

Competition & Regulatory Newsletter

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Playing to the tune of the CMA - further enforcement action against resale price maintenance in the musical instruments sector

On 29 June 2020 the Competition and Markets Authority (CMA) **announced** that it had issued two separate fines totaling £5.5 million to Roland (U.K.) Limited and Korg (UK) Limited for restricting retailers from offering online discounts and setting minimum prices for the sale of their musical instruments online, in an anti-competitive practice known as resale price maintenance. The fines imposed on Roland and Korg take the total amount of fines imposed by the CMA against resale price maintenance in the musical instruments sector (since August 2019) to over £13.5 million.

More fines and closer monitoring by the CMA of the sales of musical instruments online are expected. At the same time as announcing the most recent fines in the sector, the CMA also **announced** that musical instruments supplier Yamaha Music Europe GmbH and the retailer GAK (GAK.co.uk Ltd, The Guitar, Amp & Keyboard Centre Ltd and GAK.co.uk (Holdings) Limited) have both admitted to engaging in online resale price maintenance, as part of a separate investigation. The CMA's decision (due later this month) will be its first enforcement action against a retailer in a resale price maintenance case in any sector. The CMA intends to send out a clear message to the musical instruments sector, and more widely, that both the supplier and retailer are potentially breaking the law by agreeing to restrict the freedom of the retailer to price below a certain level.

Background

To date the CMA has launched five separate investigations into suspected resale price maintenance by various companies in the musical instruments sector under Chapter I of the Competition Act 1998 and Article 101 of the Treaty on the Functioning of the European Union. Infringements have been found in the online sales of a range of musical instruments including electronic drum kits, keyboards and guitars.

In August 2019 the digital piano and keyboard supplier **Casio Electronics Co. Limited** was fined £3.7 million for online resale price maintenance infringements over a five year period between February 2013 and April 2018. Earlier this year

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the guitar supplier [Fender Musical Instruments Europe Limited](#) was fined over £4.5 million for similar infringements over a five year period between January 2013 and April 2018.

Roland and Korg: infringement decisions

In the most recent set of fines issued, Roland was **fined** over £4 million for requiring retailers to sell its electronic drum kits, related components and accessories at or above a minimum price between January 2011 and April 2018. Korg was **fined** approximately £1.5 million for requiring retailers to sell its hi-tech music equipment and synthesizers at or above a minimum price between June 2015 and April 2018.

Both Roland and Korg benefited from a 20 per cent reduction in their fines under the CMA's settlement process. Roland also benefited from a further 20 per cent reduction under the CMA's Leniency programme. However, the fines imposed also reflected an uplift for having breached the law intentionally.

GAK and Yamaha: statement of objections

On 29 June 2020 the CMA also issued a provisional decision finding that GAK and Yamaha had engaged in online resale price maintenance by agreeing not to discount the online price of certain musical instruments below a minimum price. GAK and Yamaha now have the opportunity to respond to the statement of objections before the CMA will take its final decision on whether there has been a breach of competition law. This decision is expected in mid-July 2020.

GAK originally agreed to pay a maximum fine of more than £250,000 to settle the case but this has been increased by 15 per cent on the basis that GAK did not take sufficient action to address concerns about possible resale price maintenance raised by the CMA in an advisory letter sent to GAK in October 2015. Yamaha will receive no fine as it has been granted total immunity by the CMA for being the first whistleblower to bring the infringement to the attention of the CMA. This is conditional on Yamaha continuing to meet the requirements of the CMA's Leniency programme during the investigation.

Resale price maintenance in the musical instruments sector

In all five cases the suppliers and retailers involved had agreed to restrict retailers' ability to reduce prices below a minimum price online, harming consumers by preventing retailers from offering lower prices and setting their prices independently to attract customers. Three of the suppliers (Casio, Roland and Korg) used price monitoring software to ensure compliance with its pricing policies across the sector and three of the suppliers (Fender, Roland and Korg) were found to have taken steps to conceal recognised breaches of the law.

Recommended resale prices do not necessarily amount to illegal resale price maintenance provided that retailers are able to resell at a price they have independently arrived at and suppliers do not threaten retailers or provide financial incentives to comply with the recommended resale price. However, in all five cases retailers were threatened with sanctions such as the withholding of stock or the withdrawal of financial support for marketing promotions. In one case the supplier threatened to stop trade with the

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retailer entirely. The CMA has also identified instances where the retailers engaged in retail price maintenance to protect their own interests and margins.

The policing of resale price maintenance for online sales is seen by the CMA to be all the more pressing in light of the Covid-19 pandemic as consumers are shopping online more than usual. Michael Grenfell, the CMA's Executive Director of Enforcement, said that *“even before the pandemic, the CMA estimated that an average of around 40% of musical instruments were sold online so it's important that manufacturers and retailers do not illegally work together to keep prices high”*.

Further compliance action

Following the Roland and Korg fines and the admitted infringement by Yamaha and GAK, the CMA has announced the steps it has taken to address ongoing resale price maintenance concerns within the musical instruments sector and to *“tackle anti-competitive practices that diminish the many benefits of e-commerce”*:¹

- The CMA has launched its own price monitoring tool which will allow it to automatically monitor price levels among instrument retailers. The tool was developed in response to the online price monitoring software used by some suppliers, including Korg and Casio, to ensure that retailers were complying with their minimum pricing policy and to track their competitors' prices. The objectives of the tool are to deter companies from entering into resale price maintenance agreements, to enhance the CMA's market intelligence and to provide long-term benefits to consumers. Although the tool has been launched in response to the CMA's investigations into the musical instruments sector, the CMA has indicated that the tool will also be used to monitor pricing in other sectors.
- The CMA has issued an [open letter](#) to suppliers and retailers in the musical instruments sector which explains the prevalence of resale price maintenance in the sector, sets out advice in relation to resale price maintenance and signposts the CMA's [guidance for businesses on resale price maintenance](#).
- Separately, the CMA has sent individual letters to almost 70 manufacturers and retailers across the sector. The letters warn that the CMA suspects that they have engaged in resale price maintenance and encourage the companies to reassess their business practices to ensure compliance with the law. If companies are found to have ignored these letters, the CMA is unlikely to be sympathetic and may even increase fines as it did with GAK (which was found to have ignored the letter it received from the CMA in 2015).
- The CMA has published case studies of the Casio, Fender and Korg investigations. The studies set out the background to the investigations, the key aspects of the infringements committed and highlight the main takeaways from each investigation.

¹ Competition and Markets Authority, *The consequences of restricting resale prices: an open letter to suppliers and retailers in the musical instruments sector*, page 2.

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UK High Court orders the disqualification of an estate agent's director

On 3 July 2020 the UK High Court issued a [judgment](#) finding that Mr. Michael Martin, a director of a Somerset-based estate agency, had contributed towards a breach of competition law by his former company. As a result, the High Court ruled in favour of the CMA and disqualified Mr. Martin from “*acting as a director or being concerned in the management of a company*” for seven years.

While the CMA has been able to seek competition disqualification orders from the courts since 20 June 2003, they have rarely used these powers. Indeed, this is the first time such an application has been contested in court. In regards to Mr. Martin's conduct, the High Court ruled, despite his lack of direct involvement in the fee fixing arrangements, that he took no steps to prevent or end his fellow director's anti-competitive behaviour. As a result, the High Court concluded that his conduct “*fell below the standards of probity and competence appropriate for persons fit to be directors of companies*”. In a [CMA press release](#) Michael Grenfell, the CMA's Executive Director of Enforcement, emphasised that the court order sends out a clear message to companies, saying: “*even if you are not directly involved in the breach, you can still be held accountable for it. If you have information about a breach, as a director you must take all reasonable steps to prevent it. If you don't, you risk disqualification, and the CMA will not hesitate to take court action if needed*”.

Mr. Martin is the fourth director to be disqualified for their role in the Somerset-based estate agency cartel. Among other behaviours, it was found that six estate agents agreed to fix the minimum commission rate charged to customers for more than a year. The three other directors who have been disqualified have already given formal undertakings to the CMA not to act as a director of a company for periods of between three and five years.

General Court orders for the reduction of the cartel fine imposed on Infineon

On 8 July 2020 the General Court (GC) [announced](#) that it had ordered for the fine imposed on Infineon for its role in the smart card chip cartel to be reduced from c. €82.7 million to c. €76.8 million.

In September 2014 the European Commission imposed fines on several participants in the smart card chip sector in the EEA for, among other behaviours, coordinating their pricing policy and exchanging commercially sensitive information. In its decision, the Commission granted Infineon a fine reduction of 20 per cent due to mitigating circumstances. Specifically, it decided that Infineon had only participated in collusive arrangements with two undertakings, and was not aware of the other anti-competitive conduct of the cartel participants.

Subsequently, Infineon appealed the decision to the General Court (GC) but the GC upheld the fine imposed by the Commission. In a further appeal to the Court of Justice (CJ), the higher court found that

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the GC had failed to: (i) examine all the contact Infineon had with other cartel participants; and (ii) failed to respond to the argument raised by Infineon that the Commission had infringed the principle of proportionality by setting the amount of the fine without taking into account the limited number of contacts in which Infineon participated. The CJ therefore decided to refer the case back to the GC.

In the most recent judgment, the GC found, contrary to the Commission's decision, that only 10, not 11, anti-competitive bilateral contacts can be found to which Infineon was a party. For the cartel as a whole there were 41 anti-competitive contacts found. As a result, the GC found that a further five per cent reduction of the amount of the fine must be applied, thereby reducing it to c. €76.8 million.

International Competition Network presents scoping papers on big data and cartels

On 30 June 2020 the International Competition Network (ICN), a network of competition authorities from over 140 jurisdictions, published two scoping papers examining the role of big data in cartel enforcement and competition law enforcement at the intersection between competition, consumer protection and privacy. The papers will form the basis of discussion between the ICN members as to how, and whether, updates are required to certain chapters of the ICN Anti-Cartel Manual.

The ICN's first scoping paper, '[Big Data and Cartels](#)', is intended to instigate debate between experts into the effects of digitalisation in cartel enforcement.

The first part of the paper considers big data and algorithms as a "*vehicle for collusion*" while the second part of the paper looks at their potential use as a "*tool to detect cartels*". In the first part of the paper the ICN identifies some of the challenges of big data and algorithms as a means for illicit collusion between competitors. These include *inter alia* how to establish concurrence of wills, how the level of market transparency may require a change in the methods used to analyse documentary evidence, and how to address liability issues. In the second part, the paper lists some of the challenges relating to the detection and investigation of digital cartels. In particular, the paper looks at dealing with large volumes of data, localisation of digital information, cartel screening and combatting against bid-rigging.

The ICN's second scoping paper, '[Competition law enforcement at the intersection between competition, consumer protection, and privacy](#)', looks at, among other issues, the relationship between competition and consumer laws. For example, the ICN suggest that intense competition among digital platforms may lead to "*a 'race to the bottom' on consumer protection or privacy standards*".

Brussels	London	Hong Kong	Beijing
T +32 (0)2 737 94 00	T +44 (0)20 7600 1200	T +852 2521 0551	T +86 10 5965 0600

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