AntitrustConnect Blog

Not Playing Nicely

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Recently, there have been two striking cases of organisations behaving badly in a way that the outside world would think was well out of order.

In the first example – the Roma Medical Aids case – it isn't just about somebody breaking the rules. It's about a company acting in a way that a half-decent person wouldn't dream of doing so.

Roma Medical Aids is a company based in Bridgend in Wales that makes mobility scooters. Two years ago, it got together with seven UK online retailers and agreed a ban on their selling Roma-branded mobility scooters online and advertising their prices on the internet. Not surprisingly, this cosy little arrangement meant that vulnerable consumers – who obviously found it difficult physically to visit several stores – had a seriously restricted choice of scooters. It was also a lot harder for them to compare prices.

In slamming Roma and the retailers, the OFT said that its 2011 market study into mobility aids "found that mobility scooters in general can vary in price by over £1,000 for the identical product and we have even seen price differences of £3,000". Consequently, it was really important that people could use the internet as fully as possible, so that they could get a good price for such a vital bit of kit.

The kicker, however, was that while the OFT could wag its finger at Roma and friends, it couldn't actually punish them. This is because, under the Competition Act 1998, Roma's repellent behaviour amounted to what is called a "small agreement" that is immune from any financial penalty. It's also a result that brings the law into disrepute with the public, which is a bad idea.

That's not quite the end of it, however. Late last month, the OFT issued a statement of objections alleging that another maker of mobility scooters – Pride Mobility Products Ltd – had agreed with a bunch of online retailers that they wouldn't advertise online prices for certain scooters below those set by Pride. Some of the online retailers involved are the same as in the Roma case – including Careco (UK) Ltd, Discount Mobility Plus Ltd / Rutland Mobility Ltd and MT Mobility Ltd / Hooplah Ltd.

Now of course Pride and the others haven't yet been found guilty of anything and it may well be that it's just similar-fact conduct at roughly the same point in time. In other words, we may not be talking about actual recidivists here. But even so, you might have thought that – from a reputational angle if nothing else – a company wouldn't want to been seen as screwing the disabled for a second time.

The second example of bad behaviour comes from the European Commission and EU General Court, who together have achieved the remarkable goal of making even fans of the European project wonder what on earth is the point of the EU.

Germany had dreamt up rather a good scheme under which large areas of natural heritage land was given, free of charge, to various organisations dedicated to protecting the environment. In return, these bodies had to meet a string of environmental obligations. They also had to pay the costs of the land's transfer – together with its maintenance – along with any costs arising from contaminated sites.

The environmental donees of the scheme were allowed to exploit the land by charging for hunting and fishing, the sale of wood and tourism. However, if the revenue generated by these activities was greater than the amount spent on upkeep, then the balance had to be paid to the federal state or reinvested in heritage conservation.

On top of that, Germany planned to make financial grants for large-scale environmental projects, which would be managed by state bodies or environmental protection organisations. There were strict parameters on the proposed grants: the funds could only cover 75% of a project's costs and those managing the projects would always have to meet at least 10% of the expenditure.

Six years ago, Germany told the Commission about these two schemes, confident that they didn't constitute state aid. But in a shock decision in 2009, the Commission ruled against Germany. Supported by France, the Netherlands and Finland, Germany went to the General Court. In a gross affront to common sense, the court concluded that the Commission had been right.

The organisations receiving the aid, the court said, must be regarded as "undertakings" because their activities were economic in nature: offering hunting and fishing leases, selling wood and practising tourism were all direct offers of goods and services. These activities were quite distinct from the exclusively social objective of protecting the environment. It didn't matter apparently that the goods and services on offer were operated on a non-profit-making basis: what mattered was that they were offered in competition with profit-making organisations. Nor could the need to protect the environment be used to justify the exclusion of this type of deal from state aid rules.

Competition lawyers may think this an intelligent decision. The outside world won't. All it will see is a bunch of purblind theological ultras shooting down a nation state doing its level best to protect the environment. That's not exactly a great way of convincing the outside world that you are in fact one of the good guys.

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