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Price-fixing: the role of software

The UK's competition watchdog, the Competition and Markets Authority (CMA), has urged online sellers and suppliers of automated re-pricing software to learn from the example of a seller on Amazon Marketplace which was fined £160,000 for engaging in illegal price-fixing.

What happened?

Trod and GB eye used Amazon Marketplace to sell various products direct to consumers. They were competing sellers of posters featuring pop stars such as Justin Bieber and OneDirection. GB eye was also active at the wholesale level, as a supplier of posters and frames to other online retailers, including Trod.



Trod complained that GB eye was undercutting it on price, arguing that it was in GB eye's interest not to undermine the position of key customers of its wholesale business (which accounted for the majority of GB eye's turnover). This led both companies to enter into an arrangement not to undercut one another on price, which lasted from 2011 until 2015, when GB eye effectively "blew the whistle" on Trod by reporting it to the CMA.

GB eye's whistleblowing meant that it was granted leniency by the CMA, giving it immunity from fines, provided that it cooperated fully with the investigation. Trod eventually reached a settlement with the CMA under which it agreed to pay a fine of £163,371 – although as Trod has now ceased trading, it remains to be seen whether this amount will be recovered.

Trod was fined over £160,000 and one of its directors has been disqualified.

It is unclear whether the CMA investigation was a factor in pushing Trod into administration. One of Trod's directors has also been disqualified from further directorships because of his involvement in the case.

What's new about this?

In one sense, there is nothing new about this case – price-fixing has been illegal for many years in the UK and no one should be surprised that it applies to online sellers, just as it does to more conventional bricks-and-mortar operators. However, so far as we are aware, this is the first case where a price-fixing arrangement was monitored and enforced using automated re-

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pricing software. Normally such software is used by a business to monitor competing sellers and adjust prices downwards so as to remain competitive (subject to various parameters designed to prevent selling at a loss and to avoid prolonged pricing at unsustainably low profit margins). However, in this case, GB eye and Trod configured their software to ensure that, where they sold the same products, they would not undercut one another. There are 2 reasons why this is of particular note:

- **Software adds to the temptation:** Re-pricing software arguably makes price-fixing arrangements much easier to monitor and enforce in the online environment than offline; this may make it particularly tempting for target-driven sales staff to enter into arrangements with competitors to keep prices up. As such, it is all the more important for online sellers to ensure that staff know what they can and can't do under competition law – in particular, that they should never discuss pricing with competing sellers.
- **Software suppliers in the frame?** Whilst the suppliers of the re-pricing software in this case had no involvement in the price-fixing arrangement, the CMA has stated that where such suppliers help their clients to reconfigure software so as to restrict price competition, they can be at risk of infringing competition law. In our view, this is likely to be challenging

for the CMA to establish in many instances - except in fairly blatant cases where there is clear evidence that the supplier was well aware of the infringement. That said, if staff become concerned that a customer's price matching strategy is driven primarily by an agreement not to undercut a competitor (as opposed to a more normal and perfectly legitimate desire to be price-competitive), it may be prudent to seek legal advice on how best to proceed.

ACTION POINT

Ensure staff know what they can and can't do under competition law – particularly in relation to pricing. See further our [guide to competition law compliance](#). We also have considerable experience of advising on competition compliance measures.

What does the future hold?

Whilst online selling is generally fiercely competitive, it is likely that the CMA is keeping a watchful eye out for further examples of similar behaviour. Indeed, one can imagine a future where competition regulators use software to look for suspicious pricing patterns in online markets (that is, if they are not doing so already....).

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