

RPM comes back from the dead – EU Commission tackles pricing in e-commerce

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In the first decisions adopted following its e-commerce inquiry, the European Commission has condemned practices by four consumer electronics companies imposing prices on distributors, and considered the impact of using algorithms on prices. This is the first time in 15 years that the Commission has attacked price maintenance in vertical agreements.

The Commission Decisions

In February 2017, the Commission initiated proceedings against Asus, Denon & Marantz, Philips and Pioneer following information obtained during the e-commerce sector inquiry. The Commission's report had identified resale price maintenance as an area of concern, and highlighted the increased use of automated software for monitoring and setting prices.

On 24 July 2018, the Commission imposed a total fine of €111 million on the four consumer electronics groups for restricting their online retailers' ability to set their own retail prices for widely-used electronics products (including kitchen appliances, hair dryers, notebook computers and headphones).

In particular, the Commission found that the manufacturers had intervened with online retailers that offered their products at low prices. Failure to follow the prices set by the manufacturers resulted in threats or sanctions. The intervention had the effect of limiting effective price competition and led to higher prices for consumers.

The Commission specifically pointed to the fact that the companies used sophisticated algorithms to monitor the prices set by distributors, thereby allowing them to intervene quickly in case of price decreases.

In addition, Pioneer apparently engaged in practices restricting cross border sales of electronics – another “old chestnut” in the list of competition law infringements the Commission is again tackling in distribution agreements.

Why is this development important?

Overall, these decisions are of importance because they constitute the first infringement decisions stemming from investigations initiated as a result of the Commission's e-commerce sector inquiry. These decisions are a useful reminder that what may start as a general sector inquiry allowing the Commission to gather information about the markets it has concerns about can lead to the discovery of anti-competitive conduct, which can have serious consequences for the companies involved.

The Commission noted a central feature in today's online business: *“Many, including the biggest online retailers, use pricing algorithms which automatically adapt retail prices to those of competitors. In this way, the*

pricing restrictions imposed on low pricing online retailers typically had a broader impact on overall online prices for the respective consumer electronics products.” Since many online retailers, irrespective of the sector, use pricing algorithms which automatically adjust retail prices to those of competitors, price restrictions such as those targeted can affect a much wider market. This is the first decision adopted by the Commission where it has had an opportunity to consider the use of pricing algorithms by companies.

Interestingly, the Commission has not adopted a decision condemning a company for RPM since 2003,¹ and this signals a return to enforcement in vertical arrangements at the EU level.

Finally, the Commission apparently used its informal cooperation process (applied once before in a non cartel case in 2011²) to end the investigation prior to issuing a statement of objections, and grant the companies fine reductions in exchange for their recognition of liability and for providing evidence with significant added value. It remains to be seen how and whether the Commission plans to apply this procedure in future cases. There is also a question whether the likely faster progress of the case and publication of the Commission decision accepting the liability of the companies will result in private damages actions brought earlier against those companies.

What's next?

The online commerce market is now worth over 500 billion euros in Europe every year and growing rapidly; and the Commission continually states that it is of key importance to ensure that this market functions competitively and consumers are protected. In particular, the EU Commission is determined to tackle retail price restrictions, which it has found are by far the most widespread restrictions of competition in e-commerce markets. Further decisions are to be expected in the near future, as a number of investigations are pending in other online markets (e.g., video games, hotel accommodation and merchandising products).³

This underlines how important it is for companies to review carefully their contractual provisions, as well as their operational practices, on “recommended” prices to ensure they are not at risk in terms of competition law scrutiny. In particular, companies need to give thought to how they use algorithms or “automated software” of varying degrees of complexity in pricing, as even in the absence of collusion with competitors,⁴ their use may give rise to increased examination.

¹ Yamaha was fined €2.56 million for fixing the minimum retail price of musical instruments for distributors who engaged in parallel imports (Commission Decision of 16 July 2003 in COMP/37.975 – *Po/Yamaha*)

² The first case to use the informal settlement process was the Commission's September 2016 decision against Altstoff Recycling Austria (see *Altstoff Recycling Austria* (AT.39759))

³ Commission Press Release IP/17/201, 2 February 2017 and Commission Press Release IP/17/1646, 14 June 2017.

⁴ See for example the UK competition authority decision which found an illegal agreement between two online poster sellers not to undercut each other, relying on automated repricing software and specific pricing algorithms which they configured to automatically enforce the agreement (CMA decision, Case 50223, 12 August 2016, Online sales of posters and frames). This was the first case in the UK in which a director was disqualified. Coincidentally, the CMA this week issued, for consultation, proposals to increase its disqualification powers for competition infringements (OFT510).

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