United Kingdom

ANTI-COMPETITIVE PRACTICES

Judgment—art.101 TFEU and Ch.1 of the Competition Act 1998—market for electronic drumkits and associated products—online resale price maintenance—settlement procedure discount revoked—fine increased

Anti-competitive practices; Discounts; Fines; Infringement; Leniency programmes; Musical instruments; Resale price maintenance

Time to face the music: the UK's Competition Appeal Tribunal dismisses an appeal relating to online resale price maintenance in the UK Market of electronic drumkits and associated products

On 19 April 2021, the UK's Competition Appeal Tribunal (CAT) unanimously rejected an appeal from Roland (UK) Ltd and Roland Corp (together, Roland), upholding the earlier decision of the UK's Competition and Markets Authority (CMA).[1] The CAT found that Roland had infringed the prohibition in Ch.1 of the Competition Act 1998 (CA 1998) and/or art.101 of the Treaty on the Functioning of the European Union (TFEU) by engaging in online resale price maintenance (RPM) with a single UK distributor, during the period 7 January 2011 to 17 April 2018, in the UK market for electronic drum kits, related components and accessories. The CAT further adjudicated (for the first time) on the CMA's settlement policy in the context of a penalty appeal, granting the application of the CMA to revoke the 20 per cent settlement discount previously granted, increasing the penalty payable by Roland to £5,004,141 (from £4,003,321).

Decision of the CMA

On 24 March 2020, the CMA issued a statement of objections alleging that Roland, a global supplier of musical instruments, had breached Ch.1 of the CA 1998 and/or art.101 of the TFEU by restricting distributor freedom to discount the online retail prices of electronic drums and associated products. Roland subsequently reached a settlement agreement with the CMA, whereby Roland unequivocally admitted the facts and allegations of the alleged infringement as set out in the statement of objections and agreed to co-operate with the CMA in expediting the process for concluding the case.

On 29 June 2020, pursuant to the settlement agreement, the CMA issued an infringement decision against Roland.[2] The CMA concluded that Roland had engaged in Resale Price Maintenance (RPM) by requiring distributors to advertise and sell "Roland" brand electronic drumkits, related components and accessories online at or above a minimum price between 7 January 2011 and 17 April 2018.[3] Roland utilised elements of both Direct and Indirect RPM, including: (i) regularly issuing new price lists and contacting distributors after their issuance to inform them of new prices; (ii) monitoring resale prices through automated tracking software and asking distributors to report instances of non-compliance with the price lists; and (iii) threatening or imposing sanctions on distributors who did not adhere to the price lists. The CMA noted that the RPM deployed was particularly harmful as it was made more effective through price monitoring mechanisms including real-time

[1] *Roland (UK) Ltd v Competition and Markets Authority* [2021] CAT 8. Available at: *https://www.catribunal.org.uk/sites/default/files/2021-04/1365_roland_Judgment_190421-_1.pdf* [Accessed 9 June 2021].
[2] Competition and Markets Authority, *Decision of the Competition and Markets Authority: Online resale price maintenance in the electronic drum sector* (London: The Stationery Office, 2020). Available at: *https://assets.publishing.service.gov.uk/media/5f171ab43a6f40727ebfb440/Non-confidential_infringement_decision.pdf* [Accessed 9 June 2021].
[3] Competition and Markets Authority, *Decision of the Competition and Markets Authority: Online resale price maintenance in the electronic drum sector* (2020), s.5. At [5.27], the CMA specifically noted that ability to sell or advertise at discounted prices online carries the effect of intensifying price competition.

tracking software.[4] The ultimate effects of Roland's practice were to reduce downward pressure on online prices, reduce price competition between distributors selling Roland's products, and stabilise prices within the UK.[5]

The CMA imposed a fine of £4,003,321 on Roland (UK) Ltd, jointly and severally with its ultimate parent company Roland Corp, which continuously exercised decisive influence over its subsidiary.

- In calculating this financial penalty, the CMA took a "starting point" of 19 per cent of relevant turnover designed to reflect: (i) that RPM is a serious infringement of Ch.1 of the CA 1998 and art.101 TFEU, but is less serious than horizontal price-fixing, market-sharing and other cartel activities; (ii) the wide market coverage of the infringement given the nature of the product, the structure of the market and Roland UK's market share (10–15 per cent); (iii) the impact of the infringement, exacerbated by real-time price monitoring; and (iv) the need to deter other undertakings from engaging in similar infringements.[6]
- In addition, the fine imposed took into account three deductions on grounds of leniency: (i) immunity for the period 7 January 2011 to 31 December 2012 to reflect the "but for" test[7]; (ii) a 20 per cent discount on the penalty for the period 1 January 2013 to 17 April 2018; and (iii) a further 20 per cent discount to reflect the fact that Roland had reached a settlement with the CMA, admitting the infringement.[8]

Grounds of appeal

Roland raised two grounds of appeal, neither of which focused on the substantive elements of the CMA's decision, but instead related to the quantum of penalty and the way in which the CMA had applied its Penalty Guidance.[9]

First, Roland argued that the CMA's 19 per cent starting point was excessive, taking into account the other forms of infringement that must be accommodated in the 0 per cent to 30 per cent range provided for in the Penalty Guidance.[10] Roland submitted that the CMA should have either (a) used a starting point of no more than 3.5 per cent of the relevant turnover; or (b) applied an equivalent discount when making adjustments for specific deterrence and/or proportionality,[11] based on the following arguments:

- The CMA had overstated the seriousness of RPM generally, imposing a penalty that is equivalent to the penalties it imposes for much more serious horizontal infringements.[12] In particular,

[4] Competition and Markets Authority, *Decision of the Competition and Markets Authority: Online resale price maintenance in the electronic drum sector* (2020) at [4.166].
[5] Competition and Markets Authority, *Decision of the Competition and Markets Authority: Online resale price maintenance in the electronic drum sector* (2020) at [4.186].
[6] Competition and Markets Authority, *Decision of the Competition and Markets Authority: Online resale price maintenance in the electronic drum sector* (2020) at [5.26]–[5.28].
[7] Office for Fair Trading, *Applications for leniency and no-action in cartel cases: OFT's detailed guidance on the principles and process* (London: The Stationery Office, 2013), para.9.6 specifies that where an applicant provides evidence of previously unknown facts relevant to the gravity or duration of the infringement, the CMA will not take account of such information to the detriment of the applicant when assessing the appropriate amount of penalties. Available at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf* [Accessed 9 June 2021].
[8] Competition and Markets Authority, *Decision of the Competition and Markets Authority: Online resale price maintenance in the electronic drum sector* (2020) at [5.52]–[5.55].
[9] A summary of Roland's appeal was published by the CAT on 1 September 2020. Available at: *https://www.catribunal.org.uk/sites/default/files/2020-09/1365_Roland_Summary_010920_2.pdf* [Accessed 9 June 2021].
[10] *Roland v CMA* at [41]–[45]. For reference, see Competition and Markets Authority, *CMA's guidance as to the appropriate amount of a penalty* (London: The Stationery Office, 2018).
[11] *Roland v CMA* at [41].
[12] *Roland v CMA* at [46]. Roland relied on the CMA's and CAT's decisions in *Ping Europe Ltd v CMA* [2018] CAT 13, which concerned a complete, network-wide ban on online selling (rather than merely a restriction on online selling prices for one distributor), and yet attracted a starting point of only 12 per cent.

Roland considered that its penalty was almost three times the level that the European Commission would have applied in a case of network-wide online RPM.[13]

- RPM can have pro-competitive effects including: (i) an increase in consumer demand resulting from an enhanced level of service provided by distributors; and (ii) the promotion of inter-brand competition.[14]
- The CMA had failed to take account of the very narrow market coverage of the RPM that the CMA actually found in its decision.[15]

Secondly, Roland argued that the 20 per cent discount for leniency given by the CMA was inadequate and should have been higher in light of Roland's co-operation throughout the investigation.[16]

As a result of Roland's decision to appeal, the CMA applied to revoke the settlement discount of 20 per cent for the period 1 January 2013 to 17 April 2018, on the basis this breached the settlement agreement to accept a lower fine in return for agreeing not to appeal.[17] While settlement agreements with the European Commission do typically allow the settling party to appeal on points relating to the calculation of their fine without losing the benefit of their settlement discount, CMA settlement agreements do not.

CAT decision

On 19 April 2021, the CAT handed down a decision dismissing both grounds of Roland's appeal, and finding that Roland should lose the benefit of its 20 per cent settlement discount on the basis that Roland breached its settlement agreement with the CMA.[18]

On the first ground, the CAT rejected Roland's claims that the "starting point" of 19 per cent was excessive and did not properly reflect the gravity or scope of the RPM infringement. The CAT found that:

- Although RPM is less serious than the most serious cartel infringements, it is still an inherently serious infringement that is particularly prevalent in the musical instrument sector and which has a harmful effect on consumers, notably when it takes place online.[19] In any event, there is not necessarily a significant difference between the seriousness of RPM and the seriousness of horizontal infringements, contrary to Roland's argument.[20] The immediate effect of RPM is to restrict distributors' freedom to set their own prices, restricting intra-brand competition, and increasing the prices paid by consumers for a particular brand.[21] In this regard, the CAT cited the fact that the Vertical Restraints Guidelines identify seven respects in which RPM may restrict competition, including: (i) the possibility of collusion between suppliers and distributors, (ii) the foreclosing of smaller competitors; and (iii) a reduction in dynamism and innovation at the distribution level.[22]
- There was no evidence that the potential pro-competitive effects of RPM submitted by Roland had been achieved. In this regard, even if Roland's RPM had a pro-competitive aim, this should

[13] *Roland v CMA* at [41].
[14] *Roland v CMA* at [51]–[54].
[15] *Roland v CMA* at [55]–[59].
[16] *Roland v CMA* at [102]–[109].
[17] *Roland v CMA* at [125]–[130].
[18] *Roland v CMA* at [145].
[19] *Roland v CMA* at [85], [96].
[20] *Roland v CMA* at [88].
[21] *Roland v CMA* at [81].
[22] *Roland v CMA* at [82].

not be considered as much less serious than an infringement pursued with an anti-competitive aim, absent demonstrable competitive benefits.[23]

- The CMA had taken the infringement's limited market coverage into account and, if the CMA had found that Roland had implemented RPM in respect of multiple distributors and/or in relation to in-store drum sales, that would have warranted a higher starting point than 19 per cent. In this regard, the CAT accepted that 20 per cent was not the upper limit for the starting point for RPM.[24] In any event, the CMA was entitled to conclude that the infringement would likely have had a wide adverse effect in the market because of the active monitoring carried out by Roland (in particular the use of online price monitoring software), allowing Roland to detect price reductions and revert to the minimum price more easily and quickly than would otherwise have been the case.[25]
- The starting point of 3.5 per cent proposed by Roland was too low to operate as an effective deterrent.[26]
- The starting point of 19 per cent was not inconsistent with the starting point adopted by the CMA in other decisions.[27]

On the second ground, the CAT rejected Roland's claim that the leniency reduction of 20 per cent was too low, opting to give weight to the evaluative assessment made by the CMA in relation to matters of which the CMA has particular experience (for example, the value of the assistance provided by an applicant for leniency).[28] In making its determination, the CAT found:

- The submissions of the CMA were persuasive, namely that: (i) the documentary and witness evidence provided by Roland was of limited probative value compared to the evidence already available to the CMA; (ii) Roland's documentary evidence was fragmentary and ambiguous in nature, and only a small amount was relevant and additional to what the CMA had already obtained from other sources; and (iii) evidence of certain witnesses contradicted Roland's admission of its RPM infringement, and Roland offered limited co-operation in bringing this to the CMA's attention to address it.[29]
- The speed with which a leniency application is made after the start of an investigation is not determinative of the appropriate level of the leniency discount—it is possible to apply early and not add much value or to apply later in the investigation and add a lot of value.[30]

Finally, the CAT found that Roland's decision to appeal breached its settlement agreement. As a result, the CAT revoked the 20 per cent settlement discount, increasing the penalty payable by Roland to £5,004,141 (from £4,003,321).[31] On this issue, the CAT found:

- There was no unfairness in holding Roland to its bargain given that Roland: (i) understood the 20 per cent discount was being given on the basis that Roland would not appeal; and (ii) had ample opportunity to consider the penalty proposed by the CMA with the benefit of legal advice.[32]

[23] *Roland v CMA* at [84].
[24] *Roland v CMA* at [94].
[25] *Roland v CMA* at [92].
[26] *Roland v CMA* at [95].
[27] *Roland v CMA* at [96].
[28] *Roland v CMA* at [29], [35]–[36].
[29] *Roland v CMA* at [112], [119].
[30] *Roland v CMA* at [118].
[31] *Roland v CMA* at [144].
[32] *Roland v CMA* at [138].

- There is no requirement to quantify the savings made by the CMA as a result of the settlement (comparing the position of the CMA after the appeal with the position it would have been in if there had not been a settlement) and allow Roland to have the benefit.[33]
- The choice between (i) paying a discounted penalty on settlement and foregoing an appeal; or (ii) paying the full penalty and appealing, does not shield the CMA from scrutiny. The undertaking can choose whether to accept the settlement and ensure that the penalty is scrutinised on appeal.[34]

Conclusion

There has been one case in which a party entered into a CMA settlement and then successfully appealed the infringement decision, thereby avoiding any penalty.[35] However, the CAT's judgment in marks the first time that it has adjudicated on the CMA's settlement policy in the context of a penalty appeal, and serves as a warning to would-be appellants considering whether or not to resile from settlement decisions reached with the CMA. The judgment sends a clear message that investigations concluded swiftly through a settlement agreement cannot be reopened on appeal without forfeiture of any discount agreed.

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US

ANTI-COMPETITIVE PRACTICES

Enforcement—Supreme Court judgment—Federal Trade Commission—inability to seek monetary remedies direct from Federal Court through permanent injunction procedure—legislative reform

Anti-competitive practices; Compensation; Injunctions; National competition authorities; United States

US Supreme Court Rules that Federal Trade Commission can no longer go straight to Federal Court to obtain monetary relief

The US Supreme Court has ruled that the Federal Trade Commission ("FTC") cannot go directly to federal court to seek monetary remedies; instead, it must first exhaust its own internal administrative proceedings. This decision upends more than 40 years of practice. The case is *AMG Capital Management, LLC v FTC*, 141 S. Ct. 1341 (2021).

The FTC is responsible for "protecting consumers and competition by preventing anticompetitive, deceptive, and unfair business practices". The FTC Act authorises the FTC to prevent "[u]nfair methods of competition" and "unfair or deceptive acts or practices", which it does by bringing both antitrust and consumer protection cases. Unlike the US Department of Justice's Antitrust Division (the other federal antitrust enforcement agency), the FTC can prosecute cases in either of two ways: 1) before an FTC Administrative Law Judge or 2) in federal court.

In *AMG Capital Management*, the FTC brought an action in the federal court against a payday lender for misleading customers regarding essential terms of the loans they provided customers. Relying on s.13(b) of the FTC Act, a provision that authorises the FTC to seek "permanent injunctions," the FTC asked the court to issue a permanent injunction to prevent the

[33] *Roland v CMA* at [140].
[34] *Roland v CMA* at [141].
[35] *Asda Stores Ltd v Office of Fair Trading* [2011] CAT 41.