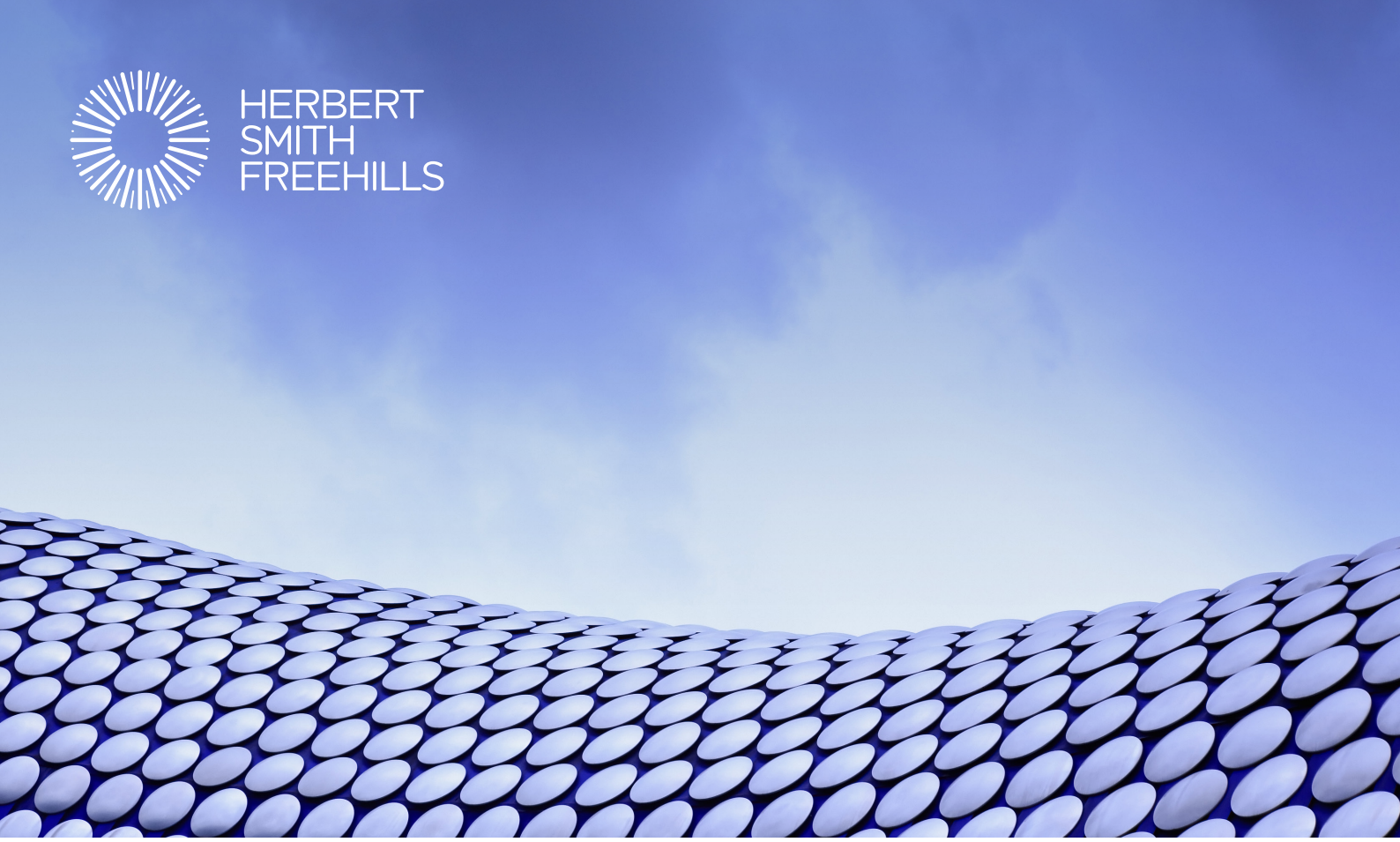

Supplier terms and Pricing issues under UK competition law

What is the basic position under UK competition law regarding resale price maintenance (RPM)

UK competition law is currently very closely aligned with EU competition law and the UK competition authorities take the same approach as the Commission in their analysis of RPM which constitutes a hardcore restriction. The Chapter I prohibition of the Competition Act 1998, the prohibition on anti-competitive agreements, mirrors the wording of Article 101 TFEU and the Chapter II prohibition that of Article 102 TFEU. In addition, section 60 of the Competition Act 1998 requires the UK competition authorities and courts to ensure that the application of UK competition law is, so far as is possible, consistent with EU competition law.

Under draft legislation published by the Government on 30 October 2018 which makes the necessary changes to UK competition legislation to make it suitable in the case of a no-deal Brexit scenario, section 60 will be repealed. A new section 60A provides that competition authorities and courts will only be bound by an obligation to ensure consistency with EU competition case law and decisions that pre-date Brexit. So UK courts and competition authorities will no longer need to have regard to EU case law and decisions adopted after that date.

Section 60A(7) further provides that the CMA and the courts may depart from pre-Brexit cases and decisions where it is considered appropriate in the light of specified circumstances, such as for example differences between UK and EU markets, developments in economic activity or the particular circumstances under consideration. The specified circumstances listed are very broad and section 60A(7) may end up diluting the requirement for consistency with pre-Brexit case law considerably.

What do recent cases and investigations tell us about the CMA's position on RPM?

Vertical restrictions feature highly on the CMA's enforcement priorities, in particular restrictions relating to online resale pricing. According to the CMA, RPM is one of the most complained about practices and these complaints are increasingly related to online practices. Focus on competition in the context of online markets is one of the CMA's current strategic objectives.

The CMA has particular concerns over practices that restrict retailers from advertising their actual selling prices online. During the course of 2016 and 2017 the CMA adopted a number of infringement decisions, imposing fines, in cases where suppliers imposed internet minimum advertised prices which it treats as a form of RPM, and the CMA continues to actively monitor RPM in the online world.

In May 2016 Ultra, supplier of bathroom fittings, was fined £786,668 for RPM conduct. Having issued recommended retail prices for online sales of its products, Ultra actively monitored resellers' websites for compliance and threatened retailers who did not advertise prices at or above the recommended prices with penalties, such as charging them higher wholesale prices, withdrawing their rights to use Ultra's images online or ceasing supply. A commercial catering equipment supplier was fined £2.3 million for imposing a minimum advertised price.

In June 2016 the CMA issued an open letter, warning suppliers and retailers not to allow their online sales activities to infringe the prohibition on RPM. The warning letter was prompted by research into levels of awareness about RPM in the business community which indicated that less than a third of the businesses surveyed were aware that RPM is a serious infringement of competition.

In June 2017 the National Lighting Company was fined £2.7 million for requiring retailers to use a minimum price when selling their products online. A fine was only imposed on the supplier but the CMA made it clear that retailers should be aware that they can also be fined for entering into RPM agreements with suppliers.

The risk of engaging in RPM in the UK may be higher than in some other jurisdictions, because it is possible for one of the parties involved to blow the whistle to the CMA in return for immunity from fines, which could increase the risk of detection. By contrast, certain other competition authorities, including the EU Commission, exclude RPM practices from the scope of their whistle-blowing (leniency) regimes.

How are online sales restrictions treated

Online sales ban

In August 2017 the CMA imposed a fine of £1.45 million on golf club manufacturer Ping for preventing two UK retailers from selling its golf clubs on their websites. Ping tried to justify the restriction on the basis that it was necessary to promote in-store custom fitting, which it argued was a genuine commercial strategy it had chosen for its products. The CMA accepted that Ping was entitled to impose certain conditions on retailers who were selling the golf clubs online, but only to the extent that such conditions are compatible with competition law. The CMA found that, while Ping was pursuing a genuine commercial aim of promoting in-store custom fitting, the online sales ban was not objectively justified or proportionate as its aims could be achieved by less restrictive measures.

On appeal before the Competition Appeal Tribunal (CAT), the CAT upheld the CMA's decision that Ping's ban on online sales was in breach of competition law. The CAT concluded that the potential impact of the ban on consumers and retailers was real and material. It significantly restricts consumers from accessing Ping golf club retailers outside their local area and from comparing prices and significantly reduces the ability and incentives for retailers to compete for business using the internet.

This is the first time that the UK courts have examined prohibitions on online sales under competition law, and the CAT's ruling confirms the approach taken by the European Court of Justice in the *Pierre Fabre* and *Coty* cases. While the CAT did not rule out that online sales bans could be permissible if they are objectively justified by reference to certain criteria, the CMA and CAT have shown that they will take a strict approach in assessing whether such a restriction is proportionate to its legitimate aim.

Requirement for bricks and mortar presence

L'Oreal is currently being sued by online retailer Beauty Bay for requiring it to have a bricks and mortar store. L'Oreal's terms require all authorised resellers to have at least one approved physical point of sale or a brick-and-mortar presence. Beauty Bay argues that L'Oreal's required minimum size retail space was unreasonable and would not have made economic sense for Beauty Bay. It also alleges that L'Oréal has approved points of sale for other companies that were "markedly less stringent".

Under EU and UK competition law manufacturers can require that their online distributors also have a brick and mortar shop that meets their quality standards as a condition to sell their products online. The case is based on this requirement to have a physical store in order to sell products online and should provide further guidance on permitted restrictions on online retailers in the context of selective distribution systems.

What is the approach to discounts and rebates under UK competition law?

The CMA follows the EU Commission and European Courts' approach in relation to abuse of dominance cases and its approach to discounts and rebates can therefore be expected to mirror that of the EU. There have been few rebates cases under UK competition law to date, but after Brexit we can expect to see an increase in abuse of dominance cases which are currently often allocated to the EU Commission's jurisdiction.

In February 2017 the CMA opened an investigation into a suspected abuse of dominant position by Unilever in the supply of single-wrapped impulse ice creams in the UK (for which it considered there were reasonable grounds to suspect that there is a national market). Unilever supplied impulse ice cream products for free or at a reduced price if retailers purchased a minimum number of products and the CMA suspected that these promotional deals offered to retailers could have an exclusionary effect on competing ice cream manufacturers.

Applying an effects-based approach, the CMA ultimately found that Unilever's offers did not affect the way in which retail customers bought impulse ice cream and did also not affect their purchasing patterns. Other suppliers were offering different packages and there was no evidence that Unilever's competitors had been adversely affected. The CMA issued a 'no grounds for action' decision and its analysis follows the EU Commission's approach in its prioritisation guidelines and in the Intel case.

The CMA published its decision which provides useful guidance on rebates for other cases, recognising that discounts and rebates are a difficult area for dominant companies. The decision demonstrates that, depending on the circumstances and the structure of the market dominant it is possible for dominant companies to offer packages and bundles to customers.

The CMA has indicated that its decision to close the investigation in this case should not be seen as an indication that the CMA will not prioritise future rebate cases where relevant.

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