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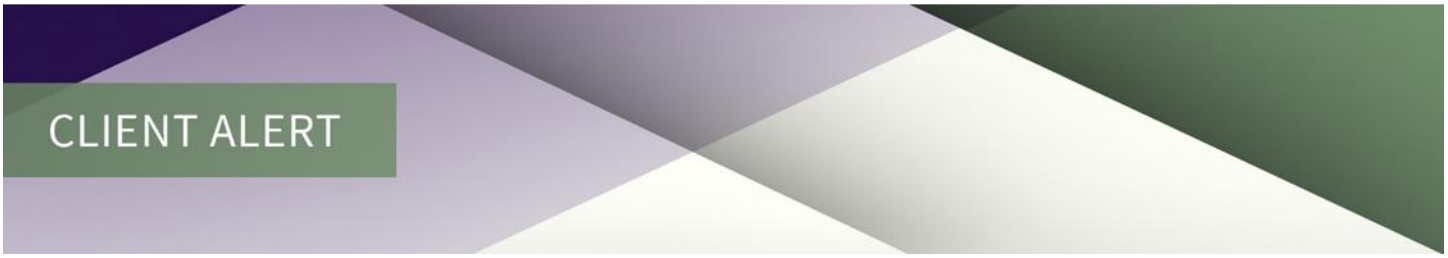

The UK Competition Authority Continues to Pursue RPM Conduct in the UK

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RPM remains an enforcement priority in the UK and EU

On 29 June 2020, the UK's Competition & Markets Authority (***CMA***) imposed a total of £5.5 million in fines on two musical instrument manufacturers, Korg[1] and Roland,[2] in two separate infringement cases for having engaged in resale price maintenance (***RPM***) conduct by restricting the ability of resellers to freely set the price for their products. The non-confidential versions of both decisions have now been published by the CMA.

In addition, on 17 July 2020, the CMA announced that it had adopted another RPM decision in the musical instrument sector against Yamaha and a UK retailer, Guitar, Amp & Keyboard Center Ltd and GAK.co.uk (***GAK***). Yamaha received immunity under the CMA's leniency policy for having disclosed the RPM conduct to the CMA. Interestingly, in this case the CMA decided to impose a fine on the retailer, GAK of £278,945, for having agreed with Yamaha not to discount online prices of certain Yamaha products below a minimum price and having continued to engage in such practices even *after* it had received a warning letter from the CMA[3]. There is no public version of this decision yet.

1 Synthesizers and hi-tech equipment: anti-competitive practices 50565-4 (here).

2 Electronic drum sector: anti-competitive practices 50565-5 (here).

3 Digital pianos, digital keyboards and guitars: anti-competitive practices 50565-6 (here).

These fines come shortly after the CMA's record fine for RPM conduct of £4.5 million imposed in January 2020 on Fender[4] and the £3.7 million fine it imposed on Casio[5] in October 2019 and mark the culmination of now five separate RPM decisions in the musical instruments sector in less than a year, with total fines of more than £13.7 million. The message is clear: the CMA continues to treat RPM conduct as an enforcement priority and is also prepared to sanction retailers (not just the suppliers) in certain cases.

The CMA's strong stance is aligned with the recent, more aggressive enforcement steps taken by a number of national competition authorities across the EU[6] and by the European Commission[7] (***Commission***) in relation to vertical price restrictions, i.e. RPM. These cases build on the Commission's E-commerce sector inquiry which found evidence of widespread RPM conduct in relation to online sales,[8] including in relation to the provision of audio-visual and music products.

These fining decisions also send a clear signal that the CMA and other competition authorities in Europe continue to consider RPM conduct as a serious infringement of competition law and, as such, the classification of RPM conduct under the EU's Vertical Block Exemption Regulation[9] (***VBER***) as a "hardcore restriction" seems unlikely to be reassessed in the context of the ongoing review of the VBER by the Commission – despite a significant number of commentators arguing that RPM conduct should not be presumed to be anti-competitive (i.e. an infringement "by object") and that, instead, RPM conduct ought to be assessed by way of a case-by-case effects analysis.

In contrast, the U.S. Supreme Court opted for the case-by-case, or "rule of reason", analysis in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[10] which acknowledged the force of economic commentary that RPM may have competitively favorable or neutral effects, including, among other things, increasing inter-brand competition and facilitating market entry for new products and brands. Some State competition laws and State Attorneys General nonetheless continue to consider RPM to be either per se illegal or, in practice, competitively suspect.

4 Guitars: anti-competitive practices 50565-3 (here).

5 Digital piano and digital keyboard sector: anti-competitive practices 50565-2 (here).

6 See, for example, enforcement actions against RPM conduct taken in Austria (here), the Czech Republic (see Mlex article here and here), Finland (here), France (here) and Poland (here). In addition, the Dutch Competition Authority recently changed its position noting that action against RPM was now an enforcement priority.

7 The Commission imposed a €111 million fine on Asus, Denon & Marantz, Philips and Pioneer in 2018 (here), 15 years after its last fine of €2.56 million imposed on Yamaha (here).

8 Final report on the E-commerce Sector Inquiry at paragraph 29 (here).

9 Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (here).

10 Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007) available here.

In the remainder of this alert, we first provide some practical general compliance takeaways from the recent CMA decisions before providing more detail in relation to the relevant infringing conduct.

Some practical compliance takeaways

The CMA's RPM decisions highlight a number of practical compliance issues for companies beyond the investigated sector for musical instruments:

- RPM conduct continues to be treated as an enforcement priority of competition authorities in the EU and the UK.
- Company directors and senior staff have a special responsibility with regards to compliance with competition law and their direct involvement in RPM conduct is treated as an aggravating factor which may result in an uplift of the fine.
- Elements such as the existence of competition law training for staff and disclaimers in email signatures of a supplier regarding the ability of resellers to set their prices freely can be relied on by an authority as aggravating factors where the compliance messages are not in practice followed by the supplier, as it may allow the authority to conclude that the infringement was not just committed negligently but intentionally (which leads to an uplift of the fine).
- A reseller is not necessarily always considered to be merely a "victim" of RPM conduct by a supplier, i.e. resellers can be investigated and fined for having cooperated with a minimum pricing policy in certain cases; although such cases remain the exception at present.
- The use of price monitoring software by suppliers is not prohibited and can have pro-competitive benefits (if it allows the supplier to set keener wholesale prices and support retailer promotions to compete more effectively with rival products). That said, these tools increase price transparency in the market which in turn may tempt suppliers from using the pricing information to detect and then seek to restrict 'unwanted' discounting by their resellers. The use of such tools to facilitate RPM conduct is treated as an aggravating factor by competition authorities. As these tools increase in sophistication and popularity, companies should ensure that appropriate safeguards are in place to avoid any compliance risks associated with their use.

RPM and EU competition law – a quick refresher

Under EU competition law, a reseller must remain genuinely free to determine its resale prices. Any agreement or concerted practice with a supplier/manufacturer which restricts a reseller's ability to determine its sale prices freely is considered to amount to an "object" restriction of competition law under Article 101(1) of the Treaty on the Functioning of

the European Union (***TFEU***) and/or the Chapter 1 prohibition of the UK's Competition Act 1998 (the ***Competition Act***), i.e. a competition authority does not need to show that the conduct had any actual appreciable anti-competitive effects.

In addition, RPM conduct is classified as a "hardcore restriction" under the VBER. This means that where RPM provisions exist in a vertical agreement between a supplier and a reseller, then the entire agreement loses the safe harbour protection afforded by the VBER to certain vertical agreements.

It is generally argued that RPM may restrict competition in a number of ways. In particular, RPM can: (i) reduce intra-brand price competition; (ii) reduce inter-brand price competition; (iii) facilitate collusion between suppliers by enhancing price transparency in the market; and (iv) stabilise prices on the market at a higher level than would have prevailed absent the RPM conduct.

For these reasons, RPM conduct is considered, by its very nature, harmful to the proper functioning of normal competition and is therefore excluded from the VBER safe harbour protection.

It is open to parties to show that RPM conduct may in exceptional cases give rise to efficiencies which outweigh any restrictions of competition generated by RPM conduct under the test set out in Article 101(3) of the TFEU and/or Section 9 of the Competition Act.

The Commission's guidelines for the assessment of VBER note that such efficiency arguments may arise, for example, in relation to the launch of a new product. In such cases, RPM over a short introductory period may assist with expanding the demand for the new product by incentivising resellers to promote the new product. Fixed resale prices, and not just maximum resale prices, may be necessary to organise in a franchise system a coordinated short-term low-price campaign (e.g. for two to six weeks).[11]

RPM concerns do not arise in relation to recommended resale prices where the supplier does not exert any pressure on the reseller or offer any incentives to the reseller to adhere to the recommended resale prices. The reseller must be free to determine its resale prices independently; this includes ignoring recommended resale prices if the reseller wishes to do so.

Finally, it should be flagged that in the UK, companies can self-report RPM conduct to the CMA in return for complete immunity from fines under the CMA's leniency policy (provided all conditions for immunity are met by the applicant).That said, the CMA considers that offering complete immunity from fines or up to a 100% penalty discount to a firm which is the first to self-report its conduct to the CMA after the CMA has already started to investigate the conduct risks being "*overly generous, limiting deterrence*". On 30 July 2020, the CMA therefore proposed to limit leniency to a maximum of a 50%

[11] See paragraph 225 of the VBER Guidelines (here).

penalty discount in such situations.[12] That said, where a company self-reports RPM conduct to the CMA under the CMA's leniency policy *before* the CMA has commenced an investigation, the company can in principle still qualify for complete immunity. In contrast, RPM conduct does not fall within the scope of the Commission's leniency policy.

Korg and Roland Infringing Conduct

Korg and Roland are both manufacturers of synthesizers/hi-tech musical equipment and electronic drums kits (the ***Relevant Products***). Each of Korg and Roland was found to have enforced pricing policies to ensure that its UK resellers would not advertise or sell the Relevant Products or bundles of the Relevant Products online below a certain minimum price specified in a price list which was communicated on a regular basis to the resellers. In Korg's case, the practice lasted from 9 June 2015 to 17 April 2018 and in Roland's case from 7 January 2011 to 17 April 2018. There was no allegation that Korg and Roland coordinated their conduct with each other – such conduct would have amounted to serious cartel conduct. As a result, the CMA adopted two distinct RPM infringement decisions, one against Korg and one against Roland. The CMA chose not to impose any fines on the relevant resellers.

Korg and Roland each ensured resellers' compliance with their respective pricing policies by monitoring resale prices both reactively, by following-up on complaints received from resellers regarding other resellers' pricing below the minimum list prices, as well as proactively, by, for example, using automated price-monitoring software which flagged discounts below their list prices.

Korg received regular price reports which contained prices from a range of resellers and real-time email notifications of any prices lowered or raised by a reseller for a given product. Similarly, key individuals at Roland received bespoke daily reports which identified the differences between its minimum list prices and the resellers' actual prices, specifying which products were below the minimum price.

These complaints and reports were then used to follow-up with non-compliant resellers. In certain cases, it was communicated to such resellers that their pricing conduct could lead to the discontinuance of certain discounts, the termination of a reseller's account, or the temporary increases of trade prices. The CMA found that resellers considered these threats to be credible.

Aggravating factors

The CMA found that in both cases, Korg's and Roland's staffs had knowledge of the illegality of the conduct and in light of such knowledge had operated under a culture of concealment. This involved a policy not to generate any incriminating evidence, e.g. by relying largely on oral communications and by using secured and encrypted forms of communication

[12] Consultation on a Draft Addendum to OFT1495 on the CMA's approach to granting type B leniency in Resale Price Maintenance (RPM) case (here). The CMA is seeking views on its proposal until 28 August 2020.

and the deletion of incriminating evidence. For example, Roland's staff avoided direct references to price, asking retailers to continue to offer 'Roland Value' having previously made them aware of what Roland understood to be 'Roland Value', namely pricing at the minimum price. On occasion, Korg's staff sent resellers weblinks to show that a Relevant Product was priced below what Korg considered to be the applicable minimum price. The CMA found evidence of Korg's staff discussing such weblinks, noting "*the link is enough. It may not be perfect but for KORG and VOX*[13] *we have to be very careful* […] *I think we need to find a way that when communicating about KORG* and Vox *we are non specific*."

In relation to Korg, the CMA also pointed out that Korg's staff was familiar with competition law and what would constitute a breach, noting in particular that staff had received competition law training and monitored news about price-fixing cases. The CMA also pointed out that for a certain period, some of Korg's staff had email signature disclaimers noting "*As a strict company policy, we absolutely refuse to discuss advertised pricing in any way. Recommended retail prices communicated by Korg UK are guide prices only*." Rather than protecting the company or amounting to a mitigating circumstance, these statements were considered by the CMA to amount to an aggravating factor because these statements showed that the company had intentionally (rather than negligently) committed the RPM breaches.

The CMA also found that directors and senior management of each company were directly involved in the infringements, e.g. in Roland's case by taking an active part in the day-to-day monitoring and in Korg's case by giving instruction to UK staff in relation to the implementation of the pricing policy and playing a key role in deciding to impose sanctions on non-complying resellers.

As a result, the CMA increased the penalty for each of Korg and Roland by 10% to reflect the fact that the RPM conduct was committed intentionally rather than negligently. In addition, Korg's fine was increased by another 10% and Roland's fine by another 15% because of the involvement of their respective senior management in the infringement. (The difference in the percentage levels reflects differences in the levels of involvement of the senior management teams.)

Each of Korg and Roland accepted the infringement finding and penalties imposed under the CMA's settlement procedures, in return for a discount off the fine of 20%. Roland also obtained a penalty discount under the leniency regime.[14]

The role of resellers in RPM cases

As in the CMA's previous RPM cases against *Fender* and *Casio*, the CMA focused in its infringement decisions in its *Korg* and *Roland* cases on only one reseller for each of these two suppliers. This was done for reasons of administrative

[13] Vox is one of Korg's brands.

[14] Roland obtained a leniency discount of 100% for the period 7 January 2011 to 31 December 2012 and 20% for the period 1 January 2013 to 17 April 2018.

efficiency and in accordance with the CMA's case prioritisation principles.[15] The final decisions were then addressed only to Korg and Roland respectively and not to the relevant resellers.

While it is the case that resellers are normally not fined in RPM cases (as the RPM conduct typically originates from and is enforced by the supplier and is principally pursued for the benefit of the supplier), the CMA has sent a strong signal that resellers can be fined for RPM conduct too in appropriate cases, in its recent *Yamaha* decision.

As noted above, on 17 July 2020, the CMA showed its willingness to fine a *reseller* by imposing a £278,945 fine on GAK for having agreed with Yamaha that it would not discount the online price of certain Yamaha musical instruments. The amount of GAK's fine was increased by 15% after it transpired that GAK had continued to engage in such practices even *after* having received a 'warning letter' from the CMA noting the existence of evidence suggesting it might be engaging in RPM (see below for further details). This factor may explain why the CMA decided to pursue this particular reseller and not any others. More details as to the reasons why the CMA chose to fine GAK may become available once the non-confidential version of the settlement decision is published in due course.

Wider implications for the CMA's general enforcement approach

The CMA appears to have had evidence about widespread RPM conduct in the musical instruments sector in the UK. The recent infringement decisions are just one aspect of the CMA's enforcement activities.

Having adopted infringement decisions in what might have been the most attractive enforcement cases (from the CMA's perspective), the CMA announced that it also sent so-called 'warning letters'[16] to around 70 other musical instrument manufacturers and resellers to put them on notice that the CMA is aware of evidence that suggests that they may have been engaging in RPM conduct and to seriously review their conduct in this regard. The CMA made clear that firms which ignore its warning letters are at risk of enhanced fines if they are subsequently found to have continued the infringing conduct.

Furthermore, as a result of its enforcement action in the musical instruments sector, the CMA's internal Data, Technology and Analytics Unit has developed a bespoke price monitoring tool which the CMA intends to use to monitor and detect suspicious pricing activities in other retail sectors in the future. In the CMA's words, this tool will give the CMA a "*better idea on which sectors to clamp down on*" and allow it to "*prioritise enforcement in those areas*".[17]

15 Available here.

16 See the CMA's open letter to suppliers and retailers in the musical instruments sector (here).

17 See CMA's announcement dated 29 June 2020 (here).

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