Kluwer Competition Law Blog

United Kingdom: Pride before a fall in online advertising restrictions or getting away with illegal behaviour that harms vulnerable consumers?

Matthew O'Regan (St Johns Chambers, United Kingdom) · Tuesday, November 18th, 2014

In March 2014, the Office of Fair Trading ("**OFT**") announced that it had adopted a decision finding that a leading manufacturer of mobility scooters, Pride, had illegally prevented its dealers from advertising prices online, other than its recommended retail price ("**RRP**"). This followed an earlier decision, adopted in August 2013, finding a slightly different infringement by another manufacturer, Roma, which prohibited dealers from selling or advertising online certain models of mobility scooter, in an attempt to maintain a certain level of pricing across its dealer network. Some of Roma's dealers were also implicated in the Pride infringements.

The Roma and Pride decisions are similar and give rise to a number of interesting issues, which are examined below, focusing on the Pride decision. Notably, in both cases, due to the small size of the undertakings involved, no fines were imposed. As observed by Max Findlay in an earlier post, *Not Playing Nicely*, these anti-competitive practices affected some of society's most vulnerable, including the disabled, infirm and elderly. What was not so apparent from the OFT's press release concerning Pride was extent to which these consumers were paying excessive prices through the use of RRPs, which bore no relationship to the real economic value of the mobility aids involved.

The OFT's successor, the Competition and Markets Authority ("**CMA**") recently published its decision in the *Pride* case.

The infringements in *Pride*

Pride and Roma are two of the UK's largest manufacturers of mobility scooters. Both operated a selective distribution system, applying both qualitative and quantitative criteria. Each actively sought to limit intra-brand competition between its dealers, often by supplying only one dealer in an area.

The infringement in *Pride* was relatively simple and was found by the OFT to be an 'object' restriction of competition, since an obvious consequence or objective of it was that price transparency and thus competition between dealers would be restricted. This was particularly the case given that Pride's selective distribution policy already limited competition. (Similarly, Roma's prohibition of online sales and advertising was also found to be an object restriction, since it has the obvious consequence of restricting competition between retailers, even if it did not eliminate all such competition.)

Starting in January 2010 and at least until April 2012, Pride prohibited its dealers from advertising prices on line that were below its RRP (before then, it had undertaken a number of other initiatives to maintain high retail prices and thus dealer margins). Dealers could, however, invite consumers to contact them (by email or phone) for their "*best price*" or "*value price*"; alternatively, dealers could choose not display any price at all on their websites. (Dealers were not restricted in respect of showroom pricing.) Pride actively and regularly monitored dealers' online pricing, using both its own sales team and reports from dealers. It would contact dealers advertising below-RRP prices (so-called "*internet rogues*"), requesting them to remove such prices or only advertise the RRP. It also developed a two-tier pricing strategy: non-compliant dealers would be charged higher wholesale prices and/or be threatened with a cessation of supplies.

Many (but not all) retailers agreed to abide by, or acquiesced in, Pride's pricing instructions. Most acquiesced completely, but although agreeing to do so, some almost immediately reverted to advertising below-RRP prices on their websites.

How can manufacturers respond to the internet's impact on dealers?

As a competition practitioner, one of the most common questions asked by manufacturers in relation to distribution strategies is how to deal with competition by internet dealers, which often offer very low prices and may be perceived (whether or not accurately) as offering lower standards of customer service. The answer was always 'carefully' and not by explicitly targeting 'problematic' dealers that offered low prices thereby incurring other dealers' displeasure.

Traditionally, mobility aids, such as scooters and electric wheelchairs, were sold through 'bricks and mortar' retailers, often selected using qualitative and/or quantitative selective distribution systems; this remains the predominant sales channel. Retailers played an important role in both the selection and sale of mobility aids (which are classified as medical devices and need to be suitable for an individual consumer's needs) and after-sales service, including undertaking warranty repairs. In *Pride* (and also in *Roma*), it was clear that dealers were expected both to provide pre-sale support (including assessing the suitability of a particular model for each customer) and to bear the labour costs incurred in repairing faulty mobility aids that were under warranty. This, of course, requires a dealer to have sufficient margin in order to be able to trade profitably. Pride clearly wished to support its service-oriented dealers which maintained showrooms and servicing centres. It was concerned that such dealers would not wish to stock and provide post-sale service for products which faced significant price competition, particularly from internet-only suppliers, including those trading on platforms such as eBay.

Whilst the OFT did accept that the provision by dealers of pre-sales and post-sales service and advice was important in the context of sales of mobility scooters and could be a consumer benefit, this did not satisfy the exemption requirements of Article 101(3) TFEU. In its view, even if the claimed consumer benefits could have been substantiated (which they were not), the pricing restrictions imposed by Pride (and Roma) were not indispensable for ensuring adequate pre- and post-sale advice and service, as they were not specific to achieving such benefits and were not apt to do so, since they did not apply to all of Pride's (or Roma's) scooter models. In any event, the manufacturers could have used less restrictive means of ensuring consumer service (including an assessment of the suitability of a particular model of scooter), for an appropriate selective distribution system under which dealers' customer service and product warranty servicing obligations are monitored and enforced. Furthermore, neither Pride nor Roma had adduced evidence that their pricing restrictions would achieve the claimed objective (indeed, Roma

apparently supplied only ‘bricks and mortar retailers’ in any event). Indeed, the evidence showed that Pride (and Roma) had implemented the restrictions in order to limit price competition between dealers.

The OFT also considered that Pride did not benefit from the block exemption for vertical agreements contained in the Vertical Restraints Block Exemption (Regulation 330/2010): the object of the prohibition was to restrict the territories into which and the customers to which dealers could sell, by preventing them from advertising for customers located outside of the typical catchment area of a ‘bricks and mortar’ store. In its view, restrictions on internet advertising and e-commerce make it difficult for retailers to market their products; this includes restrictions on some but not all forms of passive sales. This was a hardcore restriction within Article 4(b) of Regulation 330/2010. The OFT took the same approach in Roma.

The answer therefore seems to be that, to ensure an effective and economically viable dealer network, manufacturers should impose a selective distribution system, using appropriate qualitative and quantitative selection criteria. The manufacturer should, in particular, specify clearly and objectively the pre-sale advisory and post-sale product repair activities that dealers must provide to customers. If there is a specific concern in relation to the cost of repairing products that are under warranty, it could choose to fund this itself, rather than requiring dealers to bear the costs involved. It should also monitor and enforce compliance with these requirements, in order to prevent dealers from free-riding on other dealers by offering low prices and failing to provide the appropriate level of customer service. Equally, if there is a concern (as expressed by Roma) that customers are properly assessed and advised in person as to the suitability and the use of a medical device (such as a mobility scooter), this can be made a requirement of a dealer agreement, including for those selling over the internet, as appeared to be a dealer obligation in any event, in accordance with the British Healthcare Trades Association Code of Practice.

What a manufacturer cannot do is to impose a prohibition on the online sale or advertising of products (or a requirement that they be sold only through a ‘bricks and mortar’ store): as the Court of Justice of the European Union confirmed in *Pierre Fabre*, this constitutes a restriction by object. The only conceivable exception might be in respect of products for which there is an objective reason for restricting internet sales, for example health and safety, although – as is clear from *Pierre Fabre* (which concerned non-medicinal skincare and cosmetic products) and the CJEU’s judgments in *Deutscher Apothekerverband* (non-prescription medicines) and *Ker-Optika* (contact lenses), as well as Pride itself (mobility scooters being classified as medical devices) – this is a very high barrier to overcome.

Is the use of RRPs appropriate, since they may create a focal point for anticompetitive behaviour leading to consumer detriment?

In *Pride*, RRPs were used to create a ‘benchmark’ or ‘reference price’ against which dealers could offer discounts, albeit without advertising them publicly. They were also used as a benchmark for publicly-funded schemes that supported some disabled consumers in purchasing mobility aids: the scheme would pay a dealer the RRP less a 20% discount. Inevitably, the RRPs were increased to protect the dealers’ margins.

However, as the OFT’s investigation showed, Pride’s RRPs bore no relationship to the economic value of their products and were in fact completely arbitrary and set at a high level. This facilitated heavy ‘discounting’ of between 50% and 70%, particularly by the so-called “internet rogues” and

led to wide price variations. By way of example, one dealer was advertising (on eBay) a particular model for £1695 despite its RRP being £3750 and another was advertising for £795 a model with an RRP of £2650. As a result, customers – particularly those that did not shop around, as was often the case with those purchasing mobility aids, given their lack of mobility and inexperience – were often not getting a good deal despite being offered a discount. A small discount would often discourage shopping around, so reducing the competitive pressure felt by dealers.

The use of RRPs, or maximum retail prices, is generally not prohibited by competition law, unlike resale price maintenance ("**RPM**", which is regarded as a hardcore restriction of competition under Article 4(a) of Regulation 330/2010), unless they act as a minimum or fixed price. The EU Vertical Restraints Guidelines state that RPM can be implemented in a number of, often indirect, ways, including the fixing of distribution margins or maximum discounts, linking rebates to observing specific prices and measures to identify and discipline price-cutters.

Although not categorised as such, the OFT could probably have found that Pride's two-tier pricing system constituted indirect RPM, by identifying and disciplining price-cutters. However, it is clear more generally that the use of RRPs can facilitate anti-competitive behaviour and indeed outright price collusion between retailers. In *Pride*, customers were obviously not getting the 'bargain deals' that they thought they were, even though RRPs are generally understood to indicate a 'fair' or 'market' price.

An RRP self-evidently provides a focal point for retailer pricing, particularly if (as with, for example, some food or drink products or mobile phone 'top up' vouchers) it is marked on the product or its packaging. However, where the parties' market shares are below the 30% threshold in Regulation 330/2010, the vertical restraints block exemption applies. As the Vertical Restraints Guidelines indicate, where the market shares are above this threshold, RRPs may soften competition but may potentially benefit from exemption under Article 101(3) TFEU where this leads to distributors increasing their sales efforts of the product in competition with other brands.

The question nevertheless remains as to whether price competition would be greater if the practice of manufacturers setting RRPs were to be outlawed, with dealers and retailers setting their own prices entirely independently?

Relationship to the CMA's markets work

The OFT's investigations into the practices of both Roma and Pride were both 'own initiative' investigations, commenced as a result of information gathered by a during market study conducted in 2011. Although the OFT identified a number of concerns regarding competition in the mobility aids sector, it did not make a reference to the then Competition Commission, but did take action against some traders under consumer protection legislation. It also opened competition investigations against Pride and Roma.

Although antitrust investigations are an unusual outcome of market studies (which are conducted in relation to a sector as a whole), *Pride* and *Roma* are a reminder that this is a possible outcome. Companies in sectors in which the CMA is undertaking a market study (or which has made a call for information as a precursor to launching a formal study) would be well advised to consider whether their individual conduct may be anti-competitive in some way and, if so, to cease such conduct and, where appropriate, inform the CMA under its leniency programme.

Should small firms be exempt from fines for anti-competitive behaviour?

In *Pride*, the OFT was unable to impose fines on any of the participants; this was also the case in *Roma*. Under s.39(3) CA98, parties to 'small agreements' are exempt from fines, i.e. agreements between parties whose combined turnover did not exceed £20 million. This was the case for each manufacturer/dealer relationship.

This was despite, in *Pride*, there being clear documentary and witness evidence (including from its own senior managers) that Pride: wished to "*monitor and clamp down*" on internet pricing, so limiting intra-brand competition between its dealers; deliberately initiated a pricing scheme that would limit competition and lead to consumers paying higher and often hugely inflated prices; and was well aware of the requirements of the CA98. Likewise, Roma's internal documents acknowledged that "*we can't price fix but surely there must be some way of lessening the price differences between the dealers and the internet sellers [which] would surely benefit everyone in the long term by raising margins*".

In such circumstances, and particularly given the obvious consumer detriment, it must be asked whether it is appropriate to maintain the exclusion from fines for small undertakings? This does not, of course, mean that SMEs would face enormous fines for infringing the CA98, since fines are related to the duration and gravity of the infringement and are subject to a cap of 10% of worldwide turnover: in *Access Control and Alarm Systems*, the OFT imposed very modest fines of between £1,777 and £35,700 for collusive bidding on what appeared to be small companies. The exemption is also illogical, as it does not apply to SMEs involved in anticompetitive agreements and concerted practices with larger companies.

Is the CMA's enforcement message getting through?

The OFT has twice identified similar infringements of competition law in respect of the same product. In both decisions, there is a hint, at the very least, that the infringements were more widespread than those covered by the decisions, since each manufacturer had several hundred dealers across the United Kingdom. As discussed above, the OFT had also already undertaken a market study into the mobility aids sector generally, with concerns identified across the sector. The OFT and CMA also undertake regular 'outreach' work to spread awareness of competition law and to encourage compliance (see here and here for recent examples).

However, whilst larger businesses are well aware of the need for compliance with competition law, is the message really getting through to small and medium-sized enterprises? Here I should declare an interest: a relative has recently purchased a powered wheelchair. A brief internet search revealed a number of dealers' websites that did not show prices and instead stated "*please contact us for our best price*" or "*contact us for pricing*". Furthermore, this was not limited to mobility aids, but covered other high value items such as beds, stairlifts and lifting hoists required by the disabled, elderly and infirm.

Perhaps the CMA still needs to do more to ensure compliance?

How much support should an authority give to unrepresented parties?

In *Roma* and *Pride*, the OFT's decisions ran to 197 and 207 pages respectively. This included extensive annexes that had the appearance of being 'antitrust primers' for the addressees. A considerable number of the parties under investigation were not represented by lawyers, did not provide any response to the OFT's Statements of Objections ("**S/O**") and/or did not make

admissions of liability.

In these circumstances, the OFT clearly felt the need to "*assist each of the Parties to identify more easily and understand the case against it*", by issuing (before the S/O) a Summary of Preliminary Key Findings of Fact and a Legal Principles Paper, which would appear to be replicated in annexes to the relevant decision.

Whilst this desire to assist may appear to be laudable, it begs the question as to whether the OFT (or CMA) should go further than its legal obligations, including that an S/O sets out the entire case against a party, that it discloses all evidence to addressees of an S/O and that an infringement decision contains all matters of law and fact upon which it is based and is appropriately reasoned?

Undertakings under investigation, even small ones, carry on business: they cannot and should not be compared to an individual citizen facing criminal prosecution without the resources to defend him or herself and facing the risk of imprisonment. Whether a respondent chooses to be legally represented during an antitrust investigation is a matter for it alone and it should bear the consequences, if any, of that choice. Competition authorities have limited resources and need to use these to maximum effect to detect, investigate and where appropriate punish anticompetitive behaviour. It is submitted that they should not go beyond their legal obligations to assist unrepresented respondents when they would not do this for represented respondents, particularly when those unrepresented parties are statutorily immune from penalties.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe here.

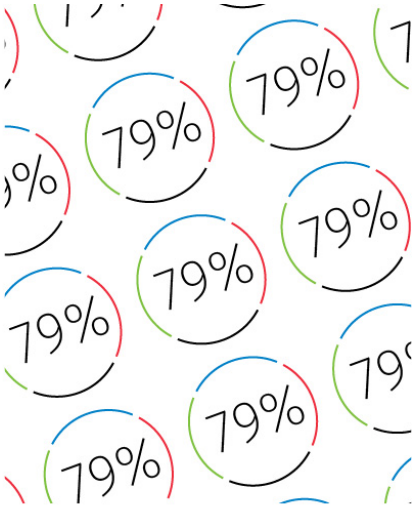
Kluwer Competition Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

Learn how **Kluwer Competition Law** can support you.

79% of the lawyers experience significant impact on their work as they are coping with increased volume & complexity of information.

Discover how Kluwer Competition Law can help you.
Speed, Accuracy & Superior advice all in one.



Wolters Kluwer

2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Tuesday, November 18th, 2014 at 10:57 am and is filed under Consumer welfare refers to the individual benefits derived from the consumption of goods and services. In theory, individual welfare is defined by an individual's own assessment of his/her satisfaction, given prices and income. Exact measurement of consumer welfare therefore requires information about individual preferences.

Source: OECD“>Consumer welfare, United Kingdom
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.