

IT'S ALL ABOUT CONTEXT: CMA IMPOSES £1.5 MILLION ON LIGHTING BRAND FOR CREATING AN UNWELCOMING ENVIRONMENT FOR PRODUCT DISCOUNTS

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Policy and Regulatory Alert

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In March 2022, the UK Competition and Markets Authority (CMA) fined the lighting products supplier, Dar Lighting Limited (Dar), £1.5 million for engaging in resale price maintenance (RPM), in breach of the UK prohibition against anticompetitive agreements, with the text of the CMA's 241-page decision only having been made available earlier this summer.

While the decision is one of many by the CMA in recent years to tackle illegal RPM practices (for example, see our recent alert on the surge of RPM enforcement all over Europe [here](#)), this case is different in that its focus is not on direct and explicit contractual terms imposing RPM, but rather on the perception that Dar's sales partners got from messages conveyed to them in relation to their ability to offer product discounts.

DAR'S CONDUCT

The CMA found that Dar, which operates a selective distribution system to sell its domestic lighting products, restricted its retailers' freedom to set their own online prices and to offer discounts for the products they onsold.

More specifically, the CMA's investigation focused on a number of terms and provisions contained in Dar's selective distribution agreements with its resellers, as well as Dar's branding guidelines, which contained strict instructions relating to the use of brand names and logos, product photography, typography, and brand colours on the resellers' websites. Although the CMA noted that these instructions "*were not explicitly or directly about the price at which the products were being sold but about product presentation*" and that they did not "*explicitly prevent discounting*," the UK competition watchdog nonetheless found that the manner in which these instructions were communicated and enforced by Dar created a perception amongst the brand's authorised resellers that discounts were not permitted because they were not compatible with the goals of the selective distribution system.

The CMA relied on two key types of contemporaneous evidence to establish that, in the absence of written price-fixing obligations, Dar's practices in effect prevented its resellers from offering sales discounts to customers:

1. Dar's internal communications, which showed a perception within the company itself that discounts and sales campaigns were not compatible with the spirit of Dar's selective distribution programme, with employees reporting internally those authorised resellers who would advertise discounts; and

2. External communications with Dar's resellers, including via WhatsApp, which the CMA concluded gave rise to an anti-discount culture for online selling, thus creating a perception amongst authorised resellers that Dar's selective distribution system somehow allowed the brand to prevent discounting. For example, a Dar employee sent the following WhatsApp message to a reseller explaining why the reseller was not admitted to the selective distribution network: *"To be able to control the prices customers who have [Dar brand] must have a designated area with an approved [Dar brand] display"* (emphasis added).

The CMA clarified that selective distribution is a legitimate way for a business to make products available only to select retailers, who meet certain criteria, and is a useful tool for brand protection. However, the authority highlighted that brands who adopt a selective distribution model must take particular care to ensure that the implementation/enforcement of the selective distribution system does not lead to any infringement of competition law. It is in this context that the CMA held that Dar's implementation and enforcement of its selective distribution system ran afoul of the UK prohibition against anticompetitive agreements.

RPM

The CMA ultimately concluded that Dar effectively operated and enforced a pricing policy that would ensure authorised resellers would not advertise or sell Dar products online below a certain minimum price specified by Dar. In the UK and EU, such practices amount to illegal resale price maintenance and constitute a so-called "hardcore" restriction of competition that cannot benefit from the safe harbour applicable to vertical agreements.

RPM practices are amongst the most hotly enforced cases by the CMA. For example:

- In 2021, the CMA fined Roland £4 million for illegal RPM with respect to electronic drum kits and components;
- In 2020, GAK (Digital pianos, digital keyboards, and guitars), Fender (guitars) and Korg (synthesizers and high-tech equipment) received penalties for RPM of £0.3 million, £4.5 million, and £1.5 million respectively;
- In 2019, £3.7 million was levied on Casio (digital pianos and keyboards) also for engaging in resale price maintenance; and
- In 2017, the CMA fined the National Lighting Company £2.7 million for restricting its resellers' freedom to set resale prices online.

Finally, it is worth noting that Dar's fine was subject to a 20% discount because it admitted it had broken the law and settled the case with the CMA. This also means that the CMA decision will not be appealed further.

KEY TAKEAWAYS

There are a number of very important points that brands and manufacturers need to be aware of when structuring and enforcing their distribution strategies:

- Selective distribution systems remain a great tool to ensure a high level of quality protection for brands. Dar itself moved from open to selective distribution because, as the CMA found, it became concerned about *"maintaining the quality of its brands and customer service levels, as well as preventing some Resellers from free-riding on the customer support and marketing investments made by other Resellers."*

- What the CMA's decision makes clear, however, is that selective distribution cannot be misused to give authorised resellers the impression that the system is a front for restrictive practices, such as illegal resale price maintenance.
- The success of any well-designed distribution system, which does not contain any direct or express terms that restrict competition, rests and falls on how the system is enforced and implemented in practice. This means that brands should take great care to adequately train their sales personnel to ensure that there is no misinterpretation in relation to the genuine and legitimate nature of their commercial strategies. In the case of Dar, it was the internal and external communications, including via WhatsApp, that ultimately proved fatal. It was not Dar's contracts or guidelines that restricted competition but rather the way in which the distribution model was conveyed to commercial partners.
- Dar's case shows that it is not enough to comply with competition law on paper – for a competition authority, substance will be more important than form. Competition law compliance should thus be weaved into the cultural fabric of each business.
- The CMA has just published its key legal instrument regulating vertical agreements – the Vertical Agreements Block Exemption Order, which came into force on 1 June 2022, and the associated CMA guidance published on 12 July 2022. These documents restate the hardcore nature of RPM practices and make it clear that such conduct is highly unlikely to be regarded as compatible with competition law. The recent nature of these legal instruments could also mean that the CMA will be looking at supply and purchase agreements, and in particular at RPM, very closely in the coming years.

HOW K&L GATES CAN HELP YOU

Our UK, EU, and global teams are 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.

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