

SURGE OF ANTITRUST ENFORCEMENT AGAINST MANUFACTURERS OF BRANDED CONSUMER GOODS

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UK Policy and Regulatory Alert

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European antitrust regulators have shown a continued focus on scrutinizing manufacturers' engagement with their distributors. The anticompetitive practices that have attracted the highest financial penalties primarily relate to marketplace restrictions, resale price maintenance, and restrictions on cross-border and online selling. This heightened attention by antitrust enforcers on vertical agreements clearly demonstrates the risks that brands are facing when it comes to the design and enforcement of their distribution strategies.

APPLE AND BEATS CASE (ITALY)

One of the most highly-anticipated cases from 2021 was the Italian competition agency's (the AGCM) decision¹ imposing fines of €174 million (as revised) in relation to a restrictive agreement that prevented legitimate resellers of 'genuine' Apple and Beats products from operating on a number of national marketplaces, including in Italy.

Apple markets its branded products (including Beats) through: (i) direct and open distribution; and (ii) selective distribution. The AGCM did not investigate Apple's distribution policies but only certain provisions of a 2018 agreement between Apple and an online marketplace. The AGCM found that these provisions:

- Limited the pool of third party resellers allowed to sell on Italy's top marketplace only to those with the highest sales in the country; and
- Allowed for handpicking of specific third party resellers authorized to sell the branded goods, without proper reliance on a genuine selective distribution system (the AGCM's investigation in fact found that Apple resisted the inclusion of qualitative criteria in the 2018 agreement, potentially in an attempt to have greater freedom in subjectively selecting trading partners).

The Italian antitrust authority concluded that the contractual provisions introduced a mere quantitative restriction and limitation of sales by restricting the number of retailers allowed to sell through the marketplace, which represented the main online platform in Italy. The AGCM found the selection of the retailers to be arbitrary and discriminatory. In addition, the limitation of the number of online retailers determined, according to the AGCM, a highly likely increase in the average price of the products sold by these retailers. This also significantly impacted cross-border sales within the European Union as a number of retailers were restricted from selling through the marketplace in Italy.

According to the AGCM, the contractual restrictions could not be justified by EU competition rules and the Court of Justice of the European Union's ruling in *Coty*.² The selection was not made on the basis of pre-defined, objective, qualitative and non-discriminatory criteria that were uniformly applied. The AGCM also rejected the parties' argument that the contractual restrictions were needed to tackle the distribution of counterfeit products that posed security concerns.

This case stands as a stark reminder that online distribution strategies need to be carefully crafted. Under EU competition law and the EU courts' decisional practice, there are opportunities that allow brands and manufacturers to effectively defend brand value from online price erosion. This includes the adoption of a properly designed and enforced selective distribution system, which can limit the number of resellers allowed to sell a brand's goods, including on marketplaces. However, gray and hybrid solutions that cannot be fully justified will inevitably attract scrutiny and may result in the imposition of significant fines.

OTHER NOTEWORTHY CASES

- *Bose (Germany)*.³ In December 2021, the German competition enforcer (the Bundeskartellamt) sanctioned Bose €7 million for having engaged in resale price maintenance practices in relation to the distribution of their audio products. According to the Bundeskartellamt, “[t]he company tried to make sure that the prices for headphones or speakers [...] did not significantly undercut the recommended retail price (RRP)”. The German regulator held that such practices adversely affect price competition and, in principle, harm consumers. The Bundeskartellamt's investigation discovered that Bose employees in particular agreed on concerted measures for setting resale prices with resellers. Bose was also said to have intervened on several occasions against sales partners who deviated from the RRP. In some instances, the resellers themselves complained to Bose about low resale prices offered by other authorized resellers, soliciting intervention by Bose.
- *Numerous major eyewear brands (France)*.⁴ In mid-2021, following a series of dawn raids, the French Autorité de la concurrence (Autorité) fined several companies active in the sunglasses and glasses frames sector a total of €126 million for limiting the freedom of opticians to set resale prices and/or to sell the products online. The Autorité in particular found that the anticompetitive conduct included misusing “recommended” prices, such as by (i) encouraging retailers to maintain a certain retail price point, (ii) monitoring compliance with the “recommended” prices and acting on deviations, (iii) requesting the help of other retailers to “combat the abuses observed”, (iv) prohibiting discounts and special offers for retail selling, and (v) taking retaliatory measures against non-compliant opticians, such as delaying or suspending deliveries to their stores, withdrawing the authorization required to distribute certain brands, or blocking their accounts to prevent them from placing orders. The Autorité also sanctioned the brands for practices or clauses in license agreements with authorized resellers prohibiting sales of sunglasses and glasses frames online.
- *PC video games (EU)*.⁵ The European Commission fined a US video game developer which owns the online PC gaming platform “Steam” and the five publishers Bandai Namco, Capcom, Focus Home, Koch Media and ZeniMax €7.8 million in total for breaching EU antitrust rules. In particular, the Commission found that the video game developer and the publishers restricted cross-border sales of certain PC video games on the basis of the geographic location of users within the European Economic Area (“EEA”), entering into the so called “geo-blocking” practices. Under EU competition law, companies are prohibited

from contractually restricting cross-border sales except in very limited specific ways because such practices deprive consumers of the benefits of the EU Digital Single Market and of the opportunity to shop around for the most suitable offer in the EU.

UK CASES

Since the United Kingdom's departure from the European Union, European Commission investigations will no longer cover the UK market. In this context, it is interesting to monitor whether the UK cases continue to follow similar priorities to the European Union and whether the level of fines changes. In fact, the focus by the UK antitrust regulator and courts on supply and distribution agreements is continuing, for example:

- *Belle Lingerie*.⁶ Belle (an online reseller in particular of lingerie products) recently brought a standalone claim for damages before the UK Competition Appeal Tribunal against a Japanese manufacturer and supplier of luxury branded lingerie and swimwear. Belle is alleging that the supplier breached competition law by maintaining a fixed and minimum retail price policy, in particular requiring Belle to align its advertised and retail prices with the supplier's RRP's on all eBay sites around the world, failing which Belle would have to de-list products from such eBay sites so that they were not visible in consumer searches. This case is an important reminder that minimum advertised pricing (MAP) policies which can be permissible in North America under certain circumstances pose serious antitrust risk in the United Kingdom, Europe and elsewhere.
- *Leicester City FC branded products case*.⁷ The UK Competition and Markets Authority (CMA) is currently investigating suspected breaches of competition law (thought to be resale price maintenance) by Leicester City Football Club and JD Sports in relation to the sale of Leicester City-branded products and merchandise in the United Kingdom.
- *Dar Lighting*.⁸ The CMA issued its preliminary charge sheet to Dar Lighting alleging that the supplier of domestic lighting products restricted retailers' freedom to set their own prices online, requiring them to sell at – or above – a minimum price and so preventing them from offering discounts.

KEY TAKEAWAYS

We see the key themes arising from this surge in enforcement activity as being:

- Antitrust regulators in both the European Union and United Kingdom are very much focused on branded consumer goods;
- Investigations can be extremely disruptive, and typically lead to very high, multi-million financial penalties being imposed on the manufacturers;
- The spike in enforcement activity into vertical agreements is not limited to a particular region but can be observed throughout the European Union and United Kingdom; and
- The most commonly sanctioned conduct involves direct or indirect resale price maintenance, though restrictions on who can sell products online or on marketplaces which lack a legitimate legal framework and basis are increasingly attracting attention.

It is apparent from these cases, and from the magnitude of the financial penalties they involve, that anticompetitive restrictions in supply and distribution agreements will not be tolerated and will be pursued resolutely. With the upcoming changes to the EU rules on vertical agreements (see our alert [here](#)), the expectation is that European antitrust authorities will very much continue to focus on vertical restrictions used in the distribution of branded consumer goods. It is therefore of paramount importance for consumer goods brands to carefully design, monitor and enforce their distribution strategies (including selective distribution systems) to limit the risk of antitrust exposure, which can lead to substantial financial penalties and reputational damage.

HOW K&L GATES CAN HELP YOU

Our global team is experienced in advising brands in relation to distribution strategies and structures, as well as in providing practical tailored guidance for limiting competition risk in their day-to-day activities, from customer-competitor relationships, to performance pricing policies, enforcement against unauthorized third parties, and the legitimate use of market monitoring technology. Please get in touch if you'd like to discuss any of these issues.

FOOTNOTES

¹ <https://www.agcm.it/dotcmsdoc/allegati-news/l842%20chiusura.pdf>; <https://en.agcm.it/en/media/press-releases/2021/12/l842>

² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0230>

³ https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/02_12_2021_Bose.html

⁴ <https://www.autoritedelaconcurrence.fr/en/press-release/several-eyewear-brands-and-manufacturers-fined-imposing-selling-prices-and>

⁵ https://ec.europa.eu/commission/presscorner/detail/en/ip_21_170

⁶ https://www.catribunal.org.uk/sites/default/files/2022-01/20220114_1427_Rule_33%288%29%20Summary%20of%20claim.pdf

⁷ <https://www.gov.uk/cma-cases/suspected-anti-competitive-behaviour-in-relation-to-the-sale-of-leicester-city-football-branded-products-and-merchandise>

⁸ <https://www.gov.uk/government/news/cma-provisionally-finds-lighting-firm-illegally-banned-discounts>

KEY CONTACTS



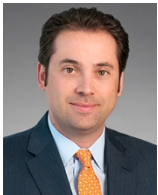
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