



OBSERVATORY ON COMPETITION LAW ENFORCEMENT

European Commission fines NIKE €12.5 million for restricting cross-border sales of merchandising products

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On 25 March 2019, the European Commission issued a press release announcing the imposition of a fine of EUR 12.5 million on NIKE for restricting cross-border sales of merchandising products.

In June 2017, the European Commission launched an investigation in the context of antitrust control in order to investigate certain practices carried out by NIKE. Through licensing and distribution agreements, the company imposed restrictions that resulted in: indirect measures to implement out-of-territory restrictions, such as threatening with the contract and carrying out audits to ensure compliance with the restrictions; direct and indirect measures on master licences; direct measures restricting out-of-territory sales by licensees, imposing double-royalties on these sales; and impositions as regards the transmission of such prohibitions, with the company intervening to ensure retail stores did not sell in other EEA territories. In essence, these measures limit and prevent the sale of branded goods in other Member States by licensees.

Accomplished its investigations, the Commission has concluded that, in the course of thirteen years, these practices have harmed licensed merchandise products bearing the brands of clubs like FC Barcelona, Manchester United, Juventus, Inter Milan and AS Roma, as well as national federations like the French Football Federation, and, consequently, the consumers of the Union.

The Commission therefore imposed a fine of EUR 12.5 million based on the anti-competitive practices of the company and on the fact that such conduct called into question the fundamental principles which underpin the proper functioning of the market.

Hence, we can clearly see that the antitrust control exercised under Article 101 TFEU is reflected in a post-clearance review of the company's conduct.

Bearing in mind Commission communication 2010/C 130/01 – guidelines on vertical restraints, to be in line with this regime it is necessary that undertakings position themselves at different levels in the production chain and that the nature of the restrictions and obligations regards the conditions under which the parties may acquire, sell or resell certain goods or services. Thus, we apply the prohibition under Article 101/1 TFEU to all practices which occur in the context of such vertical agreements. Examples of vertical restraints include: territorial protection, exclusive distribution, resale price fixing, certain types of selective



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distribution, export restrictions, customer restrictions, exclusive purchase obligations and non-compete obligations.

The company was granted a 40% reduction of the fine, since it cooperated in the investigations, granting information and acknowledging the facts and the infringement of EU competition rules. Companies may contribute to investigations by recognising their practices and also cooperate by voluntarily providing clarifying evidence or assisting in the design and implementation of remedies. The Commission assesses each case, and the level of the reduction applied is decided according to the scope and timing of the cooperation and the procedural efficiencies gained in each individual case. We can verify that these same reductions happen in cases of cartel agreements (as in the ARA case), the same logic also being applied to cases that do not fall under this classification, that is, to simpler procedures.