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The UK's CMA reminds online sellers of the potentially serious consequences of price-fixing

The UK Competition and Markets Authority ('CMA') launched on 7 November 2016 a campaign around price-fixing in the online sector, a warning to online sellers and a reminder to businesses of the consequences of anticompetitive behaviour in such markets. The campaign includes the publication of a Guidance Document, which makes a number of points of note to online sellers. Becket McGrath and Harriet Swan of Cooley (UK) LLP provide analysis of the CMA's campaign and the context in which it has appeared.

Anyone who thinks that the fast-moving, ultra-competitive world of online marketplaces is immune from competition law issues, or from scrutiny by enforcers, should think again. As online retail entered its busiest period of the year, the UK Competition and Markets Authority ('CMA') launched a campaign on 7 November 2016 to warn online sellers of the risks of price-fixing and the serious consequences faced by infringing businesses¹. In announcing this campaign, the CMA's Senior Director of the Cartels and Criminal Group noted that, in light of the huge value of the internet for consumers who wish to shop around for the best value products, the Authority is strongly committed to tackling anticompetitive behaviour in online markets.

The Trod decision

The CMA's campaign, which is so far limited to a short press release, a 'guidance note for online sellers' and a case study, builds on the CMA's decision in July 2016² to fine an online seller of posters and other licensed merchandise (Trod Ltd., now in administration) for infringing the prohibition on anticompetitive agreements set out in Chapter I of the UK Competition Act 1998. Specifically, the CMA found that Trod had agreed with one of its competitors, GB Eye Ltd., (also a major supplier to Trod) that each party would not undercut the other's prices when selling on Amazon's UK marketplace, whenever a party had the cheapest listing for the product concerned.

In addition to communicating their intentions by phone and email (which

provides some choice quotes for the CMA's decision and case study), the parties monitored and implemented their anticompetitive agreement using automatic re-pricing software. Such software, which has evolved to help online sellers deal with the often bewildering number of competing offers online and the resulting intense price competition and rapidly changing prices, enables sellers to adjust the price at which their products are offered on marketplaces automatically and in real time, by reference to the prices charged for similar products by rival sellers (for example, always to undercut a rival's price by 1p).

The CMA imposed a fine of £163,371 on Trod for this infringement, which

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1. <https://www.gov.uk/government/news/cma-warns-online-sellers-about-price-fixing>
2. <https://www.gov.uk/cma-cases/online-sales-of-discretionary-consumer-products>
3. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/565424/60ss-price-fixing-guidance-for-online-sellers.pdf
4. Available at: http://ec.europa.eu/competition/antitrust/sector_inquiry_preliminary_report_en.pdf
5. See, in particular, comments at p.174-6 of the Preliminary Report.
6. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/481040/BIS-15-659-government-response-governments-strategic-steer-to-the-competition-and-markets-authority.pdf
7. A 15 November 2016 speech by a senior CMA official, available at: <https://www.gov.uk/government/speeches/michael-grenfell-on-antitrust-in-the-digital-age>, provides a useful summary of the CMA's ongoing enforcement in this area.

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reflected a 20% reduction for settlement. (As a reminder of the global reach of US antitrust law, in August *Trod*'s administrators agreed to pay the US Department of Justice a fine of \$50,000 in parallel proceedings in the US, which arose from a similar agreement between *Trod* and a different company.) GB Eye escaped a CMA fine, as it brought the infringement to the Authority's attention. The CMA stressed in its press release announcing its decision that Amazon was not a party to this arrangement or the CMA's investigation.

The Guidance Document

The CMA has now taken the opportunity offered by the *Trod* decision to make a wider compliance point by reminding all online sellers of their responsibility under competition law to price independently. In this respect, the 7 November 2016 press release follows a pattern seen in earlier cases, such as the CMA's April 2006 'open letter' to estate agents reminding them of the need to comply with competition law and the consequences of infringement, following a 2015 infringement decision against a local association of estate agents and a newspaper group.

Having set out the key facts of the *Trod* case, the CMA's new Guidance Document³ explains that price-fixing is a form of cartel that arises when competitors agree the price that they will charge their customers or agree not to sell below a minimum price or not to undercut each other.

The Guidance Document goes on to remind online sellers that:

- competition law applies to online sales in the same way as it applies to sales through brick-and-mortar outlets;
- competition law applies to small businesses, as well as large ones

(each of the parties to the *Trod* case were a relatively small business, with annual sales of less than £16 million);

- re-pricing software can be used to encourage healthy competition 'but it's illegal to use it as part of a price-fixing agreement'; and
- breach of competition law has serious consequences, including fines, director disqualification and even jail.

The Guidance Document emphasises that online sellers should therefore:

- not agree with their competitors what prices they will charge, or not to undercut each other; and
- not discuss their pricing intentions or strategies with competitors.

The CMA's Guidance Document concludes by stressing that companies should familiarise themselves with the law and seek independent legal advice as needed.

Although there is no suggestion that either Amazon or providers of re-pricing software participated in the infringement investigated in the *Trod* case - indeed, the CMA has been at pains to emphasise that this was not the case - the CMA's press release includes a note to the effect that it is 'warning software providers that they too risk falling foul of competition law if they help their clients use software to facilitate illegal arrangements.' The precise level of assistance that would be required for software providers to be implicated in an infringement is not clear. (It is interesting to note in this context that the European Commission also touched on the role of pricing software in the Preliminary Report on its ongoing E-Commerce Sector Inquiry, noting that 35% of responding retailers use such software at least to some extent⁴. The extent to which the Commission may have specific concerns over the role of such

software, as opposed to the potential for the high level of price transparency seen online to facilitate or strengthen collusion, also remains unclear⁵.) The CMA Guidance Document also notes that it has engaged with (unnamed) online marketplace providers, who are apparently helping to make the CMA's advice available to online sellers.

Wider context

The CMA's Guidance Document, together with the *Trod* decision itself, should be seen within the context of the Authority's wider focus on online markets. It is worth noting that the UK Government's 'strategic steer⁶,' which sets out the Government's preferred framework for the CMA's activities, indicates that the CMA should 'continue to focus on developments in new emerging markets, such as online digital marketplaces.' While there has been some criticism of the extent to which the existence of the strategic steer may compromise the CMA's independence, the Authority's assiduous compliance with this request is less controversial, given the clear importance of the online sector for the economy.

As well as the *Trod* case, the CMA's focus on online markets is reflected in two recent Competition Act decisions concerning restrictions on the online advertising of bathroom fittings and commercial catering equipment, which built on earlier Office of Fair Trading decisions concerning restrictions on the online advertising of mobility scooters. A further case, concerning suspected restrictions on the online sale of Ping golf clubs, remains ongoing at the time of writing. The CMA has also recently opened a market study into digital comparison tools and has undertaken consumer protection enforcement action to help ensure that online reviews and endorsements are genuine⁷.