

Resale Price Maintenance and Artificial Intelligence: A First Glimpse into Growing Challenges for EU Competition Law

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With artificial intelligence, and in particular pricing algorithms, under increasing scrutiny from worldwide competition regulators,[1] the European Commission's (the "Commission") latest sanctions against four electronic consumer manufacturers for engaging in online resale price maintenance – the first such decisions adopted by the Commission, and its first 'resale price maintenance' decisions in 15 years – sheds important light on this topic. In particular, it confronts the issue of vertical restraints implemented by some manufacturers in the EU, at times in only a few national markets, whose effects are compounded by price comparison tools and pricing algorithms.

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On 24 July 2018, the Commission sanctioned four electronic consumer manufacturers – Asus, Denons & Marantz, Philips and Pioneer – for engaging in "fixed or minimum resale price maintenance ("RPM")" by restricting the ability of online retailers to set their own retail prices for widely used consumer electronics products, including tablets, headphones, speakers and kitchen appliances.[2] Commissioner Margrethe Vestager declared: "As a result of the actions taken by these four companies, millions of European consumers faced higher prices for kitchen appliances, hair dryers, notebook computers, headphones and many other products. This is illegal under EU antitrust rules." [3]

The millions of consumers mentioned by Commissioner Vestager are, however, not only online shoppers of the Asus, Denons & Marantz, Philips and Pioneer products referred to in the Commission's decisions, but could also include purchasers of similar products of different brands. Indeed, as a result of the vast majority of online retailers using pricing algorithms,[4] which automatically adopt retail prices to those of competitors, the pricing restrictions unlawfully imposed by the four infringing companies on low-price online retailers would have had an impact on overall online prices for similar consumer electronics products of other manufacturers.

The potential facilitating role of algorithms on anticompetitive conduct, used for instance to automatically fix prices, horizontally (*i.e.*, cartel behavior) or vertically (*i.e.*, RPM) has, with good reason, become one of the hottest topics in EU competition law over the past few years, in particular regarding the question of the responsibility of the company controlling the algorithm.[5] But the Commission's recent decisions now seem to point in another direction: the effects of RPM is aggravated by competitors' pricing practices, and has become a focus of EU competition authorities.

Thinking a step further, consumers' right to seek redress and obtain damages for the harm caused by such anticompetitive behavior should capture the widespread effect on the market if full redress is to be provided.

Vertical restraints under EU competition rules.

Under EU competition rules, manufacturers should not take any actions that interfere with the freedom of retailers to set their final prices to customers by establishing a fixed or minimum resale price or price level required to be observed by the retailers. Such agreements are deemed to be a restriction of competition "by object" (akin to a "per se" infringement) under Article 101(1) of the Treaty on the Functioning of the European Union, and a hardcore restriction within the meaning of Article 4(a) of the Commission's Vertical Block Exemption Regulation. They are subject to a strict assessment of possible exemptions as regards market efficiency, market share thresholds, and other situations where a pricing recommendation does not amount to a minimum or fixed resale price because of threats, pressure or incentives.[6]

A number of competition authorities across Europe have fined manufacturers for RPM practices, including the German Bundeskartellamt, which imposed fines in 2015 and 2016 on 27 companies in the food retail sector for illegally fixing retail prices,[7] and the UK's Competition and Markets Authority ("CMA"), which issued a decision in May 2017 finding that several businesses in the light fittings sector infringed competition law as a result of the setting of minimum prices for online sales. [8] But until now, the Commission has typically left such enforcement action to the national competition authorities. The sanctions published by the Commission on 24 July 2018 against Asus, Denons & Marantz, Philips and Pioneer were its first RPM decisions in 15 years; the last fine imposed by the Commission to sanction RPM dates back to 2003,[9] in a then completely different economic environment, and whose focus was on bricks-and-mortar (rather than online) retailers.

In the recent Commission decisions, the manufacturers used sophisticated monitoring tools, namely pricing algorithms, to effectively track resale price setting in the distribution network, and to intervene swiftly in case of pricing changes. Online retailers offering the products at the lowest prices were specifically targeted by the practices, and faced threats or sanctions such as having their supplies blocked if they sold the applicable prices below the prices required by the manufacturers. The scope of practices sanctioned differed across all four manufacturers. While the bulk of the practices took place between 2011 and 2013, in some instances the conduct continued until 2015, and spanned a number of countries.

The role of pricing algorithms in vertical restraints.

Pricing software, being a powerful tool for manufacturers and retailers to frequently, if not instantaneously, monitor online prices, also makes it easier for manufacturers to detect deviations from their pricing requirements and retaliate accordingly, thus contributing to the effectiveness of RPM practices and ensuring a more stable and durable effect on prices.

Interestingly, the algorithm not only facilitated the RPM practices. Similar software used by competitors also contributed to intensify the effects of such practices, affecting the market prices more generally. This particularity was emphasized by Commissioner Vestager:

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 and price comparison websites 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, other will follow.[10]

EU competition enforcers and the courts have already positioned themselves regarding the role of algorithms as regards horizontal agreements, which may facilitate or strengthen collusion among retailers, allowing and accelerating the detection of deviations.[11] But the role of algorithms is two-fold: not only does it facilitate unlawful RPM, but it also contributes to spreading the effects of a vertical restraint of competition.

In its July 2018 decisions, the Commission did not, at least in the press release published to date, touch upon any assessment or quantification of the effects on the market or consumer welfare, although Commissioner Vestager did note the immediate effect on consumers that the RPM practices would have had. This raises questions as regards private enforcement, where consumers have suffered harm on a large scale and may want to seek redress accordingly. Specifically, to what extent is the unlawful conduct confined to the prices charged by the infringing undertakings for the products in question; what of the pricing algorithms that could have compounded the effect of the RPM across the market; how can consumers be redressed for the higher prices they will have paid as a result?

A parallel with the “umbrella pricing” theory?

In the context of horizontal agreements, the European Court of Justice (“ECJ”) has endorsed the validity of a causal relationship between a cartel and “umbrella” pricing, namely inflated prices charged by non-cartelists whose prices are benchmarked against market-wide prices which are artificially inflated as a result of a cartel. The ECJ held in this context that: “even if the determination of an offer price is a purely autonomous decision, taken by the undertaking not party to a cartel, it must none the less be stated that such decision has been able to be taken by reference to a market price distorted by that cartel and, as a result, contrary to the competition rules.”[12]

This begs the question as to whether, if consumers are able to claim compensation from cartelists for inflated prices paid to both cartelists and non-cartelists, by analogy they may also be able to claim compensation from the infringing companies for competitors’ similarly inflated prices arising from the RPM practices whose effects are compounded by algorithms. Such a case has yet to be brought.

“E-commerce brings its own challenges for competition”.

These issues are all the more important in the context of practices targeting specific products in specific countries. The Commission has also expressed concerns on market segmentation, which can be the consequence of technical measures such as geo-blocking (also addressed in the description of the Pioneer unlawful practices), and has opened several investigations following on from the e-commerce sector inquiry Final Report adopted on 10 May 2017.[13]

In that context, while e-commerce has lowered national borders and contributed to the growth of cross-border trade within the European Union (and beyond), technological progress may also facilitate implementation and monitoring of vertical (and horizontal) restrictions that may be contrary to the principles of EU law.

A joint approach to tackle fast-evolving challenges.

The nature of pricing algorithms and more importantly of self-learning algorithms, coupled with endless scientific progress, poses challenges to EU competition authorities to not only detect but also assess the potential harm arising from practices involving artificial intelligence. Accordingly, the fast-evolving nature of the digital markets requires a pro-active, flexible, and creative approach to competition law enforcement, at all levels.

This involves, for example, close cooperation between competition enforcers in the development of their understanding of the challenges raised by algorithms, as is demonstrated by the joint project launched in June 2018 by the French Autorité de la concurrence and the German Bundeskartellamt on algorithms and their implications on competition, seeking to identify conceptual approaches to meet the challenges raised by algorithms;^[14] and the CMA's recent appointment of a new data unit "to better understand the impact that data, machine learning and other algorithms have on markets and people."^[15]

Apart from joint forces amongst competition enforcers, noteworthy initiatives have been developed beyond the sole prism of competition law, for instance with the development of a larger legislative toolkit to create a European Digital Single Market,^[16] This involves, among many other things, the concepts of data privacy and other consumer rights.^[17] It also involves the relationship between competition enforcers and private businesses, such as the CMA's Screening for Cartels tool,^[18] which provides the government enforcer with the tools to detect and defeat cartels, using algorithms to spot unusual bidder behavior and pricing patterns which may indicate that bid-rigging has taken place, and therefore potentially defeat algorithms with competing algorithms.

Footnotes

[1] See for instance a previous update published in the Hausfeld Competition Bulletin, *Are Antitrust Laws Up to the Task? A US/EU Perspective on Anti-Competitive Algorithm Behavior*, 10 August 2017.

[2] European Commission Press Release, *Antitrust: Commission fines four consumer electronics manufacturers for fixing online resale prices*, Cases AT.40465 (Asus), AT.40469 (Denon & Marantz), AT.40181 (Philips) and AT.40182 (Pioneer), Brussels, 24 July 2018.

[3] *Statement by Commissioner Vestager on Commission decision to impose fines on four consumer electronics manufacturers for fixing online resale prices*, Brussels, 24 July 2018.

[4] European Commission, *Final report on the E-commerce Sector Inquiry*, COM(2017) 229 final, Brussels, 10 May 2017: "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."

[5] OECD, Directorate For Financial And Enterprise Affairs Competition Committee, *Algorithms and Collusion - Note from the European Union*, 14 June 2017, DAF/COMP/WD(2017)12, p.9.

[6] Commission Regulation (EU) No 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.

[7] Bundeskartellamt, *Vertical price fixing - Düsseldorf Higher Regional Court raises fine against drugstore chain Rossmann*, 1 March 2018.

[8] CMA, *Online resale price maintenance in the light fittings sector*, Case 50343, 3 May 2017.

[9] European Commission, Decision of 16 July 2003, Case COMP/37.975 PO/Yamaha.

[10] *Statement by Commissioner Vestager on Commission decision to impose fines on four consumer electronics manufacturers for fixing online resale prices*, Brussels, 24 July 2018.

[11] In that vein, the CMA fined online sellers of poster and frames for automated collusion, through automated re-pricing software to monitor and adjust the parties' prices, on Amazon's UK website (*Online sales of posters and frames*, Case 50223, 12 August 2016), and the the Court of Justice of the European Union confirmed that companies cannot escape liability where collusion has been achieved and executed through automated systems (Case C-74/14, Judgment of 21 January 2016 — *'Eturas' UAB and Others v Lietuvos Respublikos konkurencijos taryba*).

[12] Case C-557/12, Judgment of the Court of 5 June 2014 *Kone AG and others v ÖBB-Infrastruktur AG*.

[13] Autorité de la concurrence, 'The French Autorité de la', 19 June 2018.

[14] CMA, *CMA appoints Stefan Hunt to top digital role*, <https://www.gov.uk/government/news/cma-appoints-stefan-hunt-to-top-digital-role>, 18 May 2018.

[15] *Vertical restraints, digital marketplaces, and enforcement tools*, DG Johannes Laitenberger, New Delhi, India ICN Annual Conference 2018.

[16] The creation on 14 June 2018 of a new EU High Level Group on Artificial Intelligence involving 52 experts from across industry, business and civil society aiming at making recommendations on how to address mid-and long-term challenges and opportunities related to artificial intelligence, including from a legal perspective, is a further step towards a proactive approach to digital challenges.

[17] CMA, *CMA launches digital tool to fight bid-rigging*, <https://www.gov.uk/government/news/cma-launches-digital-tool-to-fight-bid-rigging>, 15 December 2017.

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