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European Commission Fines Consumer Electronics Manufacturers €111 Million for Online Pricing Restrictions

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On 24 July 2018, the European Commission announced that it had fined four consumer electronics manufacturers – Asus, Denon & Marantz, Philips and Pioneer – a total of €111 million (c.$126 million) for imposing fixed or minimum resale prices (resale price maintenance or RPM) on European retailers in breach of EU competition law. In addition, the Commission ruled that Pioneer unlawfully limited cross-border sales.

While these decisions reflect long-standing hostility in EU competition law to the imposition of RPM and territorial restrictions in distribution agreements, they are significant as this is the first time that the Commission has imposed fines for such practices since 2003. As such, they mark a notable return by the Commission to this area of enforcement, which it had largely left to Member State authorities over recent years. The decisions are also interesting for their analysis of the role of price monitoring software and repricing tools in policing, and amplifying the effect of, pricing restrictions.

The infringements

The Commission found that each consumer electronics manufacturer infringed the EU's prohibition of anticompetitive agreements by restricting the ability of retailers to set their own retail prices when selling products online. In each case, the Commission found that the manufacturer specifically targeted online retailers who discounted their products and threatened sanctions, such as blocking supply, if they did not increase their prices.

According to the Commission's press release, the individual infringement decisions state that:

- **Asus** monitored the resale price of certain computer hardware and electronics products, such as notebooks and displays, in Germany and France between 2011 and 2014 and intervened when retailers sold products below its recommended prices by requesting price increases;
- **Denon & Marantz** engaged in RPM with respect to audio and video products, such as headphones and speakers, in Germany and the Netherlands between 2011 and 2015;
- **Philips** engaged in RPM in France between the end of 2011 and 2013 with respect to a range of consumer electronics products, including kitchen appliances, coffee machines, vacuum cleaners, home cinema and home video systems, electric toothbrushes, hair driers and trimmers; and
- **Pioneer** engaged in RPM with respect to home theatre products, iPod speakers, speaker sets and hi-fi products, as well as imposing cross-border sales restrictions in order to sustain different resale prices in different countries. Pioneer's conduct lasted from the beginning of 2011 to the end of 2013 and affected 12 EEA countries (Germany, France, Italy, the United Kingdom, Spain, Portugal, Sweden, Finland, Denmark, Belgium, the Netherlands and Norway).

The Commission punished the manufacturers for this conduct by imposing fines of €63.5 million, €7.7 million, €29.8 million and €10.2 million, respectively. Each manufacturer benefited from a reduction in fines of between 40% and 50% by cooperating with the Commission's investigation and acknowledging the infringement. Interestingly, none of the retailers that implemented the manufacturers' pricing demands were fined, even though they will have been technically parties to the infringements.

Comment

While all four decisions appear to be based on long-standing case law that categorises RPM and cross-border sales restrictions as serious infringements of EU competition law, the fact that the Commission has issued them is in itself significant. Although the Commission used to be highly active in enforcement against vertical restraints, decentralisation of EU competition law enforcement in 2004 saw it effectively leaving such cases to the national competition authorities (NCAs) of the EU Member States. The Commission's return to this area was heavily trailed in its May 2017 Final Report on the E-commerce Sector Inquiry, as well as by its earlier announcement of a raft of investigations of vertical agreements, including these four cases.

Notwithstanding this build-up, it remains remarkable to see the Commission taking on three cases that could easily have been taken by NCAs, given their relatively limited geographical scope. This seems especially odd given the well-established framework for case allocation and the extensive experience of the German and French competition authorities in bringing RPM cases. These cases must, therefore, be seen as reflecting a deliberate policy decision by the Commission to signal a return to the fray on vertical restraints. Meanwhile, investigations into distribution agreements for PC video games and licensed merchandise products remain ongoing. The Commission is also investigating whether various restrictive distribution and rebate practices by a brewer led to abusive market segmentation. So it is safe to assume that vertical restraints will remain an enforcement focus for the Commission for the foreseeable future.

The Commission presumably also viewed these cases as an attractive opportunity for it to take a position on the role of price monitoring and repricing software and thereby build on general comments contained in the E-commerce Sector Inquiry Final Report. Rather than viewing the use of such software as a component part of the infringing conduct, the Commission appears to have examined it as part of the factual context.

Specifically, the Commission was concerned that manufacturers' use of price monitoring tools enabled them to identify retailers' non-compliance with pricing 'recommendations' more rapidly. It was also concerned that the widespread use of repricing tools by online retailers meant that manufacturers could ensure that targeted enforcement of pricing requirements against specific retailers had a wider impact. This is because the use of such software meant that manufacturers could focus their RPM efforts on a small number of lower priced retailers in the confident expectation that their return to 'compliant' pricing would be rapidly reflected across the market, as a result of the software's response. Although full details will have to wait until publication of the text of the Commission's decisions, there appears to have been no attempt by the Commission to argue that the use of such software, let alone its provision, is itself infringing conduct.

This case provides a high-profile reminder for businesses selling in Europe that they must not attempt to dictate the price at which products are resold by retailers.

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