ENFORCEMENT OF CUSTOMER-COMPETITOR INFRINGEMENTS AND PRICE MONITORING TOOLS INTENSIFIES

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European Competition Alert

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Two recent developments in the European competition enforcement sphere provide a warning for brands when engaging with their retailers with whom they compete and when using price monitoring tools to monitor the third party resale of their products online.

First, the Danish Competition Council (DCC) found in late June that HUGO BOSS had colluded with two of its retailers by exchanging data on pricing, discounts and future sales quantities. Since, in addition to operating as a supplier at the manufacturer level, HUGO BOSS also sells directly to consumers (D2C), its communications with the retailers were found to be unlawful coordination by way of information exchange between competitors. Europe has seen a growing trend of D2C e-commerce by brands in recent years, which has only been accelerated by the COVID-19 pandemic. This decision therefore serves as a stark reminder for brands in all sectors to be particularly mindful in their dealings with their customers when they also wear the “competitor” hat.

Separately, the UK's Competition and Markets Authority (CMA) has announced that it has developed a bespoke software tool to harness the power of online price monitoring to help detect where firms might be engaging in suspicious pricing activity. The CMA and the European competition authorities have issued several decisions fining consumer brands for resale price maintenance (RPM); i.e. influencing the resale prices of their online retailers, facilitated by price monitoring tools, as discussed in our alerts previously. However, this step by the CMA, which will almost certainly be followed by competition authorities elsewhere, highlights the urgency for brands to ensure they are using these tools with appropriate safeguards in place.

DUAL DISTRIBUTION – CHALLENGES WHERE A CUSTOMER IS ALSO A COMPETITOR

DCC Decisions

On 24 June 2020, the DCC adopted two decisions finding that the exchange of certain information between HUGO BOSS and two of its retailers on prices, discounts and future sales quantities constituted serious infringements of European and Danish competition law. Specifically, since HUGO BOSS is both a supplier to and competitor of the retailers (through its physical stores and e-commerce website), its communications with them infringed the EU and local law rules prohibiting the exchange of competitively sensitive information between competitors. The DCC concluded that the exchange of information had given the parties the ability to coordinate their future sales, which may have led to a more uniform and reduced range of products on sale as well as lower

discounts for consumers. The DCC therefore ordered HUGO BOSS and the retailers to cease the illegal conduct and to refrain from similar activities going forward. Although fines were not imposed in this case, we expect that the European competition authorities may well decide to apply financial sanctions for similar conduct in future cases, just as they have for RPM and online sales restrictions.

Uncertainty Regarding Dual Distribution Rules

The limited enforcement of dual distribution infringements by the European competition authorities to date has led to some uncertainty for brands around the parameters of what they can and cannot discuss with their customer-competitors. However, with the increasing prevalence of D2C sales by brands selling in competition with their e-tailers (or to retailers in competition with wholesale partners), this was one of the main areas highlighted by respondents to the European Commission's recent consultation into the vertical distribution rules as requiring urgent clarification. This is particularly crucial given the potential risk: in the EU and UK, unlike in numerous other regions, the mere exchange of certain sensitive information between competitors can amount to horizontal collusion (even without an anti-competitive agreement). We would therefore expect to see some guidance when the Commission publishes new guidelines taking effect from 2022.

Appropriate Protocols

In the meantime, given that the Hugo Boss case may signal an increasing appetite of authorities to pursue investigations into “dual distribution” infringements, brand owners that compete with their wholesale or retail customers should remain particularly mindful of the potential impact of the competition rules in the following scenarios:

- Discussions about the parties' supply relationship
- Sharing the promotional calendar with retailers
- Market development plans for territories and customer groups
- Agreeing exclusivity for particular territories or customers
- Discussing end customer relationships and targeted activities
- Regular POS / sales reporting by the retailer to the brand owner

CMA HARNESSES PRICE MONITORING TOOLS TO SPOT RPM

As discussed in our alerts previously, price monitoring tools are not themselves unlawful, but can on the contrary be very efficient tools for allowing more competitive pricing. They can, however, also give rise to serious competition law risks if they are used to facilitate RPM - for example, if “deviations” from a minimum price or recommended resale price (RRP) are detected with such tools and the manufacturer then follows up on those to influence the reseller's price or as the basis for termination or cease and desist communications. In almost all recent RPM investigations in Europe, price monitoring tools have played a starring role. As a result, numerous authorities (including the European Commission) have warned brands about the risks of using monitoring software inappropriately, given they can both increase suppliers' ability to enforce an illegal RPM pricing policy and widen its impact.

Recognising the potential of price monitoring tools for law enforcement, the CMA's Data, Technology and Analytics unit (DaTA) has developed a bespoke tool to help the CMA detect suspicious online pricing activity.

Whilst use of the tool is currently limited to the market for musical instruments, the CMA has confirmed that it will be used to monitor pricing and detect suspicious activity in other sectors in the future. It explained, “This way, we will have a better idea of which sectors to clamp down on, allowing us to prioritise enforcement in those areas - helping to protect more customers online.”

By having the tool at its disposal, the CMA hopes to deter firms from engaging in RPM, since it will now have the benefit of real-time data and visibility to identify unusual price stabilisation.

It would also not surprise us if other national competition authorities followed suit or might already be deploying similar technology.

The enforcement of competition laws has often been perceived by market players as somewhat of a “cat and mouse” game, with companies constantly shifting to escape the attentions or grasp of the competition authorities. However, with law enforcers now catching up with sophisticated technology, brands should more than ever be mindful of how they use theirs.

HOW K&L GATES CAN HELP YOU

Our global team is experienced in advising brands in relation to dual distribution scenarios, structuring and practical protocols (including for customer teams) as well as tailored and effective safeguards for the appropriate use of market monitoring technology. Please get in touch if you'd like to discuss any of these issues.

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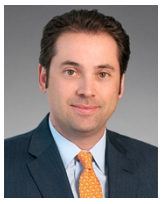

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