

From: Ann Pope
Senior Director, Antitrust
Competition and Markets Authority

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The consequences of restricting resale prices: an open letter to suppliers and retailers in the musical instruments sector

The Competition and Markets Authority (CMA) has recently imposed fines totalling more than £13.7 million on musical instruments suppliers for breaking competition law by restricting online discounting. Separately, a musical instruments retailer has also admitted to engaging in RPM with a leading supplier and agreed to pay a maximum fine of more than £250k to settle the case.

What you need to know:

- It is illegal for a supplier to prevent a retailer from discounting prices.
- Both the supplier and the retailer are potentially breaking the law if they agree that the retailer will not price below a minimum level.
- An agreement does not have to be explicit – it can be achieved by threats or financial incentives not to sell below a particular price.
- Cheating on an agreement – by a retailer sometimes reducing prices – does not prevent such arrangements being illegal.
- Fines can be increased if the CMA finds that the law has been broken intentionally because businesses are aware that their behaviour restricts competition.
- The CMA can impose fines of up to 10% of worldwide turnover on businesses that break competition law.
- It is important to ensure that everyone in your organisation understands what they need to do to stay on the right side of the law.

Resale price maintenance in musical instruments

An agreement between a supplier and a retailer restricting the retailer's ability to reduce prices is known as resale price maintenance (RPM). RPM is illegal because it prevents

retailers from offering lower prices and setting their prices independently to attract more customers.¹

The CMA has evidence suggesting that RPM has been widespread in the musical instruments sector and has taken enforcement action in five separate cases.

We have now imposed substantial fines on suppliers of digital piano and keyboards (£3.7 million), guitars (£4.5 million), electronic drum kits (£4 million) and high-tech musical equipment and synthesizers (over £1.5 million) for RPM. One digital piano and keyboard and guitar supplier was given full immunity from fines under the CMA's leniency programme. The retailer in that case has also agreed to pay a fine of more than £250k to settle allegations that it engaged in RPM.

Warning letters

We continue to receive complaints suggesting that some industry participants think that, because they were not investigated, they may have 'got away with it'. Therefore, we have sent warning letters to almost 70 other musical instruments suppliers and retailers where we already have sufficient evidence to suspect they have broken the law by engaging in RPM. If you are one of the firms who receives a CMA warning letter you should take it very seriously. A domestic light fittings supplier in a [previous case](#) ignored a warning letter and received a 25% increase in its fine as a result.

In order to reach and warn those firms not currently suspected by the CMA of engaging in RPM, the CMA is publishing this open letter to remind **all** suppliers and retailers what RPM practices look like, and what to do if they are or may have been involved in them.

As a part of its strategy to tackle RPM in the musical instruments industry, the CMA has launched an in-house price monitoring tool to detect RPM activity. This software will automatically monitor price levels of musical instrument retailers, enhancing CMA market intelligence and benefitting consumers in the long-term.

Further guidance

Attached to this letter is a case study and more specific guidance for suppliers and retailers. There is a range of guidance on the CMA's website to help businesses comply with the law, including a [60-second guide](#) and more detailed [case studies](#) to help businesses understand more about RPM. There is also a [short video](#) that explains what RPM looks like. The CMA has also [published guidance on effective compliance programmes](#), which can help businesses identify if they are at risk of breaking the law.

The CMA's message

The message from these latest cases, and those before them, is clear: the CMA takes RPM seriously and is focused on tackling anti-competitive practices that diminish the many benefits of e-commerce.

Online RPM short-changes customers because they cannot shop around for a better deal. Customers have been shopping online more and more over time. During the coronavirus outbreak and beyond, we expect this trend to continue. This underlines the importance of fair online competition. Most businesses want to comply with the law. Not

¹ There are some very exceptional circumstances in which it may not be unlawful to specify retail prices and you may wish to seek independent legal advice on this point.

only because it is the right thing to do, but also because it is in their commercial interests to do so, irrespective of their size or business model.

If you have information on companies in your industry that may have been involved in an anti-competitive arrangement, you should report this to us by emailing general.enquiries@cma.gov.uk or calling the CMA enquiries team on 020 3738 6000. If you think your business has been involved in RPM, then you may even benefit from [lenient treatment](#) by coming forward to the CMA.

We always recommend that you seek independent legal advice.

Yours faithfully

Ann Pope

Senior Director, Antitrust

Overview of the musical instruments cases

In these musical instruments cases², the suppliers all admitted restricting their retailers' freedom to discount online. They set minimum prices below which their retailers could not advertise or sell their instruments online. Retailers understood that agreeing to these restrictions was an unwritten condition of their supply contracts.

Whilst it is generally lawful for a supplier to **recommend** retail prices for retailers, in these cases, the supplier threatened retailers with sanctions for not pricing at or above a specified price. Such threats included suspending retailers' accounts, delaying deliveries, reducing supply, increasing the trade prices retailers paid or in one case ceasing trading with them entirely.

In each case, the supplier's pricing arrangements restricted the retailers' ability to sell that supplier's instruments online at independently determined prices and therefore amounted to RPM. This reduces price competition between rival retailers and contributes to keeping prices artificially high for online shoppers.

Three of the suppliers ([Casio](#), [Roland](#) and [Korg](#)) used **price monitoring software** which made it easier to monitor online prices in real time and ensure widespread compliance with their pricing policies. It also meant that individual retailers had less incentive to discount for fear of being caught and potentially sanctioned.

We also found that three suppliers ([Fender](#), [Roland](#) and [Korg](#)) had **intentionally broken the law**, as they knew RPM was illegal and took steps to conceal what they were doing. Employees of each firm had deliberately tried to cover up their actions by recording as little as possible in writing. But the CMA used its sophisticated IT forensics tools to uncover emails and messages from IT servers and mobile phones, which helped to prove the illegal behaviour. The fines for these suppliers were each increased by 10% as a result.

In these cases, the monitoring of retailers' online pricing carried out by the suppliers was helped by numerous retailers reporting to them other retailers who were discounting the prices of their instruments. Some retailers appeared to be supportive of RPM in the belief that it would protect their margins. Some suppliers cited this pressure as part of the reason for introducing their pricing restrictions. Retailers should be aware that the CMA may take action against them as well as suppliers, particularly if it appears that they have been actively encouraging RPM.

In [one case](#), a leading supplier (Yamaha) came forward with evidence that led to us opening the investigation, it admitted breaking the law and cooperated with our investigation. In return, it was given immunity from any fine or director disqualification. In this case, a retailer (GAK) has now agreed to pay a fine to settle allegations that it engaged in RPM with that supplier. The CMA has provisionally found further that the retailer did not take sufficient action following its receipt of an [advisory letter](#) the CMA had sent, explaining that RPM was illegal. As a result, the proposed penalty has been increased by 15%.

² In the case of [Yamaha and GAK](#), Yamaha has received immunity from fines and admitted to an infringement, and GAK has settled the CMA's allegations and agreed to pay a fine. The CMA has not yet taken a final decision on whether or not there has been an infringement in that case. The CMA currently expects that it will be in a position to take that decision in mid-July 2020.

Key points to know

The musical instruments industry cases have much in common with other recent RPM cases³ the CMA has taken. Therefore, the CMA would like to highlight important points that are relevant to all businesses where there is a supplier/retailer relationship.

- **If you receive a CMA advisory or warning letter, take it seriously** and seek independent legal advice to ensure your business is compliant with competition law.⁴

If you are a supplier:

- **You must not dictate the price at which your products are sold**, either online or through other sales channels.
- Policies that set a **minimum advertised price** for online sales can equate to RPM and are usually illegal.
- **You must not use or intimate the use of threats**, financial incentives or take any other action, such as withholding supply or offering less favourable terms, to make retailers stick to recommended resale prices.
- **You cannot hide RPM agreements** – restrictive pricing policies in business-to-business arrangements are illegal whether verbal or written. Equally you cannot try to use apparently legitimate policies (e.g. selective distribution agreements) to conceal RPM practices. You face higher fines if you do this.
- **You must take extra care if you use price monitoring software** – monitoring your market position is legitimate, but you must not act on pricing information in a way that could limit your retailers' freedom to set their own resale prices.

If you are a retailer:

- **You are entitled to and must set the price of the products you sell independently**, whether online or through other sales channels.
- Suppliers are not usually allowed to dictate the prices at which you sell or at which you advertise their products online.
- If you have agreed to sell at fixed or minimum prices with your supplier, **you may both be found to be breaking competition law**.
- **You should not ask your supplier to influence your competitors' prices** – do not be tempted to push for consistent resale prices or to “police” RPM by reporting your competitors' prices to your suppliers. If you instigate RPM conduct you can face higher fines and directors can risk being disqualified from managing companies.

³ See www.gov.uk/cma-cases/light-fittings-sector-anti-competitive-practices, www.gov.uk/cma-cases/commercial-catering-sector-investigation-into-anti-competitive-practices and <https://www.gov.uk/cma-cases/bathroom-fittings-sector-investigation-into-anti-competitive-practices>

⁴ If you do not have your own legal advisers, you can use other sources of advice, such as the Competition Pro Bono Scheme. This scheme offers an initial free legal consultation. Other legal advisers may offer a similar service. See <http://probonogroup.org.uk/competition/>

- **If your business model does not enable you to compete on price with the big online 'discounters' you need to find other ways in which to make your products more attractive to shoppers and protect your margins.**
- **If a supplier asks you to comply with a restrictive pricing policy you should report this to the CMA.**

There can be serious consequences for businesses which break competition law, including fines of up to 10% of a business's worldwide turnover.