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European Algorithmic Antitrust and Resale Price Maintenance: *Asus, Denon & Marantz, Philips, and Pioneer* Decisions

By Dr. Aurélien Portuese (St Mary's University London)¹

Edited by Thibault Schrepel, Sam Sadden & Jan Roth (CPI)

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On February 2, 2017, the European Commission announced the launch on its own initiative of three sets of investigations into suspected anticompetitive behavior in online commerce.² The three sectors inquired have been (i) consumer electronics manufacturers; (ii) video games publishers; and (iii) hotels and tour operators' price discrimination. As of the November 2018, the consumer electronics manufacturers sector is the first sector to be fined with an amount totaling €111 million for the companies Asus, Denon & Marantz, Philips, and Pioneer, following a press release on July 24, 2018.³ Since the *Yamaha* decision of 2003,⁴ it is the first time the European Commission has fined companies on the basis of resale price maintenance as prohibited by Article 101 TFEU.

Four Decisions for Algorithmic Resale Price Maintenance

All decisions, except *Denon & Marantz*, have been closed as of November 7, 2018.⁵ All decisions concerned vertical restraint instances wherein defendant companies relied upon "fixed or minimum resale price maintenance (RPM)"⁶ in order to restrict "the ability of their online retailers to set their own retail prices for widely used consumer electronics products such as kitchen appliances, notebooks and hi-fi products."⁷ Although bundled together, the four companies' infringements portray different antitrust violation characteristics worth detailing successively.

Asus⁸ resorted to price monitoring over independent distributors through a variety of means - notably algorithmic price comparison websites and software monitoring tools enabling Asus to identify retailers selling below the recommended resale price. The identified low-pricing retailers were subsequently subjected to retaliatory measures if price increases were not complied with Asus' pricing strategy. The antitrust violation took place in France for all products from 2011 until 2014 and in Germany for some networking, desktop, and display products from 2013 until 2014.

Pioneer⁹ designed a monitoring policy throughout Europe for resale prices of retailers from 2011 until 2013. With threats of retaliatory measures against non-compliant retailers, Pioneer successfully required retailers to increase their prices as well as to avoid parallel trade within the EEA. Both price increase and the internal market fragmentation constituted Pioneer's main anticompetitive practices.

Philips¹⁰ engaged in resale price monitoring towards independent retailers so that lowest-pricing retailers in France, from 2011 until 2013, were bound to increase their prices otherwise retaliatory measures would to be implemented by Philips against these identified non-cooperative retailers.

Finally, *Denon & Marantz*¹¹ was fined for having forced retailers to increase resale prices to the desired level through commercial pressures, retaliatory measures, and even refusals to supply. For sales in Germany between 2011 and 2015 and for sales in the Netherlands between 2011 and 2014, Denon & Marantz maintained an effective resale price level to ensure higher profit margins for retailers against aggressive pricing.

One crucial feature of these acknowledged anticompetitive conducts rests upon the fact that these RPMs are algorithm-driven RPMs. Indeed, in all four decisions, the European Commission unearthed complex and innovative RPMs monitored through algorithms. The European Commission notes that "many, including the biggest online retailers, use pricing algorithms which automatically adapt retail prices to those of competitors. In this way, the pricing restrictions imposed on low pricing online retailers typically had a broader impact on overall online prices for the respective consumer electronics products."¹²

Fine Reductions for Resale Price Maintenance

Asus has cooperated extensively with the European Commission so that it enjoyed a 40 percent fine reduction¹³ with a final fine amounting to €58 million for infringements in Germany and €5 million for infringements in France. Given the remarkable cooperation of Pioneer with the European Commission, the fine was reduced by 50 percent to €10 million. Given effective cooperation with the European Commission, Philips' fine was reduced by 40 percent to €29 million. Denon & Marantz was fined €6 million for its infringements in Germany and €1 million for those in Netherlands, after a fine reduction of 40 percent.

A noticeable feature of these outcomes is the extent of fine reduction along the lines of the European Commission's *Fines Guidelines* of 2006.¹⁴ The mitigating circumstances identified in the *Fines Guidelines* are (i) offenses are terminated by the time of investigations; (ii) negligence; (iii) substantially limited role; (iv) cooperation with authorities; and (v) encouragement by public authorities or legislation. Despite the fact that all companies involved in the infringements are concerned with (i) mitigating circumstances since all infringements were terminated by the time of the Commission's investigations, the main (if not only)¹⁵ mitigating circumstances which led to fine reduction was effective cooperation. All companies enjoyed a 40 percent fine reduction because of "effective cooperation" of the defendant companies with antitrust authorities, except Pioneer which enjoyed a 50 percent fine reduction thanks to a "very effective cooperation." Cooperation means that the company must not only go beyond its mere legal obligation but also be effective by bringing the infringement to an end.¹⁶

The leniency program of the European Commission derived from the *Fines Guidelines* of 2006 particularly concerns cartel detection and fine reductions for cartel members who first blow the whistle to the European Commission. Interestingly, in the present decisions, fine reductions have been granted for resale price maintenance behaviors infringing Article 101 TFEU while RPM is considered to be one of those "hardcore restrictions" according to the European Commission.¹⁷ Notably, these generous fine reductions do not concern stereotypical cartels but more creatively RPMs.¹⁸ This line of decisions materially opens up an era of incentives for companies to effectively cooperate with antitrust authorities for all sorts of anticompetitive conduct, be they under Article 101 or Article 102 TFEU.

The Rise of European Algorithmic Antitrust: Illustration with Resale Price Maintenance

As the first decisions where the European Commission refers to algorithm-driven companies with prices being fixed by automated machines rather than humanly devised price strategies, the Asus, Denon & Marantz, Philips, and Pioneer decisions forestall the rise of an EU algorithmic antitrust: antitrust analysis carried out by the European Commission shall adapt and necessitate authorities to delve into the complex algorithms elaborated by e-commerce companies.

One difficult question left unanswered with these four decisions is the following: to what extent, and how, can companies justify pro-competitive effects of algorithmic-based RPMs in spite of the identified anticompetitive effects of such RPMs? In the present decisions, the (either "effective" or "very effective") cooperation of the defendant companies with the European Commission prevents us from envisaging the countervailing arguments of procompetitive consequences of algorithmic-based RPMs.¹⁹ Algorithmic price coordination can represent challenges to antitrust analysis and enforcement.²⁰

In the present decisions, the European Commission has explicitly excluded the application of the Vertical Block Exemption Regulation (“VBER”) “because that conduct had as its object to restrict the ability of retailers [...] to independently determine their sale price,” or of arguments based on Article 101(3) TFEU because “there are no indications that it was indispensable to induce retailer investment in certain promotional measures or pre-sale services or to alleviate the repercussions of free-riding between online and offline sales channels.”²¹

But the prevailing view by European antitrust authorities according to which RPMs are prohibited *per se* (i.e. by object, without further inquiry necessary)²² is questionable under algorithm-driven companies. In all decisions, RPMs were deemed to be anticompetitive by object.²³ More interestingly, it is considered that algorithmic-driven RPMs have greater harming effects on competition: indeed, the European Commission concluded that “price monitoring and adjustment software programmes multiply the impact of price interventions.”²⁴ If the anticompetitive risks of algorithms have indeed been well documented,²⁵ algorithms can also yield pro-competitive effects due to the unparalleled price comparison tools they offer: algorithm-driven price comparison can therefore be designed and used in pro- or anti-competitive manners. Indeed, the monitoring of prices through algorithms can usher greater aggressive reactions to price changes rather than necessarily easier and stable collusive reactions.²⁶

Therefore, “the rise of pricing algorithms and AI software will require changes in our enforcement practices” aptly argues Terrell McSweeney.²⁷ Indeed, given the unknown consequences of algorithmic pricing on offline and online markets, can the EU policy stance remain to prohibit RPMs *by object* (rather than *by effects*) without delving into the real effects on consumer harm of allegedly anticompetitive algorithmic RPMs? These questions are clearly opened with the present decisions and further research, as well as further decisions,²⁸ shall clarify (if not improve) the way European antitrust should address algorithmic pricing strategies.

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- ¹ Dr. Aurélien Portuese is Senior Lecturer in Law at St Mary's University London.
- ² European Commission (2017) *Commission opens three investigations into suspected anticompetitive practices in e-commerce*, Press Release of February 2, 2017, available at http://europa.eu/rapid/press-release_IP-17-201_en.htm.
- ³ European Commission (2017) *Commission fines four consumer electronics manufacturers for fixing online resale prices*, Press Release of July 24, 2018, available at http://europa.eu/rapid/press-release_IP-18-4601_en.htm.
- ⁴ COMP(2003) *Yamaha*, 37.975.
- ⁵ See history of each case at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40465;
http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40469;
http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40181;
http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40182.
- ⁶ *Supra* note 2.
- ⁷ *Id.*
- ⁸ Case AT.40465 - *ASUS*.
- ⁹ Case AT.40182 - *PIONEER*.
- ¹⁰ Case AT.40181 - *PHILIPS*.
- ¹¹ Case AT.40469 – *DENON & MARANTZ*.
- ¹² *Supra* note 2.
- ¹³ See European Commission (2006) *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003*, OJ C 210, 1.9.2006, p.2 [hereinafter *Fines Guidelines*].
- ¹⁴ *Id.*
- ¹⁵ Indeed, the European Commission does not explicitly refer to the other mitigating circumstances than cooperation in its decisions.
- ¹⁶ See Judgment of the EC Court of Justice of November 16, 2000 in Case C-297/98 P, *SCA Holding v. Commission (Cartonboard)*, [2000] ECR I-10101, paragraph 36, confirming the Judgment of the EC Court of First Instance of May 14, 1998 in Case T-327/94.
- ¹⁷ European Commission's Guidelines on Vertical Restraints (OJ 2010 C131/01, 19.5.2010), para. 223 [hereinafter *Vertical Restraints Guidelines*].
- ¹⁸ See *Altstoff Recycling Austria* (AT.39759) which is the first non-cartel case where fine reduction has been granted.
- ¹⁹ RPMs can have pro-competitive effects as acknowledged in the Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L102/1 [hereinafter *Vertical Block Exemption Regulation*].
- ²⁰ See, for an overview of the antitrust risks, Ezrachi, A. & Stucke, M. (2017) *Algorithmic Collusion: Problems and Counter-Measures*, OECD Note DAF/COMP/WD(2017)25, available at <https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD%282017%2925&docLanguage=En>
- ²¹ For instance, Case AT.40465 – *ASUS*, at p.19.
- ²² Judgment of September 11, 2014, *CB v. Commission*, C-67/13 P, EU:C:2014:2204, paragraph 49; Judgment of March 19, 2015, *Dole Food and Dole Fresh Fruit Europe v. Commission*, C-286/13 P, EU:C:2015:184, paragraph 113.
- ²³ For instance, see Case AT.40182 - *PIONEER* at p.27 where it is concluded that “such conduct, by its very nature, restricts competition within the meaning of Article 101(1) of the Treaty.”
- ²⁴ *Id.* p.27.
- ²⁵ *Supra* note 19. See also ARIEL EZRACHI & MAURICE E. STUCKE, *VIRTUAL COMPETITION: THE PROMISE AND PERILS OF THE ALGORITHM-DRIVEN ECONOMY* 39 (2016).
- ²⁶ See for instance, Terrell McSweeney, “*ALGORITHMS AND COORDINATED EFFECTS*,” Remarks at the University of Oxford Center for Competition Law and Policy Oxford, May 22, 2017, available at https://www.ftc.gov/system/files/documents/public_statements/1220673/mcsweeney_-_oxford_cclp_remarks_-_algorithms_and_coordinated_effects_5-22-17.pdf; Salil K. Mehra, *Antitrust and the Robo-Seller: Competition in the Time of Algorithms*, 100 MINN. L. REV. 1323, 1352 (2016).
- ²⁷ *Supra* note 25 at p.6.
- ²⁸ The *Google* cases are prime examples of current on-going cases where the rise of an EU algorithmic antitrust stance unfold with fundamental notions to be reconceptualized. See Case AT.39740 *Google Search (Shopping)*; *Google Android*, IP/18/4581.