



Newsletter, 27 August 2020

Vertical restraints: The trend towards strict enforcement at EU and national level continues

Both the European Commission as well as national competition authorities have been taking a firm stance in the past year in relation to vertical antitrust infringement cases

As part of its renewed enforcement focus on vertical restraints, the European Commission ("Commission") has fined in the past year Sanrio and NBCUniversal for restricting cross-border sales of merchandise products within the EEA and Meliá for discriminating between consumers on the basis of their country of residence. Likewise, national competition authorities remain keen on tackling vertical infringements. Most notably, the French Competition Authority ("FCA") recently fined Apple EUR 1.1 billion. The trend towards strict enforcement of vertical restraints at EU and national level seems to be gaining momentum, with more cases in the pipeline.

Enforcement at EU level

Vertical restraints continue to be on the Commission's radar. As reported in our April 2019 newsletter¹, from mid-2018 onwards the Commission has been active in investigating and imposing substantial fines on companies for infringing competition law by means of vertical restraints, such as cross-border territorial restrictions and resale price maintenance. So far the list includes Asus, Denon & Marantz, Philips, Pioneer, Guess, MasterCard and Nike, which in total have been fined over EUR 730 million.

In the wake of this enforcement trend against vertical restraints, the Commission also imposed fines of EUR 6.2 million on Sanrio² in July 2019 and EUR 14.3 million on NBCUniversal³ in January 2020 for practices restricting sales of licensed merchandise across territories and customer groups.

Sanrio, known in particular for its proprietary character *Hello Kitty*, and NBCUniversal, known for its film-related intellectual property rights including the *Minions* and *Jurassic World*, implemented certain practices by contractual and non-contractual means preventing licensees from distributing licensed products (e.g. clothes, toys, mugs) to customers located in EEA countries other than those allocated to the licensee under their merchandising license agreement. In both cases, the Commission found that such practices breached Article 101 TFEU insofar as they prohibited out-of-territory passive and active sales as well as online sales.

Most recently, on 21 February 2020, the Commission also imposed a fine of nearly EUR 6.7 million on the hotel company Meliá.⁴ The Commission's investigation, triggered by consumer complaints, concerned the distribution of hotel accommodation at Meliá's holiday resorts during 2014 and 2015 by means of contracts between Meliá and certain tour operators (Kuoni, REWE, Thomas Cook and TUI), which acted as sales intermediaries. Some of these contracts were based on Meliá's standard terms and conditions, which contained a clause specifying the EEA country or countries for which the contracts were valid.

According to the Commission's decision, published on 3 June 2020, by specifying the territories to which the contracts apply and empowering Meliá to verify the market of origin of any reservation and ultimately reject a reservation if the consumer's country of residence was not among those specified, such clause differentiated between consumers within the EEA on the basis of their country of residence, possibly resulting in the partitioning

¹ Commeo Newsletter of 30 April 2019, 'European Commission: Renewed Enforcement Focus on Vertical Restraints', available [here](#).

² Commission, Decision of 9 July 2019, [Case AT.40432](#) – *Character merchandise*.

³ Commission, Decision of 30 January 2020, [Case AT.40433](#) – *Film Merchandise*.

⁴ Commission, Decision of 21 February 2020, [Case AT.40528](#) – *Melia (Holiday Pricing)*.

of the internal market. In the Commission's view, this deterred the tour operators from freely distributing Meliá's hotel accommodation in countries other than those specified – either *actively*, by discouraging the tour operators from advertising Meliá's hotel accommodation outside the specified markets, or *passively*, by restricting the ability of the tour operators to respond to unsolicited requests from consumers residing in a country not specified.

In fixing the amount of fine to be imposed on Sanrio, NBCUniversal and Meliá, the Commission took into account that vertical restraints are generally less harmful than horizontal ones, resulting in a lower 'basic amount' of fine for the first part of the fine calculation (7-8% of the value of sales, far from the maximum percentage of value of sales of 30%). Additionally, the three companies submitted a formal offer to cooperate with the Commission *before* the issuance of the Statement of Objections, in particular by acknowledging the infringement and providing additional evidence, which contributed to a fine reduction of 40% for Sanrio and 30% for NBCUniversal and Meliá. Further details on the Commission's cooperation procedure in non-cartel cases can be found in our newsletter of June 2019.⁵

Enforcement at national level

National competition authorities also remain active in enforcing vertical cases. A noteworthy example is the fine of EUR 1.1 billion imposed by the FCA on Apple on 16 March 2020 for *inter alia* two anticompetitive vertical practices within its distribution network.⁶ Two wholesalers, namely Tech Data and Ingram Micro, were also fined for their participation.

Apple organizes its retail distribution in France via two distinct channels: (i) its own network (Apple retail and online stores) and (ii) 2,000 independent resellers, which are supplied via wholesalers or directly from Apple. According to the FCA's decision, Apple had divided products and customers between its two wholesalers. By controlling how resellers were supplied with Apple products by the wholesalers, Apple restricted intra-brand competition on the sale of Apple products between the wholesalers and Apple and between the wholesalers themselves. Contrary to Apple's reasoning, the FCA concluded that this was not justified by the need to manage product scarcity, as Apple also

applied this practice outside "constraint" periods.

Furthermore, the FCA found that Apple's recommended resale prices for Apple Premium Resellers were "disguised" fixed prices, as the latter were in fact forced to observe Apple's recommended prices. The FCA stressed that Apple strictly controlled promotional actions and introduced measures to monitor prices (*e.g.* by controlling the supply and discounts).

Comment

These recent decisions reiterate that vertical distribution issues continue to be on competition authorities' radars, both at an EU as well as at a national level. From an EU perspective, this is particularly noteworthy considering the Commission's history of prioritizing enforcement against horizontal infringements. And the trend continues: In November 2019, the Commission initiated an investigation into the confectionery company Mondelez for an alleged practices restricting cross-border trade within the EEA.⁷ Going forward, companies should keep in mind the authorities' tougher stance on any attempt to partition the EU Single Market according to national borders and to fix resale prices.



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⁵ Commeo Newsletter of 12 June 2019, 'The European Commission's New Cooperation Procedure in Non-Cartel Cases', available [here](#).

⁶ French Competition Authority, [Decision 20-D-04](#) of 16 March 2020. The decision is currently under appeal.

⁷ See Mondelez' [2019 Annual Report](#) (Form 10-K), p. 110.