



Newsletter, 30 April 2019

European Commission: Renewed Enforcement Focus on Vertical Restraints

Following the end of its E-commerce Sector Inquiry, the European Commission issued fines of more than € 600 million for vertical infringements in various industry sectors with more fines on their way.

The European Commission (“Commission”) continues to issue substantial fines for vertical restraints. The decisions follow the Commission’s E-commerce Sector Inquiry, which was closed in 2017 with the Commission announcing a revised focus on vertical enforcement.¹ The amount of fines is all the more relevant, as in many of these decisions the Commission rewarded the investigated companies’ cooperation with the authority with substantive fine reductions.

Territorial Restrictions

Not surprisingly one emphasis of the Commission’s recent enforcement lies on the sanctioning of territorial restrictions. In March 2019, it fined Nike € 12.5 million for banning traders from selling licensed merchandise products “cross-border” within the EEA.² The Commission found that Nike’s non-exclusive licencing and distribution agreements partitioned the Single Market and prevented licensees in Europe from selling cross-border.

Only a view weeks earlier, the Commission published commitments issued by Sky UK, Disney, NBCUniversal, Sony Picture and Warner Bros. in order to address the Commission’s concerns regarding national licensing practices for pay-TV content. The Commission objected against certain contractual terms that prevented Sky UK from allowing EU consumers outside the UK and Ireland to subscribe to Sky UK’s pay-TV services to access films via satellite or online.³ The provisions also required NBCUniversal, Sony Picture and Warn-

er Bros. to ensure that broadcasters other than Sky UK were prevented from making their pay-TV services available in the UK and Ireland.

Also Mastercard and Guess were fined in two separate proceedings for infringing Art. 101 TFEU by territorial restraints. Mastercard received a fine of € 570 million for limiting the possibility for merchants to benefit from lower interchange fees offered by banks located in another Member State.⁴ Guess was fined € 40 million for restricting retailers from online advertising and selling cross-border to consumers in other Member States.⁵ With regard to Guess, the Commission also found that such practices violated the newly issued Geo-Blocking Regulation⁶ that came into force on 3 December 2018. This Regulation addresses unjustified online sales discrimination by traders vis-à-vis consumers based on customers’ nationality, place of residence or place of establishment. Whereas the Regulation does not interfere with restrictions of active sales compliant with the Vertical Block Exemption Regulation, it declares passive sales restrictions to be automatically void.

Retail Price Maintenance and Algorithms

Besides territorial restrictions, the Commission continues to focus on retail price maintenance. In July 2018 it imposed fines totalling € 110 million on the consumer electronics manufacturers Asus, Denon&Marantz, Philips

¹ EU Commission, [Final Report](#) on the E-commerce Sector Inquiry, 10 May 2017.

² EU Commission, Press Release, 25 March 2019, [IP/19/1828](#).

³ EU Commission, Press Release, 7 March 2019, [IP/19/1590](#).

⁴ EU Commission, Press Release, 22 January 2019, [IP/19/582](#).

⁵ EU Commission, Press Release, 17 December 2019, [IP/18/6844](#).

⁶ [Regulation \(EU\) 2018/302](#) of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers’ nationality, place of residence or place of establishment within the internal market.

and Pioneer for fixing online resale prices.⁷ In the Commission's view, all four manufacturers restricted the ability of their online retailers to set their own retail prices for widely used consumer electronic products. Whenever the retailers did not follow the prices requested by manufacturers, they faced threats or sanctions such as blocking of supplies. Some of the manufacturers used sophisticated monitoring software that allowed them to effectively track resale price setting in their distribution network and to intervene swiftly in case of price decreases. The Commission considered the use of algorithms by the online retailers as an aggravation factor to the impact of the resale price maintenance agreements.

Reduction of Fines for Cooperation

In some of the above-mentioned cases the Commission significantly reduced the volumes of the fines in order to reward the investigated companies' cooperation with the authority beyond their legal obligation (*Kooperationsverfahren*). While cooperation procedures are well-established in the area of cartels, their application to vertical investigations is rather new. In the (separate) procedures against Pioneer, Philips, Denon&Marantz, Asus and Guess, such cooperation led to fine reductions of 50%. Nike obtained a fine reduction of 40%. All companies benefitted from acknowledging the infringements prior to the Commission having issued a Statement of Objection. Moreover, the Commission rewarded the companies for producing self-incriminating evidence and/or accepting a more streamlined and shorter procedure.

The Commission assesses on a case-by-case basis whether cooperation in vertical cases qualifies for a fine reduction. For this, it also takes into account the probability of reaching a common understanding with the infringing company within a reasonable time-frame.⁸

Comment

As expected, the E-commerce Sector Inquiry was a kick-start for the Commission to stress the relevance of vertical compliance as well as to ensure a more streamlined approach across Member States in future enforcement.

Further enforcement actions seem just around the corner: in April 2019, Valve, the owner of

the world's largest PC video game distribution platform "Steam", as well as five PC video game publishers received Statements of Objections.⁹ The Commission claims that the companies agreed to use geo-blocked activation keys to prevent cross-border sales, including to block the response to unsolicited consumer requests of PC video games from consumers in several Member States. The five PC video game publishers allegedly prevented a number of distributors from selling the relevant PC video games outside the allocated territories. These practices may have prevented consumers from purchasing and playing PC video games sold by these distributors.

In light of these developments, companies should revisit their distribution policies and ensure in particular that modern tools such as the use of algorithms and pricing software remain in line with EU competition rules.



Isabel Oest



Damaris Kosack

Commeo LLP
Rechtsanwälte und Notar
Speicherstraße 55
60327 Frankfurt am Main
www.commeo-law.com

Dr. Jörg-Martin Schultze, LL.M.
Dr. Dominique S. Wagener, LL.M.
Dr. Stephanie Pautke, LL.M.
Dr. Johanna Kübler
Isabel Oest, LL.M.
Christoph Weinert, LL.M.
Josefa Billinger, LL.B./LL.M.
Damaris Kosack
Priscilla Tollini, LL.M.

Commeo LLP is an independent law firm specialized in competition law. We are an established team of experienced lawyers advising clients on all aspects of German and European competition law.

This publication is intended to highlight issues. It is not intended to be comprehensive nor to provide legal advice. Any liability which might arise from the reliance on the information is excluded.

⁷ EU Commission, Press Release, 24 July 2018, [IP/18/4601](https://ec.europa.eu/competition/press/180724_01_en.htm).

⁸ See link to EU Commission's Fact Sheet on Cooperation in Press Release, 17 December 2019, [IP/18/6844](https://ec.europa.eu/competition/press/191217_01_en.htm).

⁹ EU Commission, Press Release, 5 April 2019, [IP/19/2010](https://ec.europa.eu/competition/press/190405_01_en.htm).