# Maintaining price competition between retailers in e-commerce markets: the European Commission's recent RPM decisions

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Co-operation; EU law; Fines; Mitigation; Resale price maintenance; Software; Vertical price fixing

## Introduction

On 24 July 2018, the European Commission issued four separate decisions, fining Asus, Denon & Marantz, Philips and Pioneer a total of over €111 million for engaging in resale price maintenance ("RPM").[1] In each case, the Commission found that the consumer electronics manufacturers had restricted retailers' ability to set their own prices for products such as computer notebooks, kitchen appliances and hi-fi products.[2] The manufacturers intervened particularly with online retailers, making threats or imposing sanctions if the retailers failed to price at the "correct" level. In the Commission's view, the manufacturers' interventions "limited effective price competition between retailers and led to higher prices with an immediate effect on consumers".[3]

This article considers three aspects of the Commission's RPM decisions. First, it discusses the Commission's renewed interest in enforcement against vertical price-fixing. Secondly, it examines how pricing algorithms and other software tools formed part of the anti-competitive conduct in the four cases. Thirdly, it comments on the companies' co-operation with the Commission and the Commission's resultant grant of significant reductions to the fines.

## Renewed focus on vertical price-fixing

The Commission's RPM decisions form part of the follow-up to the Commission's E-commerce Sector Inquiry. The objective of that inquiry, which was launched in May 2015 in the context of the Commission's broader Digital Single Market Strategy, was to allow the Commission to identify possible competition concerns in European e-commerce markets. The results of the inquiry were published in May 2017, and the Commission's Final Report noted that resale-price-related restrictions were by far the most widespread type of vertical restraint faced by retailers in e-commerce markets.[4] This prompted the Commission to take the view that "effective competition enforcement in this area is important".[5] Announcing the decisions against the four consumer electronics manufacturers, Commissioner Vestager highlighted the significance of the e-commerce context:

> "The online commerce market grows rapidly and is now worth over €500 billion in Europe every year. More than half of Europeans shop online. […] One of the big advantages for consumers of e-commerce is that you can easily compare prices and shop around for the best deals. By stopping retailers from offering lower prices, the four manufacturers denied consumers the full benefits of e-commerce."[6]

The Commission last took enforcement action against vertical price-fixing 15 years ago, at a time when e-commerce was in its relative infancy.[7] In its 2003 *Yamaha* decision,[8] the Commission held that the musical instruments manufacturer had illegally partitioned national markets and fixed resale prices. Although Yamaha's infringement covered eight national markets and involved two types of anti-competitive conduct, it was fined just €2.56 million.[9] That pales in comparison to the fines imposed on Asus, D&M, Philips and Pioneer.[10]

The UK's Competition & Markets Authority ("CMA") has also shown renewed interest in tackling RPM in recent years. In June 2017, it published an open letter to raise awareness of vertical price-fixing practices, reminding suppliers and resellers that the CMA "takes RPM

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[1] Commission press release, "Commission fines four consumer electronics manufacturers for fixing online resale prices", 24 July 2018, IP/18/4601, *http://europa.eu/rapid/press-release_IP-18-4601_en.htm* [Accessed 10 September 2018] ("Commission Press Release"). At the time of writing, non-confidential versions of the decisions have not been published.

[2] Pioneer was also found to have illegally restricted retailers' ability to sell cross-border to consumers in other EU Member States.

[3] Commission Press Release.

[4] Commission, Final Report on the E-commerce Sector Inquiry, COM(2017) 229 final, 10 May 2017, para.29.

[5] Commission Press Release.

[6] Commission, "Statement by Commissioner Vestager on Commission decision to impose fines on four consumer electronics manufacturers for fixing online resale prices", 24 July 2018, *http://europa.eu/rapid/press-release_STATEMENT-18-4665_en.htm* [Accessed 10 September 2018].

[7] It should be noted that whilst the Commission had not taken enforcement action against RPM for 15 years, certain national competition authorities have been more vigilant. The Bundeskartellamt has been particularly active in its efforts to tackle RPM. For example, in 2016, it imposed fines totalling €4.43 million on five furniture manufacturers for vertical price-fixing.

[8] *PO/Yamaha* (COMP/37.975), Commission decision of 16 July 2003.

[9] Yamaha was fined under the Commission's previous (1998) Fining Guidelines.

[10] Asus was fined €63.5 million; D&M was fined €7.7 million; Philips was fined €29.8 million; and Pioneer was fined €10.2 million.

seriously and is focused on tackling anti-competitive practices that diminish the many benefits of e-commerce".[11] The letter came in the wake of a flurry of RPM decisions taken by the authority. In May 2016 a fridge supplier and a bathroom fittings manufacturer were fined over £2 million and £780,000 respectively for imposing minimum resale prices on their online retailers.[12] A year later, a supplier of domestic light fittings was fined £2.7 million for engaging in similar RPM activities.[13]

The strict approach to RPM taken by the Commission and the CMA can be contrasted with the more relaxed approach of courts and authorities in the US. In its 2007 decision in *Leegin Creative Leather Products v PSKS*,[14] the US Supreme Court overturned the almost century old rule that had made vertical price-fixing per se illegal under s.1 of the Sherman Act. Observing that the economic literature provides various pro-competitive justifications for RPM, the Supreme Court was not convinced that the imposition of minimum resale prices "always or almost always" tends to restrict competition. It therefore concluded that RPM should be analysed under the rule of reason.[15]

In Europe, by contrast, the imposition of fixed or minimum resale prices is treated as a restriction of competition "by object" under art.101(1) TFEU and as a hardcore restriction under art.4(a) of the Vertical Agreements Block Exemption.[16] RPM is seen as harmful to the proper functioning of normal competition "by its very nature" and is therefore presumed to infringe the EU competition rules, regardless of the actual effects on competition.[17] To avoid the prohibition, it must be shown that the pricing restrictions give rise to sufficient pro-competitive efficiencies to meet the criteria for exemption. The Commission's Vertical Guidelines recognise that

> "where a manufacturer introduces a new product, RPM may be helpful during the introductory period of expanding demand to induce distributors to better take into account the manufacturer's interest to promote the product"

and that

> "[i]n some situations, the extra margin provided by RPM may allow retailers to provide (additional) pre-sales services, in particular in case of experience or complex products".[18]

In practice, however, it is very difficult to justify RPM under art.101(3) TFEU.

## The role of algorithms in e-commerce

The Commission's RPM decisions also shed light on the increased use of pricing algorithms and other software tools by retailers and suppliers in e-commerce markets. The Commission commented on the price-setting and price-monitoring functions of such software in its Final Report in the E-commerce Sector Inquiry:

> "[…] [I]ncreased price transparency allows companies to monitor more easily their prices. A majority of retailers track the online prices of competitors. Two thirds of them use automatic software programmes that adjust their own prices based on the observed prices of competitors. With pricing software, detecting deviations from 'recommended' retail prices takes a matter of seconds and manufacturers are increasingly able to monitor and influence retailers' price setting […]."[19]

A report on algorithms submitted by the Commission to the OECD's Competition Committee in June 2017[20] ("Algorithms Report") made similar observations:

> "[…] [O]nline prices are highly transparent. Monitoring can be done at short time intervals and at a low cost. Firms can use software to automatically monitor competitors' prices almost in real time, and adapt prices (or 'reprice') accordingly. The software's repricing methods can be based on more or less complex algorithms, and more or less comprehensive user-defined rules and strategies […]."[21]

In the *Asus*, *D&M*, *Philips* and *Pioneer* cases, the Commission considered that the manufacturers' use of "sophisticated monitoring tools" allowed them "to effectively track resale price setting in the distribution network and to intervene swiftly in case of price decreases".[22] The cases' novelty therefore lies in the manufacturers' use of price-monitoring software to *police* traditional resale pricing restrictions. As the Commission noted in its Algorithms Report,

[11] CMA, "Restricting resale prices: an open letter to suppliers and resellers", 20 June 2017, *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/620454/resale-price-maintenance-open-letter.pdf* [Accessed 10 September 2018].
[12] *Commercial Refrigeration* (CE/9856/14) (24 May 2016) and *Bathroom Fittings* (CE/9857-14) (10 May 2016).
[13] *Light Fittings* (50343) (3 May 2017).
[14] *Leegin Creative Leather Products v PSKS* 127 S. Ct. 2705 (2007).
[15] It is worth noting that the Supreme Court in *Leegin* spoke only about the federal antitrust laws. Certain US states maintain per se prohibitions against RPM in their own antitrust statutes.
[16] Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.
[17] See e.g. *VVR v Sociale Dienst van de Plasstselijke en Gewestelijke Overheidsdiensten* (311/85) EU:C:1987:418; [1989] 4 C.M.L.R. 213 at [17].
[18] Commission Guidelines on Vertical Restraints (2010) OJ C131/01, 19 May 2010, para.225.
[19] Commission, Final Report on the E-commerce Sector Inquiry, COM(2017) 229 final, 10 May 2017, para.13.
[20] Commission, Algorithms and Collusion - Note from the European Union, DAF/COMP/WD(2017)12, 14 June 2017, *https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2017)12&docLanguage=En* [Accessed 10 September 2018].
[21] Algorithms Report, para.9.
[22] Commission Press Release.

> "algorithm-enabled price monitoring does not constitute an RPM offence as such but forms part of the RPM infringement, as it contributes to the effectiveness of the RPM".[23]

The Commission also found that online retailers' use of pricing algorithms exacerbated the impact of the manufacturers' conduct.[24] Where manufacturers were able to force low-pricing online retailers to adopt higher prices than they wished, this "typically had a broader impact on overall online prices" for the relevant products.[25] In her speech announcing the decisions, Commissioner Vestager summarised the effects of the retailers' repricing software as follows:

> "In fact, by targeting specific low-price retailers, the four manufacturers were also able to influence the prices other online retailers charged. This is because online retailers use pricing algorithms […] to constantly monitor, in real time, the prices charged by their competitors. They then adjust their prices accordingly. So if one retailer offers lower prices than others, this prompts other competitors to lower their prices. Conversely, if that retailer puts its prices back up, others will follow."[26]

It remains to be seen whether the evidence in the four decisions supports this simple picture.[27] Particularly in competitive and fragmented markets, a manufacturer's success in getting one or two low-pricing retailers to increase their prices would not necessarily prevent price erosion across the network. Many retailers configure their repricing software to match (or go, for example, 5 per cent below) the lowest price in the market. Consequently, if a manufacturer failed to persuade just a single low-pricing retailer to increase its prices, price erosion would be likely to persist. As the Commission itself acknowledges in its Algorithms Report,

> "repricing software is highly configurable by each user, and would normally be configured to reflect the user's pricing objectives in view of its minimum price, inventory volume, storage costs, seller reputation/reviews, the selection of certain (benchmark) competitors, etc".[28]

The same report presents a more contingent view of the potential effects of retailers' repricing software:

> "[…] [W]hen retailer A adheres to fixed or minimum resale prices (RPM) and is being monitored by retailer B using algorithms, retailer B *may* match A's price. In this way, one retailer's use of RPM *may* spread high prices to other retailers who may not be similarly engaged in RPM."[29]

## Reduction in fines for co-operation

In all four cases, the fines imposed by the Commission were reduced as a result of the companies' co-operation. That co-operation took three main forms:

(a) acknowledging the facts and the infringements of the EU competition rules;
(b) waiving certain procedural rights and accepting a streamlined administrative process; and
(c) providing additional evidence which represented significant added value in relation to the evidence already in the Commission's possession, and which by its nature and level of detail strengthened the Commission's ability to establish the infringement.

The Commission granted fining discounts depending on the extent and timing of the co-operation, ranging from 40 per cent (for Asus, D&M and Philips) to 50 per cent (for Pioneer). The Commission's press release notes that such co-operation "allows the Commission to increase the relevance and impact of decisions by speeding up its investigations". At the same time, "companies can benefit from significant reductions of the fines depending on the level of cooperation".

With these four decisions, the Commission has broadened its practice of rewarding co-operation in non-cartel cases, taking a further step towards a more consent-oriented enforcement policy. The process used by the Commission can be seen as a "hybrid" co-operation procedure, in the sense that it appears to have been inspired by elements of both the cartel settlement and leniency procedures.[30] Only one non-cartel case—*ARA Foreclosure*[31]—has previously been settled in a similar way. In that case, which concerned an abuse of dominance, ARA co-operated with the Commission by acknowledging the infringement and ensuring the decision could benefit from administrative efficiencies, as well as

[23] Algorithms Report, para.14.
[24] The Commission did not allege that the retailers had used pricing software to pursue automatised price co-ordination.
[25] Commission Press Release.
[26] Commission, "Statement by Commissioner Vestager on Commission decision to impose fines on four consumer electronics manufacturers for fixing online resale prices", 24 July 2018, *http://europa.eu/rapid/press-release_STATEMENT-18-4665_en.htm* [Accessed 10 September 2018].
[27] As noted above, non-confidential versions of the decisions have not been published at the time of writing.
[28] Algorithms Report, para.9.
[29] Algorithms Report, para.16. Emphasis added.
[30] Under the Commission's cartel settlement procedure, companies can be rewarded with a fining reduction of 10 per cent if they acknowledge infringement and accept a streamlined administrative process. Under the Commission's leniency procedure, cartelists that provide significant added value to the Commission's investigation can benefit from reductions in fines. Under the Leniency Notice, the level of fining reduction depends on the timing and extent of the additional valuable evidence provided.
[31] *ARA Foreclosure* (AT.39759), Commission decision of 20 September 2016.

by proposing a structural remedy. The Commission rewarded this co-operation by reducing the fine by 30 per cent.

At the same time as issuing its decision against ARA, the Commission published a short "factsheet"[32] outlining its thinking on the various ways in which companies can co-operate in antitrust cases. It notes that: (i) in non-cartel cases, there is currently limited practice for rewarding companies' co-operation where the Commission wants to issue a prohibition decision[33]; (ii) not all non-cartel cases are suitable for settlement through commitments under art.9 of Reg.1/2003; and (iii) the leniency and settlement procedures can only be applied in cartel cases. However, the factsheet goes on to emphasise that whilst there is no structured framework for rewarding companies' co-operation in non-cartel cases leading to a prohibition decision, such co-operation can nevertheless be rewarded within the framework of the Commission's Fining Guidelines.[34] The Commission did this in the ARA case by applying para.37 of the Guidelines.[35]

It remains to be seen whether the "hybrid" co-operation procedure used by the Commission in its recent RPM investigations will become a common way to reach art.7 prohibition decisions in non-cartel cases. It may become important for the Commission to consider formalising procedural safeguards (for example by introducing a new Notice[36]) if the procedure is to develop further. While the potential benefits to both the Commission and companies under investigation are clear, the procedure is unlikely to work in all cases. It is instead likely to be most effective where (i) there is a solid case against the company under investigation and (ii) the Commission and the company can see eye-to-eye on the core facts, on the legal characterisation of the infringement and on what constitutes a reasonable fine. As with all settlement procedures, concern about potential exposure to private enforcement will also play a role in a company's willingness to settle and, potentially, the scope of any settlement that can be agreed. In practice, if a case requires a novel legal theory or the Commission needs to rely on hotly contested facts, it is unlikely to be suitable for settlement.

## Conclusion

The decisions against Asus, D&M, Philips and Pioneer provide concrete evidence that the Commission takes a dim view of anti-competitive behaviour in e-commerce markets which seeks to prevent price competition between retailers. As Commissioner Vestager put it in her statement announcing the decisions, such practices are—in the Commission's eyes—"a serious violation of European competition rules". Further, whilst the four decisions do not represent a fully-fledged attack on pricing algorithms and other software tools, they do show that the Commission is alive to the potential for such tools to be used as part of an anti-competitive scheme. Given recent economic and technological developments in e-commerce markets, it would not be surprising if pricing algorithms and other software tools featured more prominently in future Commission decisions.

In the final analysis, however, the procedural implications of the decisions may be equally significant. Taking inspiration from elements of its cartel settlement and leniency processes, the Commission has further broadened the scope of application of consensual solutions in its competition enforcement and has shown that it is willing to recognise companies' effective co-operation in vertical cases in a way which goes beyond its practice under the previous fining regime. The Commission is likely to want to make use of the "hybrid" co-operation procedure in future non-cartel cases. If this procedure is to develop further, the Commission may need to consider formalising its framework, rather than continuing to rely on the somewhat vague para.37 of its Fining Guidelines. Such formalisation would give companies under investigation greater certainty about what the hybrid co-operation procedure entails and the benefits that they could expect to obtain.

[32] Commission factsheet, "Antitrust: reduction of fines for cooperation" (undated), *http://ec.europa.eu/competition/antitrust/ara_factsheet_en.pdf* [Accessed 10 September 2018].
[33] As the factsheet acknowledges, co-operation by parties was rewarded by the Commission in a handful of non-cartel cases before the entry into force of Reg.1/2003. See, for example, *Eurofix-Bauco v Hilti* (IV/30.787 and 31.488) (Commission decision of 22 December 1987) and *PO Video Games* (COMP/35.587), *PO Nintendo Distribution* (COMP/35.706) and *Omega — Nintendo* (COMP/36.321) (Commission decision of 30 October 2002).
[34] Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003 (2006) OJ C210/2, 1 September 2006.
[35] Paragraph 37 of the Guidelines states: "Although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology […]".
[36] Such a Notice could be akin to the ones currently in place for the Commission's leniency and cartel settlement procedures.