SLAUGHTER AND MAY

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Commission fines consumer electronics manufacturers for online retail price restrictions

On 24 July 2018 the European Commission **announced** fines totalling €111 million against Asus, Denon & Marantz, Philips and Pioneer for imposing fixed or minimum resale prices on retailers of their products, contrary to EU competition law. This is the first time in 15 years that the Commission has issued fines for such violations.

The Commission found that the four manufacturers restricted the ability of online retailers to set their own retail prices for a variety of widely-used consumer electronics products, such as kitchen appliances, notebooks and hi-fi products. Commissioner Vestager **said** that "*by stopping retailers from offering lower prices, the four manufacturers denied consumers the full benefits of e-commerce*". She went on to say that the decisions therefore "*show that EU competition rules serve to protect consumers where companies stand in the way of more price competition and better choice*".

Background

The Commission announced its investigation into the conduct of the four manufacturers on 2 February 2017. This followed the Commission's inquiry into the e-commerce sector, conducted as part of its Digital Single Market strategy. The results of this inquiry were published in May 2017 (see our **newsletter**, 14 - 27 June 2017). The inquiry found that resale-price restrictions were the most widespread form of restriction in e-commerce markets.

For further information on any competition related matter, please contact the **Competition Group** or your usual Slaughter and May contact.

Decision - the anticompetitive practices

The Commission found that the four manufacturers engaged in fixed or minimum resale price maintenance (RPM) by threatening retailers with sanctions, such as blocking supply, if they did not follow the prices (or price increases) requested by the manufacturers. In particular, the Commission found that:

- **Asus** monitored the resale prices of certain computer hardware and electronics products, including notebooks and displays in France and Germany. Asus intervened where retailers sold such products below the resale prices recommended by Asus and requested price increases.

- **Denon & Marantz** engaged in RPM with respect to audio and video consumer products such as headphones and speakers in Germany and the Netherlands.

- **Philips** engaged in RPM in France with respect to various consumer electronics products, including kitchen appliances, coffee machines, vacuum cleaners, home cinema and video systems, as well as electric toothbrushes, hairdryers and trimmers.

- **Pioneer** engaged not only in RPM with respect to products such as speakers, home theatre products, and hi-fi products, but also imposed cross-border sales restrictions. They did this, for example, by blocking orders from retailers who sold cross-border. This allowed Pioneer to maintain different retail prices across different Member States. This conduct concerned 12 countries (Germany, France, Italy, the United Kingdom, Spain, Portugal, Sweden, Finland, Denmark, Belgium, the Netherlands and Norway).

These practices took place for varying periods of time between 2011 and 2015.

The Commission also observed that:

- the customers' use of pricing algorithms (that automatically adapt retail prices to competitors' prices) exacerbated the impact of RPM on overall online prices for the effected products; and

- the use of sophisticated monitoring tools meant that the manufacturers could more effectively track resale prices in the distribution network and intervene promptly in the event of price decreases.

The price interventions, the Commission found, had an immediate effect on consumers, limiting effective price competition between retailers and leading to high prices.

Decision - reduced fines due to cooperation

The Commission reduced the fines of all four manufacturers due to their cooperation: providing evidence with significant added value and expressly acknowledging the facts and infringements. The reductions differed according to the extent of the cooperation and resulted in the following fines:

- Asus: €63,522,000 (including a 40% reduction);

- Philips: €29,828,000 (including a 40% reduction);

- Pioneer: €10,173,000 (including a 50% reduction); and

- Denon & Marantz: €7,719,000 (including a 40% reduction)

Comment

These cases serve as a reminder that RPM remains an enforcement priority for the Commission, particularly in the context of online markets, as considered in the e-commerce sector inquiry. The cases also demonstrate that the use of price monitoring software and similar tools can be relevant to vertical anticompetitive practices (such as RPM) as well as horizontal practices (there was no suggestion here that

the manufacturers colluded). The Commission found the use of price monitoring software had assisted the implementation of the RPM strategies. Whilst the Commission did not condemn the use of pricing algorithms in and of itself, they found that the algorithms had exacerbated the anti-competitive effect of the RPM strategies.

The Commission is also conducting **investigations** into concerns of cross-border and online sales restrictions in distribution agreements by Sanrio, Guess, Nike and Universal Studios. National authorities have also focused, and may be expected to continue to focus on, online RPM cases and other anticompetitive behaviour in the e-commerce and digital sectors (as considered in our Best Friends' **Competition Law in the Digital Age newsletter**). More decisions are therefore expected in these areas.

Other developments

State aid

General Court's judgment on the "Spanish tax lease system" set aside by the Court of Justice

On 25 July 2018 the European Court of Justice (CJ) **set aside** the European General Court (GC)'s **judgment** on the "Spanish tax lease system" (the STL system).

The STL system allowed shipping companies to benefit from a 20-30 per cent. price reduction when purchasing ships constructed in Spanish shipyards. The ships were leased by economic interest companies (EIG) established by various banks, with these EIGs in turn leasing the ships to shipping companies. The banks subsequently sold shares in the EIGs to third party investors. As a result, the STL system resulted in tax advantages both to the investors in the EIGs and to the shipping companies.

On 17 July 2013 the European Commission **found** that the STL system constituted illegal State aid. On 17 December 2015 the GC annulled the Commission's findings, resulting in an application by the Commission to the CJ for the GC's judgment to be set aside.

The CJ found that the GC had incorrectly applied Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) on prohibited State aid.

First, in finding that the EIGs could not be the beneficiaries of State aid, the CJ found that the GC had failed to take into account case-law stating that "*the classification of a measure as 'State aid' cannot depend on the legal status of the undertakings concerned or the techniques used*".[1]

Second, the CJ found that the GC committed an error of law in holding that the advantages obtained by the EIG investors participating in the STL system could not be regarded as selective. In particular, the CJ found that, in failing to treat the EIGs as beneficiaries under the STL system, the condition relating to selectivity was incorrectly applied by the GC by reference to the investors in the EIGs, rather than by reference to the EIGs themselves. Moreover, the CJ also found that, in examining this selectivity

[1] Case C-128/16 *Commission v Spain and Others*, judgment of 25 July 2018, paragraph 46.

condition, the GC relied on two judgments[2] that, following the GC's annulment of the Commission's findings, had been set aside by the CJ.[3]

The case has therefore been referred back to the GC to examine correctly the condition relating to selectivity.

General competition

CMA proposes reforms to the investment consultancy and fiduciary management market

On 18 July 2018 the UK Competition and Markets Authority (CMA) published a **provisional report** on the investment consultancy and fiduciary management sector. The CMA launched its investigation into this sector in September 2017, at the request of the Financial Conduct Authority.

In its provisional report, the CMA found that:

- Around half of pension schemes choose the same provider for fiduciary management as they do for investment consultancy. Pension schemes can be encouraged to do this by their current investment consultants, meaning that companies which offer both investment consultancy and fiduciary management services have an advantage over other firms when winning business from existing clients.
- A number of pension trustees have low levels of engagement when choosing fiduciary managers. Only a third of pension trustees select fiduciary managers through a tender process, meaning no competitive pressure is put on their existing investment consultant or fiduciary manager to offer the best terms or the highest performance.
- Pension trustees are often unable to judge if they are getting a good deal from their existing investment consultant or fiduciary manager, because there is insufficient information on the fees or quality of service provided.

As a result of these provisional findings, the CMA is proposing that pension trustees should run a competitive tender when selecting their fiduciary manager for the first time. This process would then be repeated within five years of a fiduciary manager being appointed. The CMA is also proposing that fiduciary management firms must provide clearer information on fees and performance, allowing for a meaningful comparison to be made between different service providers. Further, the CMA is making recommendations for new guidance from the Pensions Regulator, which would provide pension trustees with more advice on how to choose and scrutinise providers. The CMA is also proposing that the FCA's regulatory scope is widened, to ensure greater oversight of the investment consultancy and fiduciary management sector.

The CMA has invited feedback on the provisional report by 24 August 2018. The deadline for the CMA's final report is 13 March 2019.

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[2] Case T-399/11 *Banco Santander and Santusa v Commission*, judgment of 7 November 2014; and Case T-219/10 *Autogrill España v Commission*, judgment of 7 November 2014.
[3] Joined Cases C-20/15 P and C-21/15 *P Commission v World Duty Free Group and Others*, judgment of 21 December 2016.

Business Secretary finds no national security concerns in the Northern Aerospace/Gardner Aerospace merger

On 19 July 2018 Greg Clark, the Secretary of State for Business, Energy and Industrial Strategy, **cleared** the proposed acquisition of Northern Aerospace Limited by Gardner Aerospace Holdings Limited, a subsidiary of the Shenzhen-listed company Shaanxi Ligeance Mineral Resources Co. Limited. The acquisition was cleared on the basis that there were no national security grounds for referring the merger for a Phase 2 investigation. The Business Secretary had, on 17 June 2018, issued an **intervention notice** requiring the CMA to investigate and report on the public interest considerations relevant to this merger. On 13 July 2018 the CMA delivered its **report** to the Business Secretary, which summarised the views received from the Ministry of Defence (MoD) on the public interest aspects of the transaction. The MoD considered there to be no national security concerns relevant to the merger.

This decision is of note because it is the first time the Business Secretary has exercised his powers of intervention[4] since the jurisdictional thresholds of the Enterprise Act 2002 (the Act) were amended on 11 June 2018.[5] The amended Act introduced the concept of "relevant enterprises"[6], which covers enterprises active in the development or production of items for military use, and also reduced the turnover thresholds for relevant enterprises to turnover in the UK exceeding £1 million (rather than £70 million)[7]. Northern was deemed to be a "relevant enterprise", and its turnover exceeded the reduced threshold of £1 million.

Although the proposed acquisition was cleared, this case can be considered in light of the increased focus by the UK Government on reviewing takeovers and other transactions on the grounds of national security. For our previous briefings on this topic, including the UK Government's latest proposals to create a standalone national security regime, see **here** and **here**.

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[4] S.42(2) of the Enterprise Act 2002.
[5] The Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018, SI 2018/578; and the Enterprise Act 2002 (Turnover Test) (Amendment) Order 2018, SI 2018/593.
[6] S.23A of the Enterprise Act 2002.
[7] S.23(1)(b)(i) and (ii) of the Enterprise Act 2002.