

Two UPC Resellers Settle FTC Invitation to Collude Investigation

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On July 28, 2014, the **Federal Trade Commission** accepted, subject to final approval, settlements with **InstantUPCCodes.com** (“**Instant**”) and **Nationwide Barcode** (“**Nationwide**”), two of the leading barcode resellers, and their principals, Jacob Alifraghis and Philip Peretz, who operate Instant and Nationwide, respectively. In its complaints, the FTC alleged that the settling respondents **violated Section 5** of the FTC Act by inviting certain competitors in the sale of barcodes to join together in a collusive scheme to raise prices.

I. The Complaint Allegations

Instant, Nationwide and Competitor A sell barcodes over the Internet. Competitor B also sells barcodes over the Internet but at higher prices than Respondents and Competitor A. Price competition among these firms allegedly caused the price of barcodes to decline over time.

According to the FTC’s complaints, on August 4, 2013, Mr. Alefraghis **transmitted a long message** to Mr. Peretz and Nationwide via Nationwide’s website. A similar message was sent to Competitor A. According to the FTC, the message contained an explicit invitation to raise and fix prices for barcodes. Alifraghis proposed that Nationwide and Competitor A match the higher prices of Competitor B, stressing that all these firms needed to agree to the plan for it to work and proposed a forty-eight hour window to put the plan in place. Alifraghis’s message was, in pertinent part:

Hello Phil, Our company name is InstantUPCCodes.com, as you may be aware, we are one of your competitors within the same direct industry that you are in. The reason for this email is because of the constant price changing from multiple vendors within this industry. The 3 main problems are US, YOU and [Competitor A].

Here’s the deal Phil, I’m your friend, not your enemy. ...

I can even assure you right now, that I will never lower my prices under yours, I will only match your prices. This problem has to stop between the 3 of us constantly lowering our prices. Here’s what I’d like to do:

All 3 of us – US, YOU and [Competitor A] need to match the price that [Competitor B] has. The

reason why they won't lower their price is because they would kill their sales from their existing customer database. I am also going to send this email to [Competitor A] regarding this as well. I'd say that 48 hours would be an acceptable amount of time to get these price changes completed for all 3 of us. The thing is though, we all need to agree to do this or it won't work. If [Competitor A] or you decide not to go through with the price change to match [Competitor B] pricing, then it won't work, we need all 3 of us to do this.

Reply and let me know if you are willing to do this or not. In the mean time I will contact [Competitor A] with the same message and ask him if he's okay with doing this. If this is acceptable by everyone, I will coordinate a date when the change must be completed so that everyone's on board.

If you do not decide you want to match the prices of [Competitor B], I will match your prices upon receiving your reply or within 48 hours, whichever comes first, this will make [Competitor A] obviously change his prices as well and we will all be at a lower price.

Alifraghis sent a similar email to Competitor A. Two days later, as requested by Alifraghis, Mr. Peretz responded to Instant and Competitor A with a new proposed "trigger date" and an additional condition – he wanted Instant to raise its prices first:

We are open to what you suggest [...] and are willing to pull the trigger on this at midnight Sunday, August 11th.

Since I am in the Pacific Time zone, this will give me the chance to see what you have done BEFORE I go live with my updated prices.

The discussion continued but Instant and Nationwide were unable to reach an agreement. The discussions ended in January 2014 when the respondents became aware of the FTC's investigation. Competitor A never responded to the email from Mr. Alifraghis, and did not respond either to the email from Mr. Peretz or any subsequent message.

In its Analysis to Aid Public Content, in support of the proposed settlements, the FTC explained:

The term "invitation to collude" describes an improper communication from a firm to an actual or potential competitor that the firm is ready and willing to coordinate on price or output or other important terms of competition. Mr. Alifraghis' August 4 email to his competitors outlining a mechanism by which the three companies can and should fix the price of barcodes is a clear example of an invitation to collude. The ensuing private communications among barcode sellers outlined in the Complaints establish a series of subsequent invitations, with each Respondent repeatedly communicating its willingness to raise and fix prices for barcodes, contingent on other competitors doing so, and soliciting rivals to participate in a common scheme.

The Commission noted that for twenty years it has held that invitations to collude may violate Section 5 of the FTC Act. It noted several justifications for the imposition of liability upon a firm communicating an invitation to collude even if there is no acceptance:

First, difficulties exist in determining whether a competitor has or has not accepted a particular solicitation. Second, even an unaccepted solicitation may facilitate coordinated interaction by disclosing the solicitor's intentions or preferences. Third, the anti-solicitation doctrine serves as a useful deterrent against potentially harmful conduct that serves no legitimate business purpose.

The Commission noted that while the conduct in this matter was “particularly egregious,” it stressed that less egregious conduct could also run afoul of Section 5.

Under the proposed consent decrees, Respondents are required to cease and desist from communicating with their competitors about rates or prices. They are also barred from entering into, participating in, inviting, or soliciting an agreement with any competitor to divide markets, to allocate customers, or to fix prices.

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