SLAUGHTER AND MAY

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CMA fines Casio £3.7 million for preventing online discounting of its products

The UK's Competition and Markets Authority (CMA) has **fined** Casio £3.7 million for imposing minimum resale prices (a form of resale price maintenance (RPM)) on retailers that sold its musical instruments online. This fine is the latest in a series of cases that illustrate both the CMA's and the European Commission's increased focus on RPM, in particular in online markets.

Casio's conduct and fine

Having issued *recommended* retail prices for online sales of its electronic pianos and keyboards, Casio then used advanced monitoring software to ensure retailers were complying with its pricing policy and pressured deviating retailers to raise their prices. The CMA noted Casio's monitoring software made it easier for the company to enforce its pricing policy in "real time". Retailers also notified Casio when their rivals offered discounts on the instruments, the CMA said. Ann Pope – CMA Senior Director of Antitrust – said Casio's "illegal action" made it harder for customers to "*shop around for a better price and meant they risked paying over the odds*" for keyboards and pianos.

The CMA discounted Casio's fine by 20 per cent because it admitted to the illegal conduct and cooperated with the CMA's probe. This admission allowed the CMA to speed up its investigation, having only **issued** a statement of objections in April this year.

The CMA's recent focus on RPM

Casio's fine is the largest fine imposed for this type of anti-competitive conduct in a series of recent cases illustrating the CMA's increasing focus on online RPM:

- In 2016 the authority **fined** a manufacturer of bathroom fittings (over £780,000) and a supplier of commercial catering equipment (£2.3 million) for setting minimum online resale prices.
- In 2017 it **fined** a lighting supplier £2.7 million for online RPM and for ignoring a prior CMA warning about its sales restrictions.

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

- In 2018 the CMA issued 19 warning letters and three advisory letters about RPM warning undertakings about the illegal nature of the conduct and prompting compliance action.

According to the CMA, RPM is one of the most complained about practices, with complaints increasingly relating to online platforms. Such restrictions prevent customers from identifying and obtaining discounted prices by shopping online, undermining the benefit of the internet's wide-reach, transparency and enhanced functionality. The CMA says this limits the possibilities e-commerce offers for both retailers and consumers.

The CMA has therefore warned that it takes RPM seriously, and "*will not hesitate to impose penalties where […] the law has been broken*". It has produced **RPM guidance** for businesses.

Similar focus by the European Commission

The number of enforcement cases involving RPM has also been growing at EU level. The Commission classifies RPM as a hardcore restriction and its e-commerce sector inquiry – the results of which were **published** in May 2017 as part of the Commission's Digital Market strategy – showed that resale-price related restrictions are by far the most widespread restrictions of competition in e-commerce markets.

In July 2018 the Commission **fined** consumer electronics manufacturers Asus, Denon & Marantz, Philips and Pioneer over €111 million for imposing fixed or minimum resale prices on their online retailers. The Commission found that the manufacturers threatened retailers with sanctions, such as blocking supply, if they did not follow the prices the manufacturers requested. The Commission observed that the use of pricing algorithms by online retailers had exacerbated the impact of the RPM, while the manufacturers' use of sophisticated monitoring tools had allowed them effectively to track resale price setting in their network and intervene quickly in case of price decreases.

When announcing the decisions, Competition Commissioner Margrethe Vestager said: "*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. Our decisions today show that EU competition rules serve to protect consumers where companies stand in the way of more price competition and better choice.*"

Other developments

Antitrust

CMA disqualifies three further directors of "office fit-out cartel" companies

The CMA has **announced** that it has secured the disqualification of three more directors of companies involved in the "office fit-out cartel", bringing the total number of disqualifications to six. Earlier this year, the CMA **found** that six companies in the office fit-out sector had breached UK antitrust rules by "cover bidding", a form of collusive tendering. Five of the companies involved were **fined** an amount totalling £7 million. The CMA also secured **disqualification undertakings** from three directors in this cartel case in May 2019.

Under the Company Directors Disqualification Act, the CMA has the power to apply to the court to disqualify directors from acting as directors or being involved in management of any UK company for a specified period, if a company of which he or she is a director has breached competition rules. Directors can avoid an application for a disqualification order by giving a disqualification undertaking. The CMA managed to secure the latest three undertakings only after it had put the directors on formal notice of its intention to apply to the court for disqualification orders against them.

JLL group was not fined as it was the first undertaking to confess its participation in the cartel under the CMA's cartel leniency programme. As a former director of the JLL group, Robb Simms-Davies would have been immune from director disqualification. However, the CMA withdrew Simms-Davies' protection for refusing to submit to a voluntary interview with the CMA, breaching the condition of the leniency programme to "*maintain continuous and complete cooperation*".

The 31 July 2019 announcement brings the total number of director disqualifications that the CMA has secured for illegal cartel conduct to 12 since December 2016.

State aid

France must recover €8.5 million of illegal aid from Ryanair

The European Commission has **found** that marketing agreements between Ryanair and the local Association for the Promotion of Touristic and Economic Flows (APFTE) at Montpellier airport amounted to illegal and incompatible aid under EU State aid rules. France must now recover the aid (amounting to around €8.5 million).

Between 2010 and 2017, APFTE entered into marketing agreements with Ryanair and AMS, its subsidiary. Under these agreements, Ryanair and AMS received around €8.5 million for promoting Montpellier as a tourist destination on Ryanair's website. Following a complaint by a competitor of Ryanair, the Commission opened an in-depth investigation in July 2018. The Commission's investigation found that:

- The agreements were financed through State resources and were attributable to the State. APFTE is an association unrelated to the airport operator and funded "almost entirely" by regional and local public entities in France, which closely control the use of APFTE's budget;
- The payments to Ryanair did not correspond to the effective marketing needs of APFTE. Instead, the payments only served as an incentive for the airline to maintain its operations at Montpellier airport; and
- APFTE either concluded the agreements with Ryanair and AMS directly (and not other airlines) or organised public tenders biased towards Ryanair.

On this basis, the Commission found that the agreements gave an "undue and selective advantage" to Ryanair and concluded that they amounted to illegal and incompatible State aid. As a matter of EU law, there are no fines under EU State aid rules. However, these rules require that any incompatible aid be recovered in order to restore equal treatment with other competitors.

General competition

China Hangzhou Internet Court awards Tencent RMB 650,000 in first unfair competition case against in-platform businesses

On 8 August 2019 the China Hangzhou Internet Court (a specialist Court designated to handle internet-related disputes) announced it had awarded Shenzhen Tencent Computer System and Tencent Technology (Shenzhen) (collectively Tencent) RMB 650,000 (approximately £76,000) in an unfair competition case against Hangzhou Kebei Network Technology and Hangzhou Haiyi Network Technology. This is the first lawsuit brought by platform operators against in-platform businesses under the Anti-unfair Competition Law (AUCL), which is a separate regime from traditional antitrust regulation under the Anti-monopoly Law.

The defendants operated multiple public accounts and in-platform programmes displaying information about online loans on WeChat, a Chinese multi-purpose platform developed by Tencent. Tencent alleged that the defendants engaged in unfair competition by: (i) operating internet financial information intermediary businesses without necessary qualifications (in breach of article 2 of the AUCL); (ii) conducting false advertising about their products (in breach of article 8 of the AUCL); and (iii) incorporating a complaints interface that could be mistaken for WeChat's own interface (in breach of article 6(4) of the AUCL). Tencent argued that the defendants' behaviour undermined WeChat users' confidence in WeChat products, disrupted the normal business order of WeChat public accounts and in-platform programs, and weakened the competitiveness of WeChat products.

The Court awarded damages in favour of Tencent and ordered the defendants to issue a statement removing the adverse impact on WeChat. In particular, the Court rejected the defendants' argument that Tencent should not have resorted to the AUCL to resolve a contractual dispute (arising from the defendants' breach of the relevant rules on WeChat). The Court observed that the AUCL is more conducive to protecting the rights and interests of in-platform businesses and consumers at large in the context of the growing online platform economy, which places more emphasis on the interactions between different economic actors and the overall value of the platform ecosystem.

In the words of the Court, this case demonstrates an innovative approach to online platform governance and deters dishonest and unethical conduct in the digital ecosystem. It appears that the AUCL has the potential to become an effective tool to deter anti-competitive behaviour in relation to platforms and the internet-related sector.

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