

## Antitrust Compliance Bullet

bite size compliance reminders for business colleagues

BAKER & MCKENZIE

### Bricks vs Clicks: Between a Rock and a Hard Place Can Retailer Pressure Cause You to Violate the Law?

From bidets to ballcocks, bathroom online sales are booming. A third of canny customers fitting out a new bathroom want cheap online deals. Online plumbing sales are predicted to soar by 50% by 2018. But what about the showrooms and sales staff that help customers touch and feel their dream bathroom? Will bricks and mortar retailers stock brands when they are smart-phone price-checked by customers in the showroom, and then bought online for half the price?



#### The Ultra Sanction

As prices spiralled down, heavily discounted online sales were seen as the business threat for Ultra Finishing, maker of the "Hudson Reed" bathroom brand.

Offline retailers put the choice to Ultra in stark terms. "Hudson Reed is not a brand that we would promote ... not competitive at all on prices. There are internet retail outlets that are simply butchering your prices to the point where it is impossible to compete."

Ultra thought it had no choice. Its board signed off on a new e-tail policy *recommending* online prices not go 25% below RRP.

But this was not a "recommendation." Far from it. Ultra monitored sites' pricing daily and key accounts reported "idiot sellers" to Ultra. As one Ultra employee wrote to a key account "[i]f there are any other examples you may come across please forward them on and they will be dealt with immediately." E-tailers disregarding the "recommendation" found that Ultra reduced discounts, prohibited product image use and refused orders.

Was no one concerned this might violate the law? Seemingly not. Managers overrode concerns. "Some concerns by the team that they will be involved in illegal practices relating to price fixing need to be addressed." Legal advice was taken but not fully implemented. "We propose to complete [the] majority of communication verbally, however clarification of what we can and can't say and what, if anything, we can put in writing is essential."

E-tailers did not mince their words. One retailer "guarantees what we are doing is illegal and we will all go to jail," an Ultra employee reported. And it even started hitting the trade press. "Price Fixing Rife" headlined the *Kitchen, Bedroom and Bathroom Review*.

Eventually an aggrieved e-tailer emailed the competition authorities. An investigation swiftly uncovered the truth behind the "recommendation," as Ultra's internal records of price monitoring and sanctions were exposed. Ultra was fined almost £800,000 for resale price maintenance.

The price pressure from bricks and mortar resellers can seem irresistible. But don't fall into Ultra's trap. There are ways to preserve offline retailers' incentives to invest in facilities and staff, without breaking the law by fixing resale prices.

### Know How Far You Can Go - You Can:

- **Set a recommended resale price.** But it must be genuine. If failure to meet the "recommendation" is met with sanctions, that quickly becomes an illegal agreement.
- **Offer a lump sum to support bricks and mortar resellers'** in-store promotions and investments in staff or facilities.
- **Require quality standards from e-tailers** e.g. prohibiting pop-ups, third party branding/logo, use of third party sites or brand-detrimental-advertising. It's a tricky area, so ask Legal to help.
- **Require that a reseller has at least one bricks and mortar outlet and/or sell a minimum quantity offline.** Again Legal should be involved in devising these rules.

### But, remember the risks - a supplier may not:

- **Fix a resale price,** or fix a distribution margin or maximum discount offered to customers. This includes restricting advertised pricing.
- **Penalise a reseller for discounting** by e.g. reducing supplies, restricting credit, increasing price, withdrawing promotional support.
- **Encourage resellers to report discounters** or tell one reseller that you will require another reseller to stop discounting.
- **Charge a reseller a higher price for goods to be sold online.**

### Get Legal Involved:

- **Get Legal to help** before introducing any new pricing policy or guidelines and in dealing with reseller complaints about other reseller's pricing.
- **Work with legal, not around them:** Legal is there for a reason. Work with them to resolve compliance concerns. Don't sweep it under the carpet when Legal flags a compliance risk.
- **No matter how senior the executive, speak up if you have concerns:** even if it's approved by the board, if you still have legal doubts, raise them. It's your job and maybe your liberty on the line.
- **There is no "don't write it down" defence:** written or oral, the law is clear that restricting resale prices is illegal.

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