algorithms does not place them at risk of scrutiny, and that their policies do not go further than is necessary to monitor prices.

Additionally, companies should review their contractual provisions with retailers to ensure that they do not include terms that dictate minimum levels of pricing or insist on compliance with 'recommended' retail prices. Retailers should always maintain a degree of commercial discretion.

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