



# The price is not right: European Commission sanctions consumer electronics manufacturers for resale price maintenance entrenched by pricing algorithms and monitoring technologies

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On 24 July 2018, the European Commission announced four separate decisions imposing total fines of €111 million on consumer electronics manufacturers for breaching EU competition rules by imposing fixed or minimum retail prices for their products sold online – so-called resale price maintenance or RPM. These cases are significant because:

1. They are the first fines in a series of e-commerce investigations the Commission has been pursuing since the start of 2017, with several other cases ongoing and e-commerce becoming an important area of focus for Commission enforcement action after possible competition concerns were identified during a sector inquiry conducted as part of its Digital Single Market strategy.
2. It is also the first time the Commission has highlighted the role of pricing algorithms and monitoring software in exacerbating the impact of an infringement and enabling quick intervention by the parties to track and put to an end price decreases. Such technologies are expected to become increasingly prominent in future enforcement cases with this being just the beginning.
3. Prior to these cases RPM had not been an area of priority for the Commission based on cases pursued over the past 15 years and despite being deemed a serious infringement of the EU competition rules. While recent enforcement has been greater at national level by competition authorities in individual EU Member

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These RPM cases flowed from the Commission's e-commerce sector inquiry which concluded in May 2017 and found RPM type restrictions to be by far the most widespread of restrictions of competition in e-commerce markets. The sector inquiry also led to a flurry of other cases involving e-commerce that are ongoing related to geo-blocking and video games, hotel pricing and brand licensing, demonstrating how the focus of an authority's investigations can quickly hone in on a particular sector or type of issue once on its radar.

Prohibited RPM involves manufacturers imposing fixed or minimum resale prices on their customers. Recommended prices (RRPs) and maximum prices are generally fine – provided manufacturers do not compel or exert pressure on retailers to stick to these prices such that they actually become fixed or minimum prices in practice.

In the four new RPM decisions (cases AT.40181, AT.40182, AT.40465 and AT.40469) the Commission found that the relevant manufacturers – Asus, Denon & Marantz, Philips and Pioneer – used threats or sanctions such as blocking of supplies to prevent online retailers offering their products at low prices. The conduct by the four manufacturers was similar but not identical, beginning in 2011 but ending at different times and affecting different EU countries and products. Pioneer's infringement also included restricting cross-border sales as well as RPM.

Notable across all four cases is that the Commission for the first time found the infringements were exacerbated by use of pricing algorithms by online retailers which automatically adapt retail prices to those of competitors. This meant the restrictions imposed on low pricing online retailers typically had a broader impact on overall online prices. The Commission also identified that sophisticated monitoring tools allowed the manufacturers to track resale prices in their distribution networks and to intervene quickly when there were price decreases.

Pricing algorithms and sophisticated technologies are expected to have an increasing role to play in future antitrust cases, with these RPM cases at just the start of this trend. The Commission and other global authorities are grappling with issues such as new technologies and digital markets and whether and how these fit



year to focus on such issues, and recently flagged in response to the UK Government's "Modernising consumer markets" green paper consultation that legislative changes may be helpful to tackle challenges including ongoing technological advances. The French and German competition authorities have also launched a joint study on algorithms in recent months.

Discounting the technological aspect here, RPM of itself is not a novel type of infringement but has instead long been characterised as a serious "hard-core" or "by object" infringement of the EU competition rules prohibiting anti-competitive agreements (i.e. Article 101 of the Treaty on the Functioning of the European Union and equivalent national rules). However, RPM had not been an area of high priority for the Commission of late, although national authorities such as Germany's Bundeskartellamt and the CMA in the UK have shown more appetite in this area, and recognising the Commission has in recent years investigated cases involving price parity clauses that have a relationship with RPM.

Despite the lack of recent cases, the EU's "by object" classification of RPM – which means RPM is deemed anti-competitive by its very nature and there is no requirement to prove actual harm to establish an infringement – is increasingly controversial, noting that economically RPM is unlikely to be harmful absent market power. The divergent "rule of reason" approach in the US – balancing pro-competitive benefits against anti-competitive harm – following the Leegin case in 2010 which overturned automatic "per se" illegality for RPM has only fuelled the debate. While parties to EU cases are also able to demonstrate pro-competitive benefits to exempt conduct from amounting to an infringement, in practice this is very difficult for conduct deemed a "by object" infringement.

Although the Commission is yet to publish its detailed reasoning and analysis behind the fines just announced, Commissioner Vestager's announcement that "millions of European consumers faced higher prices for kitchen appliances, hair dryers, notebook computers, headphones and many other products" as a result of the four companies' actions suggests the Commission found evidence of actual harm this time. It will be interesting to see how this factors into the Commission's detailed analysis. However, we do not expect RPM to be moved out of the "by object" box anytime soon.



infringements are serious – especially as these figures include significant reductions for cooperation, Pioneer having secured a 50 per cent reduction in fine and the other three companies 40 per cent reductions. Parties to investigations can secure full or partial immunity or reductions in fines under the Commission’s leniency and settlement procedures by cooperating and adding significant value to the Commission’s case. While those procedures are limited to horizontal cartel arrangements between competitors and do not strictly cover vertical arrangements such as RPM, from a policy perspective it is helpful to see the Commission recognising the benefits of parties’ cooperation in broader types of cases such as these.

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