

Newsletter, 17 August 2018

## Digital Pricing, Resale Price Maintenance and the use of algorithms

European Commission fines four consumer electronics manufacturers EUR 110 million for imposing fixed or minimum resale prices on their online retailers.

Already in its E-commerce Sector Inquiry the European Commission (“Commission”) has expressed the concern that pricing software could allow monitoring retail prices and thereby reinforce Resale Price Maintenance (RPM) arrangements.<sup>1</sup> On 24 July 2018, the Commission has imposed fines totalling EUR 110 million, in four separate decisions, on the consumer electronic manufacturers Asus, Denon & Marantz, Philips and Pioneer for fixing online resale prices.<sup>2</sup> What is interesting about those cases is that firstly they constitute the first fining decisions of the Commission in RPM-cases since many years, secondly the Commission reduced the fines even though the leniency and settlement guidelines only apply to horizontal cartels, and thirdly the use of algorithms was considered as aggravating factor. This newsletter therefore also includes a wrap-up of the latest discussions on digital pricing and the use of algorithms.

### *Commission’s fining decision for RPM*

The facts of the four cases seem to be rather straightforward. All four manufacturers restricted the ability of their online retailers to set their own retail prices for widely used consumer electronics products such as kitchen appliances, notebooks and hi-fi products. What happened is that the manufacturers intervened particularly with online retailers who offered their products at low prices. Whenever those retailers did not follow the prices requested by manufacturers, they faced threats or sanctions such as blocking of supplies. Pioneer also limited the ability of its retailers to sell cross-border to consumers in other Member States in order to sustain different resale prices in different Member States. Whereas the Commission has left it in the past to the national competition authorities to decide on such cases, it has

obviously decided to turn its enforcement focus on vertical restraints.

Since the four companies cooperated with the Commission, the Commission granted reductions to the fines ranging from 40% to 50%. Even though the Commission’s leniency and settlement guidelines only provide reductions of fines for horizontal cases, the Commission granted those reductions in order to reward the companies’ cooperation. Companies seem thus to be able to achieve similar benefits in vertical cases.

Interesting about the case is furthermore, that the use of algorithms by the online retailers was considered as aggravating the impact of the RPM. Given that many retailers, including the biggest online retailers, use pricing algorithms which automatically adapt retail prices to those of competitors, the pricing restrictions imposed on low pricing online retailers had a broader impact on overall online prices for the respective consumer electronics products. Moreover, the use of sophisticated monitoring tools allowed the manufacturers to effectively track resale price setting in the distribution network and to intervene swiftly in case of price decreases. That does not mean that the Commission has considered the use of the algorithms in those cases as unlawful behaviour. However, the Commission has recognized in the factual context that the use of algorithms had a specific impact.

### *Digital pricing and the use of algorithms*

Competition concerns over algorithms are linked to the impact they can have on prices, particularly concerning the monitoring of market prices and the implementation of price-fixing agreements. Price-fixing is of course not new to competition law. The use of algorithms, however, brings new collusive means. Commissioner Vestager already stated during a conference in 2017 that “pricing algorithms need to be built in a way that doesn’t allow them to collude”.<sup>3</sup>

<sup>1</sup> EU-Commission, Staff Working Document, Final [Report on the E-commerce Sector Inquiry](#), 2017.

<sup>2</sup> EU-Commission, Press release, 24 July 2018, [IP/18/4601](#).

<sup>3</sup> Vestager, BKartA 18<sup>th</sup> Conference on Competition, Berlin, 16 March 2017, [speech](#).

Four scenarios are currently discussed in which pricing algorithms may promote anti-competitive collusion<sup>4</sup>:

- The first is where firms collude as in a traditional cartel, but use computers to manage or implement the cartel more effectively, or to monitor compliance, for example by utilising real-time data analysis.<sup>5</sup> In those scenarios the software is merely used as a tool to collude.
- The second setting refers to a hub-and-spoke scenario in which pricing algorithms may be used to determine prices charged by numerous users.<sup>6</sup> Again, the software functions as a means for the cartel behaviour. In that regard it is noteworthy that, for example, the Luxembourg Competition Authority has only recently exempted the algorithmic price-fixing arrangement of Webtaxi, a booking platform for taxi services in Luxembourg, on grounds of economic efficiency, because the effect of the mechanism were inter alia price reductions.<sup>7</sup>
- In the third scenario, each firm independently adopts an algorithm that continually monitors and adjusts prices according to market data. Although this can lead to tacit collusion, there is still no agreement or concerted practice between companies that could be considered as illegal behaviour. However, this scenario is likely to create problems in practice: Where a competition authority finds that a number of competitors have used a similar algorithm to “align” their prices, it will be difficult to prove when the line of an illegal concerted practice is crossed – or that it has not been crossed.
- The fourth scenario relates to the expectation that machine learning and the increasing sophistication of algorithms expands tacit collusion i.e. will allow algorithms to communicate with each other. In that case the question will circle around whether companies will still be considered as being responsible for the software’s “behaviour”.

### Authorities are keeping pace

Apart from the investigations undertaken against companies using pricing algorithms in collusion the competition authorities around the world are preparing themselves in order to keep pace with the use of algorithms, artificial intelligence and

big data in business. The American Department of Justice and the British Competition and Markets Authority have built up technology teams consisting of data scientist, computer experts and economists. The French Autorité de la Concurrence and the German Bundeskartellamt launched a joint project on algorithms and competition in June 2018.<sup>8</sup> It will mainly aim at analyzing the challenges raised by algorithms and at identifying conceptual approaches to meet them. Also the German Monopolies Commission (Monopolkommission) discusses in its XXII Main Report the influence of price algorithms on collusion.<sup>9</sup>

### Comment

The Commission has already made clear with its E-commerce Sector Inquiry that it has an increased interest in vertical restrictions. That it is also prepared to punish such behaviour and to take the use of algorithms into account has been demonstrated with the most recent decisions. Companies must therefore not attempt to dictate the price at which products are resold by retailers. In addition, when using pricing software the companies should at least understand what this software is designed to do, why it was put in place and what the business does with the pricing information provided. And finally, companies should keep an eye on the enforcement practice of the competition authorities or regulatory activities relating to pricing algorithms.



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<sup>4</sup> Ezrachi/Stucke, Virtual Competition – The Promise and perils of the Algorithms-Driven Economy 2016, p. 35.

<sup>5</sup> CMA, 12 August 2016, [Amazon Poster](#), Case 50223.

<sup>6</sup> CJEU, 21 January 2016, C-74/14, para 50 – [Eturas](#).

<sup>7</sup> Conseil de la Concurrence, [decision 2018 FO 01](#), 7 June 2018.

*This publication is intended to highlight issues. It is not intended to be comprehensive nor to provide legal advice. Any liability which might arise from the reliance on the information is excluded.*

<sup>8</sup> BKartA, [Press release](#), 19 June 2018.

<sup>9</sup> Monopolies Commission, [XXII Main Report 2018](#).