

# Kluwer Competition Law Blog

## Dutch ACM fines Samsung almost € 40 million for resale price maintenance

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The Dutch competition authority ACM **fined** Samsung Electronics Benelux B.V. (“**Samsung**”) € 39,875,500 for coordinating the retail prices of Samsung television sets together with various retailers. The alleged coordination took place for five years, from January 2013 through December 2018. The ACM only published a [summary of the decision](#) dated 14 September 2021 thus far, but this already provides insight into the conduct and reasoning of the ACM to impose the fine.

This is the first time the ACM imposes a fine in relation to resale price maintenance (“**RPM**”). RPM still constitutes a hardcore restriction in light of the cartel prohibition (as laid down in Article 6 Dutch Competition Act and Article 101 Treaty on the Functioning of the European Union).[1] RPM concerns agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer.

### Samsung’s conduct

The ACM alleges that Samsung ensured that its retailers would adhere to the desired (recommended) retail price of its television sets. According to the ACM, Samsung played a central role by actively exercising influence on the online retail prices of retailers and expecting retailers to stick to the prices communicated by Samsung.

Samsung monitored, collected and analysed retailers’ prices through price-comparison websites using webcrawlers and spider software. According to the ACM, it acted upon diverging prices (prices diverging from Samsung’s recommended retail prices). Samsung would contact retailers via e-mail or Whatsapp and urge them to adjust their retail price. Samsung would also let these retailers know that it gave the same message to other retailers and that they too would adjust (raise) their pricing. This gave retailers reassurance that they would not price themselves out of the market if they would follow the recommended price levels as ‘advised’ by Samsung.

Furthermore, retailers have been found to contact Samsung with complaints about the pricing of other retailers and Samsung would act upon these complaints by contacting the retailer in question and align them on the recommended price level. According to the documentation found by the ACM, Samsung would also ask retailers to wait with lowering its retail price until it had contacted

the retailer that went below the market price desired by Samsung.

The summary of the decision contains a few examples of the communication between Samsung and its retailers mentioning for example that ‘*all other partners have been advised*’, ‘*429 euros... can you also match this (...) also more margin?*’, ‘*will do something about this [a retailer that did not charge the desired price]*’, etc.

The ACM mentions that Samsung did not impose any penalties. Nor did it sanction retailers by other means (such as suspension of deliveries) or give incentives (such as offering discounts) to ensure adherence to the recommended prices.

### The infringement alleged by the ACM

According to the ACM, the conduct of Samsung went beyond providing advisory prices or non-binding price recommendations (which is in principle allowed). Samsung *de facto* determined retail prices and disciplined retailers not being able to set their own retail prices independently. The ACM stated that Samsung unlawfully intervened directly in the competitive dynamics between retailers and that the practice served to maintain the margins of retailers and of Samsung.

The ACM concludes that the objective of Samsung’s conduct was to restrict competition leading to a climate in which retailers were discouraged to lower prices. The conduct had an effect on the large majority of the total sales of Samsung television sets in the Netherlands and the price coordination was at the expense of consumers. Samsung thus infringed the cartel prohibition.

### Amount of the fine

By setting the amount of the fine the ACM take into account that Samsung systematically intervened in the retail prices, is a major competitor on the television market (who should have known that the conduct was illegal) and that the practice lasted for years. A mitigating factor is that the price coordination did not involve any sanctions or incentives.

We note, however, that it cannot be ruled out that there was an (indirect) incentive given to the retailers. For, the result of a successful coordination or disciplining of retail price levels, if proven by the ACM, would result in retailers not having to compete on price and therefore obtaining higher margins.

### Samsung’s position

According to the ACM, the practices of Samsung were aimed at controlling and minimizing any price deviations across the range of Samsung television sets. Samsung was pulling all the strings and its conduct led to systematic coordination between Samsung and its retailers.

The summary of the decision is very brief on Samsung’s position. The ACM mentions that Samsung contests that there has been an infringement and has taken the position that it merely gave retailers advice, did not pressurize anyone and did not create any incentives for retailers to adjust their pricing to the recommended prices. Samsung has always clearly communicated that retailers

are free to determine resale prices and has not forced anyone to follow certain price recommendations.

*Sidestep: Current VBER/Guidelines and draft revised VBER/Guidelines*

The provision in relation to RPM being a hardcore competition restriction (Article 4(a) VBER) has not been amended in the [draft VBER](#). However, the [draft Guidelines](#) contain more extensive guidance on the topic. The draft Guidelines state that RPM is a clear-cut restriction where a supplier requests a price increase and the buyer complies with such a request.<sup>[2]</sup>

The Draft Guidelines discuss the use of price monitoring systems, which are increasingly used in e-commerce, and increase price transparency in the market. Monitoring allows suppliers to effectively track the resale prices in their distribution network and to intervene swiftly in case of price decreases and it allows retailers to effectively track the prices of their competitors and report price decreases to the manufacturer, together with a request to intervene against such price decreases.<sup>[3]</sup> The Draft Guidelines indicate how monitoring can result in indirect price maintenance. This seems to touch the core of the debate in the present case.

*Conclusion*

The ACM established in this case that the conduct constituted indirect (or *de facto*) RPM. This is less clear cut than direct RPM which means that there is room for debate whether the conduct is in fact RPM in violation of the cartel prohibition. Furthermore, although the examples of the communication between Samsung and its retailers seem to indicate unlawful coordination, there is always room for interpretation in these matters.

According to [Dutch news](#), Samsung will appeal the decision of the ACM (as expected). The summary makes clear that Samsung disputed the conclusion that it infringed the cartel prohibition. As the restriction of indirect RPM is not as clear cut, we expect a lively debate in appeal. Will this decision be the turning point for ACM's current track record or will Samsung take it home in appeal? As this is the first case where the ACM imposed a fine in relation to RPM in the Netherlands, it is definitely one to watch.

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[1] See also the Vertical Block Exemption Regulation (EU) [No 330/2010](#), Article 4(a); Guidelines on Vertical Restraints, [2010/C 130/01](#), paras 48, 223-229.

[2] Draft Guidelines on Vertical Restraints, para 171.

[3] Draft Guidelines on Vertical Restraints, para 176 (with reference to Commission Decisions in AT.40182 *Pioneer*, paras 136 and 155; AT.40182 *Denon & Marantz*, para 95; AT.40181 *Philips*, para 64; AT.40465 *Asus*, para 27).

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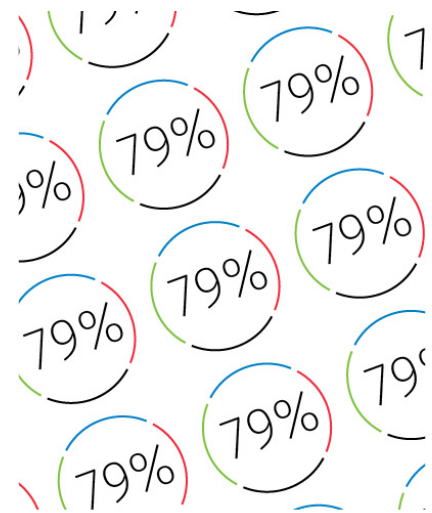
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