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1. The Sherman Antitrust Act was passed in 1890 and was enhanced in 1914 by the introduction of the Clayton Act, which, among other things, allows private parties injured by violations of the antitrust laws to sue for treble damages.
2. One can imagine some future challenges posed by artificial intelligence to the extent that systems tasked with achieving the best possible profit for a business arrive at a view that interacting with competitor systems to raise prices may be the best way to do that, independent of any agreement between the businesses or instruction by programmers to do so.

Antitrust concerns surrounding automatic repricing software

The announcement on 28 July 2016 by the UK Competition and Markets Authority ('CMA') that it had fined a relatively small Birmingham-based online toy retailer, specialising in distributing Justin Bieber posters, £163,371 for breaching competition law did not trigger much reaction outside of the local media. As Mark Tricker and Susanna Rogers of Norton Rose Fulbright explain however, if you dig a little deeper, there is more to this case than meets the eye. Mark and Susanna discuss the implications of the Trod case for online retailers.

The CMA's press release confirms that its investigation into Trod Ltd was launched in December 2015, following receipt of a leniency application from one of Trod Ltd's competitors, a company called GB eye Limited (trading as 'GB Posters'). To secure immunity from fines, GB eye confessed to the CMA that it had entered into an agreement with Trod whereby each agreed not to undercut the other's prices for wall posters and frames sold on Amazon's UK website and supplied evidence of the illegal agreement.

The first interesting aspect of this case is the swiftness with which the case was disposed - taking less than eight months from start to finish. CMA investigations typically take well over a year, if not longer, to complete.

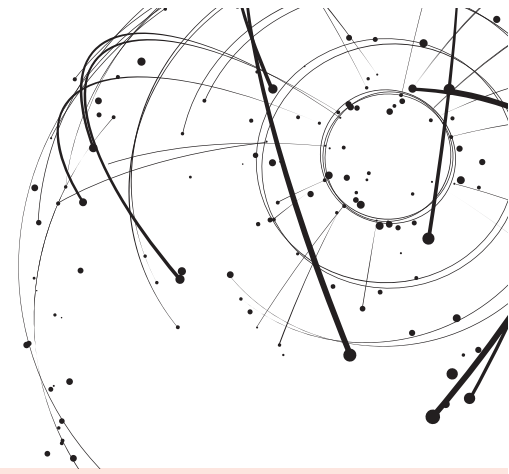
The CMA has come under pressure to deliver completed cases more quickly and that may partly explain the efficient handling of this case. In addition, the CMA is now using far more sophisticated forensic techniques to gather and assess evidence. Unannounced inspections used to involve officials walking around company premises looking for hard copy files or conducting on-screen searches through company emails but, in December 2014, the CMA announced it had introduced a new role - that of the Director of Digital Forensics and Intelligence. This advanced the CMA's conduct of internet investigations,

helped the capture and review of digital evidence and provided leadership to its forensics team. A year later, it was no doubt relatively straightforward for the CMA's digital forensic investigators to image Trod's servers and secure data to support evidence supplied by GB eye.

However, to fully understand why the case was concluded so quickly we need to look further afield. In April 2015, the US Department of Justice ('DOJ') announced its first 'online marketplace prosecution.' David Topkins, the founder of Poster Revolution, an online poster retailer acquired by Art.com in September 2012, became the first senior manager from an e-commerce business to be prosecuted under antitrust law. His crime was conspiring with other online sellers to fix, increase, maintain and stabilise the prices of certain posters sold through Amazon Marketplace in the US during the period from September 2013 to January 2014. The DOJ found evidence of discussions between Mr Topkins and his co-conspirators, proving that they had agreed to coordinate their pricing strategies for sales of these posters.

Having announced a plea agreement with Mr Topkins in April 2015, the DOJ later revealed that a federal grand jury indicted Trod Ltd in San Francisco in August 2015, and Daniel Aston, the boss of Trod Ltd, in December 2015 for separate but similar conduct. It seems

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that it was the existence of the DOJ's investigation that compelled GB eye Limited to confess its wrongdoing to the CMA in the UK. Trod pled guilty for fixing prices of posters in August 2016.

This case is a case study in international cooperation. The opportunity for investigators in different jurisdictions to collaborate with each other helps ensure more efficient use of resources and drives swifter resolution of cases. The CMA took full advantage of the US involvement, ensuring that it coordinated its investigation into Trod Ltd with the DOJ, conducting a joint dawn raid of company premises, as well as the domestic premises of one of the company's directors. The raids no doubt assisted the US investigators to progress their investigations swiftly with the DOJ announcing on 11 August 2016 that Trod Ltd had pleaded guilty to fixing the prices of posters sold through Amazon Marketplace to shoppers in the US.

Challenges for antitrust law

The second interesting aspect of this case is the novel way in which the cartel was implemented. This was not a textbook case of executives heading to the golf course or of collusion in a 'smoke-filled room.' Instead, the online retailers used the tools of their trade to coordinate their activities - relying upon a computer algorithm that coordinated changes in their prices for posters to implement and maintain the cartel. In short, once you design the right algorithm and agree how it works the computer takes care of the rest. The software is not new - it is commonly used by Amazon sellers to monitor pricing and automatically reprice products according to fluctuations. But the use of an algorithm to implement and maintain a cartel is not something investigated by antitrust authorities before.

Some commentators have suggested that this novel approach to implementation of a cartel raises questions about whether the law is still fit for purpose. In the US, the legislative foundation upon which

antitrust enforcement relies is more than a century old¹. In the UK, the rules are almost 20 years old and the concepts on which the law relies are much older. Past cases have relied on evidence of communication between the cartellists to show implementation of an ongoing agreement or understanding to fix prices because such ongoing communication was essential to making a cartel work. Using technology to do this for you changes the look and feel of a cartel.

Despite this, in our opinion, this use of technology does not call into question well-established principles of antitrust law - at least not yet². The core concepts of what makes a cartel remain relevant to this type of arrangement as they do to competitors meeting in a hotel room and writing down agreed prices. Certainly the authorities do not appear concerned. The US Government has not hesitated to apply antitrust rules to the online world. In the UK, the CMA has confirmed that making sure online and digital markets are working effectively is a priority. Indeed, this is the third case targeted at online retailers conducted this year. While representatives from Trod suggested they had no idea that what they did was a breach of competition law this appears to have stemmed from a general lack of awareness, costly error given the company is now in administration.

More of an issue may be the challenges posed in gathering the requisite evidence in these types of cases. In this case, it is likely that the CMA - as with the DOJ before it - took care to ensure it had witness evidence from GB eye to corroborate the contemporaneous evidence available. This is partly because the CMA does not want to repeat the mistakes of its predecessor - the OFT - which had a poor track record, losing a number of high-profile cases for failing to ensure its decisions were robust.

However, in the Trod case, absent evidence from GB eye of a 'concurrence of wills,' a creative defence team might have argued that once the algorithm was

in place the robots had taken over, using self-learning to determine the market price. Interestingly, a CMA spokesperson revealed that it was not possible in Trod to determine how much the firms had benefitted from the cartel, although prices had typically increased by 20% during March 2011 to July 2015. The lack of precision perhaps suggests that monitoring prices was not something the companies themselves were concerned about once the algorithm was in place. In the future, though, it may be that the CMA needs to get up-to-speed with analysis of 'big data' to be able to demonstrate the continuing implementation of a cartel through price movements.

What this means for online retailers

Given the prevalence of automatic repricing software and its use by online retailers, analysing algorithms to ensure that consumers enjoy the benefits that technology delivers without being exposed to deceptive and unfair practices is likely to become part of the day job for antitrust officials.

This is a task they will be increasingly well-equipped to perform. Only last year, the US Federal Trade Commission announced that it had created the Office of Technology, Research and Investigation, which will undertake a range of projects, among them to examine the effect of algorithms on markets. There will be many within the CMA who will no doubt be interested in the results of this research.

While we can't predict the path of technology, and it is clear that future challenges still lie ahead for antitrust authorities, they have so far shown themselves equally capable of evolution: increasing the number, speed and effectiveness of the cartel investigations they pursue and working together to better understand technology and how antitrust law can be used to combat exploitation. Online retailers should tread carefully when conducting business using automatic repricing software to avoid ending up like Trod.