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COMPETITION & EU

BEWARE OF RPM – COMMISSION ISSUES FINES FOR ONLINE RESALE PRICE-FIXING

On 24th July 2018, the European Commission (EC) issued four decisions fining Asus, Philips, Denon & Marantz and Pioneer, for a total of 111 million EUR, for fixing or establishing minimum resale prices on online retailers, a commercial practice also known as resale price maintenance (RPM).

According to the EC, such RPM practices restricted online retailers' ability to set their own retail prices for widely used consumer electronics product infringing EU competition rules.

Background

According to the [EC's press release](#), from 2011 to 2015, Asus, Philips, Denon & Marantz and Pioneer have each engaged in RPM practices whereby online retailers that did not follow the requested prices of manufacturers would face threats or sanctions like supply cuts. The manufacturers therefore maintained higher prices than those resulting from normal price competition between retailers.

Additionally, Pioneer may have encouraged price discrimination between Member States by limiting the possibility of its retailers to engage in cross-border sales, for example by blocking orders of such retailers who sold cross-border.

The EC especially highlights the increased effects of RPM by the use of pricing tools:

- on the one hand, the used sophisticated monitoring tools allowed manufactures to constantly track retailers' prices and influence prices of their distribution network, allowing a swift intervention in case of price decreases;
- on the other hand, because many retailers (including the biggest online retailers) use pricing algorithms which allow automatic retail price changes to follow competitors' prices, the RPM practices would be followed by retailers outside the manufacturers' distribution networks extending the impact of such practices.

Under EU competition rules, minimum or fixed resale price maintenance is considered a serious restriction of competition and is thus illegal, unless such behaviour can be justified by the creation of efficiencies for consumers or support of brick and mortar shops.

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The Parties have cooperated with the EC, admitted the infringement and apparently have settled before the issuance of a Statement of Objections, benefiting from a reduction of the fine of 50% (Pioneer) and 40% (the remaining companies), based on their cooperation with the EC.

The formal antitrust proceedings against the companies were initiated in February 2017. Previously, the EC conducted unannounced inspections at the premises of several companies (i) active in the manufacture, distribution and retail of consumer electronic products and small domestic appliances – including Phillips – (in 2013) and (ii) active in the online sale of consumer electronics and consumer electric products (in 2015).

The decisions have been adopted in the context of the EC's focus on e-commerce. In May 2017, the EC released its conclusions on the e-commerce sector inquiry, where it confirmed that resale-price related restrictions were the most widespread restrictive conducts in online sales.

What to expect

The EC has confirmed that it is currently investigating the commercial practices of other companies such as Guess, Nike, Sanrio and Universal Studios for possible imposition of cross-borders and online trading restrictions on licensed merchandise.

While RPM practices have not been at the core of the EC's priorities over the last decade, national competition authorities have pursued their interest in such behaviours. For instance, in addition to the decisional practice of the Portuguese Competition Authority (PCA), which has previously sanctioned such behaviours more than once, the UK Competition and Markets Authority (CMA) has recently published a market study on the impact of RPM practices on competition through price comparison websites. Amongst fining decisions, the German Federal Competition Authority has published a Guidance note on the prohibition of vertical price fixing in the brick-and-mortar food retail sector, while the Austrian Federal Competition Authority has published a Standpoint on RPM.

The PCA has expressed a desire to focus its attention on the online market and on RPM practices. In its Competition Policy Priorities for 2018, the PCA has specifically included the strengthening of its investigative capacity in the digital environment and has publicly committed to foster the promotion of competition by actively surveying key sectors of the Portuguese economy such as distribution & food sector which is currently under heavy focus after the unannounced inspections conducted by the PCA, in the 1Q 2017, to 20 companies active in the retail & food sector.

The PCA also confirmed its attention to new practices which may lead to the exclusion of competitors from a given market. In particular, businesses that undertake such practices should not be exempted from liability for the use of algorithms or artificial intelligence likely to result in anticompetitive practices.

The EC's decision should recall companies to pay attention to their pricing policies and to assess the context in which sophisticated pricing tools are used, in particular for business that operate online. Although EU (and Portuguese) competition law does not prohibit the use of such tools, they should not be used as mechanisms to support or implement RPM practices.