

Competition & Regulatory Newsletter

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European Commission opens four further investigations in a move to crack down on anti-competitive practices in online retailing

The European Commission recently opened investigations into the distribution practices of Guess, Nike, Sanrio and Universal Studios, the latest in the series of probes into the e-commerce sector. These investigations come shortly after the conclusion of the Commission's two-year inquiry into the e-commerce sector, which was aimed at identifying potential barriers to competition following an extensive fact gathering exercise. The Commission's final [report](#) was published on 10 May 2017.

The e-commerce sector final report

The final report notes that the growth of online trade has brought increased price transparency and price competition to the sector, but has also prompted manufacturers and retailers to reconsider their distribution strategies. The Commission identified a number of trends in the e-commerce sector which affect the business practices of online retailers:

- (i) Increased direct retail activities by manufacturers, with many manufacturers now competing directly with their distributors by also selling their products through their own online retail shops;
- (ii) Expansion of selective distribution, as manufacturers seek to better control their distribution network, in particular in terms of the quality of distribution; and
- (iii) More contractual sales restrictions in agreements between manufacturers and distributors, such as pricing restrictions or restrictions on cross-border sales.

Over the course of the inquiry, the Commission examined over 8,000 contracts from 1,900 companies selling consumer goods and digital content online in the EU. The final report sets out the Commission's position on a number of potentially anti-competitive practices, notably (i) geo-blocking measures, (ii) restrictions on the use of online marketplaces, (iii) requirements for brick and

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mortar shops, (iv) restrictions on price comparison tools, and (v) dual pricing. A full summary of the Commission's findings can be found in our [Competition Law in the Digital Age newsletter](#).

The Commission's findings broadly follow those set out in the Commission's preliminary [report](#) on the e-commerce sector, which was published in September 2016. Our briefing on the preliminary report can be found [here](#).

The preliminary report had already prompted the Commission to open three [investigations](#) in February 2017 into potential anti-competitive online pricing practices of a number of companies active in the consumer electronics, video games and hotel markets. The Commission also, unusually, [identified](#) a number of companies, such as Mango, Pull & Bear, Dorothy Perkins and De Longhi, that reviewed their commercial agreements on their own initiative to ensure that they were in line with the Commission's preliminary findings.

Commission opens investigations into Guess, Nike, Sanrio and Universal Studios

On 6 June 2017 the Commission [opened](#) a formal investigation into the distribution practices of the clothing and accessories designer, distributor and licensor Guess. The investigation aims to determine whether Guess's distribution agreements impose cross-border sales restrictions on retailers, preventing them from making online sales to consumers in other Member States (or preventing wholesalers from selling to retailers in other Member States). Competition Commissioner Margrethe Vestager commented that *"... one of the key benefits of the EU's Single Market is that consumers can shop around for a better deal."* Distribution agreements that prevent cross-border sales may breach Article 101 of the Treaty on the Functioning of the European Union, as agreements that prevent, restrict or distort competition within the internal market.

On 14 June 2017 the Commission [announced](#) that it had launched three further investigations into the licensing and distribution practices of Nike, Universal Studios and Sanrio, in their roles as brand licensors. These three companies license intellectual property rights to manufacturers of merchandising products such as the Fútbol Club Barcelona, Minions and Hello Kitty merchandise. The Commission is concerned that consumers may have had less choice and paid higher prices for merchandised products as a result of restrictions on cross-border and online sales imposed by Nike, Sanrio and Universal Studios on the manufacturers.

Further developments

The four investigations are part of a wider Commission crack down on anti-competitive business practices in the e-commerce sector. Further Commission investigations can be expected, and these investigations may whet national competition authorities' appetite to open their own investigations in the e-commerce sector.

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Other developments

Antitrust

European Commission decides on yet another car parts settlement, this time fining car lighting system producers

On 21 June 2017 the European Commission **announced** fines totalling €27 million for three companies which had been engaged in a cartel relating to the supply of spare parts for vehicle lighting systems (such as headlamps and daytime running lights) to manufacturers of passenger and commercial vehicles after the end of mass production of a car model.

The Commission found that Automotive Lighting, Hella and Valeo coordinated prices and other trading conditions for the supply of vehicle lighting systems across the EEA for a period of more than three years.

The cartelists benefited from reductions under the **2006 Leniency Notice**. In revealing the existence of the cartel, Valeo received full immunity and therefore avoided a fine of over €30.5 million. Automotive Lighting and Hella benefited from reductions in the level of their fines of 35 per cent and 20 per cent respectively.

In addition, since all three companies admitted that they had been involved in the cartel and agreed to settle the case under the **2008 Settlement Notice**, they each benefited from a reduction of 10 per cent in the amount of any fines imposed upon them.

After the leniency and settlement reductions, the fines imposed upon Automotive Lighting and Hella therefore amounted to €16.4 million and €10.4 million respectively.

The Commission's decision in this case is the culmination of yet another investigation into suspected cartels in the automotive parts sector since 2012, bringing the total number of decisions to seven. This case, however, is the first that relates to replacement parts for vehicles that are out of production. Most recently, we **reported** on the Commission's decision in March 2017 to fine six companies (including Valeo) which were engaged in cartels relating to the supply of air conditioning and engine cooling systems.

CMA publishes resale price maintenance decision in light fittings case and updates its open letter about restricting online resale prices

On 20 June 2017 the Competition and Markets Authority (CMA) **published** the non-confidential version of its infringement decision fining The National Lighting Company (NLC) and three subsidiaries, Saxby, Endon and Poole (together, the NLC Group) for entering into resale price maintenance (RPM) agreements.

The specific infringements related to the following:

- (i) NLC, Poole and Saxby participated in an agreement and/or concerted practice with a reseller between 31 October 2012 and 25 February 2013 whereby the reseller would not sell Saxby-branded products below a specified online price (the Saxby infringement); and

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- (ii) NLC, Poole and Endon participated in an agreement and/or concerted practice with a reseller between 31 May 2013 and 15 June 2016 whereby the reseller would not sell Endon-branded products below a specified online price (the Endon infringement).

The fines imposed on the NLC Group for these infringements amounted to £2.7 million in total. The NLC Group benefitted from reductions of 30 per cent and 20 per cent for, respectively, a successful leniency application and voluntarily entering into settlement with the CMA. The CMA decided, however, to increase the fine for the Endon infringement by 25 per cent because Endon had ignored a warning letter from the CMA in May 2012 (stating that it was potentially infringing competition law due to RPM practices).

In a separate but linked development, the CMA has [reissued](#) its open letter to suppliers and retailers about restricting online resale prices. To reflect the latest developments in the light fittings case, the letter revises the advice that was originally issued in May 2016 (following the imposition of fines in relation to bathroom fittings and commercial catering equipment cartels).

The updated letter explains the sort of practices that are deemed to amount to RPM (including, for instance, the use of minimum internet advertised price policies) and advises businesses on what to do if they are or may have been engaged in such practices. It also cautions that both retailers and suppliers may be fined by the CMA if they are found to have been involved in RPM. Finally, it notes that, in view of the light fittings case, warning letters should be taken seriously.

General competition

Hong Kong Competition Commission announces appointment of new Chief Executive Officer

On 19 June 2017 the Hong Kong Competition Commission (HKCC) [announced](#) the appointment of Mr Brent Snyder as the next Chief Executive Officer (CEO) of the HKCC. Mr Snyder will be CEO for a term of three years, starting 4 September 2017. He will be the third CEO of the HKCC since it was established in 2013, and will succeed Ms Rose Webb, whose term as CEO comes to an end on 2 September 2017.

Mr Snyder previously served as Deputy Assistant Attorney General (DAAG) for Criminal Enforcement in the Antitrust Division of the United States Department of Justice (DoJ) from 2013 until 2017. From January to April 2017, Mr Snyder was Acting Assistant Attorney General leading the Antitrust Division.

In the Antitrust Division of the DoJ, Mr Snyder worked on cartel investigations and trials including thin-film transistor liquid crystal display panels, coastal water freight and air transportation. While serving as DAAG, he led the criminal enforcement function overseeing enforcement, prosecutions, leniency and other policy work.

Mr Snyder's appointment as CEO is positive news for the enforcement of the Competition Ordinance in Hong Kong. The HKCC will benefit greatly from his experience in pursuing cartel investigations in a jurisdiction with a prosecutorial system. The HKCC's first case before the Competition Tribunal, concerning allegations of bid-rigging, had its first case management conference on 26 May 2017. Following the case management conference, the Competition Tribunal issued a [decision](#) on 12 June 2017 granting broad confidentiality protections to the parties, thereby limiting disclosure of documents.

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