

Antitrust Alliance

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COMPETITION LAW: SELECTIVE DISTRIBUTION AND ONLINE SALES

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1. INTRODUCTION

Distribution agreements and online sales – particularly restrictions on online sales – have been a hot topic among suppliers, their advisors and competition authorities in many jurisdictions for more than a decade. In May 2017, the European Commission published its final report on the e-commerce sector inquiry.¹ The Commission's work has been followed closely by companies and competition law practitioners as the Commission's latest sector inquiry in the pharmaceutical sector resulted in some serious antitrust cases – at the EU and national levels.

The e-commerce sector inquiry is a part of the Digital Single Market strategy, where one of the main goals is to ease the cross-border purchase of goods and services and to benefit from lower prices.² Stakeholders from all member states submitted information to the inquiry, and the Commission received more than 2,600 contracts related to distribution of consumer goods.^{3,4}

The objective of the e-commerce sector inquiry has also been to enable the Commission to open antitrust investigations by obtaining an overview of the main market trends and gather evidence about competition barriers.⁵ According to the Commission, the inquiry has identified business practices that could restrict competition, and shows where the Commission will focus its enforcement activities.⁶

In the final report, the Commission has described the development within online distribution of consumer goods during the last decade and has identified contractual restrictions used by different stakeholders. The report highlights topics such as *increased price-transparency*, which has led to manufacturers need for greater control through selective distribution. In a selective distribution network, retailers must fulfil certain criteria to become part of the network.⁷ **The different restrictions in selective distributions systems are the focal point of many of the Commission's main competition concerns.**

Among the concerns raised by the Commission are: the exclusion of 'pure' online retailers, the use of geographical restrictions (so-called *geo-blocking*), restrictions on the *use of marketplaces*, and restrictions on the use of *price comparison tools*. The e-commerce sector inquiry has shown similar tendencies, but it also has highlighted that the restrictions and concerns vary across member states and sectors.

This new market insight will lead to investigation into specific distribution systems, and the Commission has already opened cases in the hotel, consumer electronics, and video games sectors. In addition, national competition authorities taking the main national issues, concerns and differences into account will also carry out investigations. This means that national case law will continue to play a crucial role in the assessment of cross-border selective distribution systems.

In this paper, we provide legal insight into some of the most important topics and national differences within online sales and selective distribution.

¹ The Final Report on the e-commerce sector inquiry (COM (2017) 229 final) ("**The Final Report (COM (2017) 229 final)**") and the Staff Working Document (SWD(2017) 154 final) are available on the European Commission's website: http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html.

² Staff Working Document (SWD (2017) 154 final), p. 9.

³ Ibid.

⁴ The Final Report is divided into two separate sections; one section covering e-commerce and consumer goods, and one section covering e-commerce and digital content. The section on digital content covers licensed right to movies, television series, music and sports. This paper does not cover this section of the report and the sector inquiry.

⁵ The Final Report (COM (2017) 229 final), p. 3.

⁶ European Commission press release, 10 May 2017, "*Antitrust: Commission publishes final report on e-commerce sector inquiry*".

⁷ The Final Report (COM (2017) 229 final), p. 4-5.

2. SELECTIVE DISTRIBUTION - THE MOST IMPORTANT TOPICS

2.1 Restrictions on passive sales

2.1.1 *Restrictions on passive sales and online distribution*

In the context of selective distribution networks, it is prohibited to place any **restrictions on distributors' active and passive sales** to end users.⁸

As far as online sales are concerned, the prohibition on passive sales is a particularly sensitive issue, as the use of a website to sell products is considered as a form of passive selling.⁹ Therefore, a prohibition of online sales is not allowed.

Passive sales are defined in the Guidelines on Vertical Restraints as *“responding to unsolicited requests from individual customers including delivery of goods or services to such customers”*.¹⁰

“General advertising or promotion that reaches customers in other distributors'(...) territories or customer groups but which is a reasonable way to reach customers outside those territories or customer groups, for instance to reach customers in one's own territory” is considered as passive selling.¹¹

2.1.2 *Possible limitations for online distributors and legal requirements*

The prohibition on restricting distributors' passive sales does not mean that suppliers may not limit their distributors' use of the internet: it is essential that suppliers are given tools to protect their brand image, which is generally one of the main reasons for setting-up selective distribution networks. In that context, suppliers may want to set out criteria for online sales.

Suppliers are allowed to request that their distributors run one or several physical points of sale in order to become a member of the selective distribution network.¹² Suppliers may also require that their distributors sell at least a certain absolute number of products offline to ensure an efficient operation of the physical point(s) of sales.¹³

Suppliers can also require quality standards from their distributors. When setting such standards, the supplier should impose criteria that are *“overall equivalent to the criteria imposed for the sales from the brick and mortar shop”*. The Commission states that *“this does not mean that the criteria imposed for online sales must be identical to those imposed for offline sales, but rather that they should pursue the same objectives and achieve comparable results and that the difference between the criteria must be justified by the different nature of these two distribution modes”*.¹⁴

⁸ Article 4 (c) 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 (“Vertical Block Exemption Regulation” or “VBER”).

⁹ Cf. paragraph 52 of the EU Commission Guidelines on Vertical Restraints, OJ C 130, 19.5.2010 (“**Guidelines on Vertical Restraints**”).

¹⁰ Cf. paragraph 51 of the Guidelines on Vertical Restraints.

¹¹ Cf. paragraph 51 of the Guidelines on Vertical Restraints.

¹² Cf. paragraph 54 of the Guidelines on Vertical Restraints.

¹³ Cf. paragraph 52 of the Guidelines on Vertical Restraints.

¹⁴ Cf. paragraph 56 of the Guidelines on Vertical Restraints.

2.1.3 Trends in case law

The cases concerning restrictions of passive sales and online distribution in selective distribution can be divided into two categories: *the first category* concerns restrictions that amount to a direct or indirect ban on online sales imposed by suppliers on their distributors; *the second category* concerns restrictions that make it disadvantageous for the distributor to sell online, but do not amount to a complete ban on online sales.

A **complete ban on online sales is prohibited** across all EU member states. This prohibition includes organising a selective distribution system in ways that entail a *de facto* ban on online sales. This was the case, in a more or less obvious way, in the Polish *Royal Canin* case.¹⁵ Royal Canin organised a selective distribution system of specialised pet food distributors and limited their distribution system to specialised veterinary practices that did not sell online. This was found to be an illegal restriction of passive sales and Royal Canin was fined.

On the same note, in the Dutch case, *Voorne Koi/Oase*¹⁶, a district court found that terms requiring the Voorne Koi distributor to get approval from the supplier, Oase, before selling products online qualified as a hardcore restriction of passive sales.

In the Danish case concerning *Independent Matas stores' access to online-sale*,¹⁷ a clause preventing distributors owning independent franchise stores from selling goods on websites owned by the individual independent franchise store (and not by the concept-owner) was found to be an illegal restriction of passive sales. However, clauses requiring the independent franchise store to take certain precautionary measures before selling over-the-counter drugs online were accepted. These clauses were viewed as overall equivalent to the criteria concerning interior and marketing that brick-and-mortar shops had to meet.

Discrimination on wholesale prices between goods sold online and goods sold in brick-and-mortar shops was not considered to be an illegal restriction of passive sales in the Dutch *ATAG* case¹⁸. The dual pricing system was justified, as online sales incurred higher costs for ATAG, because customers that bought online more often called ATAG for service support.

However, in the Hungarian case *CIBA/Alcon*¹⁹, the suppliers also gave online distributors of contact lenses less favourable terms, e.g. higher prices. This situation was deemed to be an illegal restriction of passive sales. The Hungarian Competition Authority rejected the argument that restrictions on online sales could be justified by health risks due to the customers' need for specialist support.

2.1.4 Conclusions

A direct or indirect prohibition of online sales is generally considered as an illegal restriction of passive sales in all EU member states. The main challenges suppliers face is to pass the equivalence test when setting up a selective distribution network, which includes different criteria for online sales. **Restrictions making it less favourable to sell online seem to be assessed in accordance with the Guidelines on Vertical Restraints in the different member states, but the outcome of this assessment and possible justifications vary.** Thus, suppliers must be thorough in this assessment and aware of the national case law, when implementing the

¹⁵ Polish Competition Authority, Royal Canin, No. RKR 48 /2013, 30 December 2013 (please note that this case is not yet final as an appeal is pending).

¹⁶ Midden-Nederland District Court, Voorne Koi/Oase, No. C/16/331595 / HA ZA 12-1167, 3 December 2014.

¹⁷ The Danish Competition Council, Independent Matas stores' access to online-sale, No. 4/0120-0100-0376/BYS/kb, 23 April 2008.

¹⁸ Zutphen District Court, ATAG, No 79005 / HA ZA 06-716, 8 August 2007.

¹⁹ Hungarian Competition Authority, Alcon Services AG (CIBA/Alcon), Novartis Hungária Kft., and Alcon Hungária Gyógyszerkereskedelmi Kft. No. Vj-55/2013, 6 August 2015 (please note that this case is not yet final as an appeal is pending).

same restrictions on online resellers in selective distribution systems operating in multiple EU member states.

2.2 Third party platforms

2.2.1 *Third party platforms and selective distribution*

Third party platforms are websites facilitating the sale and purchase of goods and services online as easily and cheaply as possible. Third party platforms include websites such as eBay and Amazon.

In the context of selective distribution, third party platforms present a number of challenges. The primary purpose of a selective distribution system is often to protect brand prestige and to protect the consumer's purchasing experience that goes with purchasing a product or service through someone, who provides the right setting and information. To that end, a supplier may require its distributors to maintain shops (decorated using specified colours and brand labels) and offer customer facilities such as guidance and after-sale care. These requirements are difficult to maintain and control if the distributor uses third party platforms.

In some cases, sales via a third party platform may be prohibited because the nature of the goods in question raises health or safety issues. This may be the case, for example, in relation to pharmaceutical drugs where the distributor needs to check the identity, the medical prescription or age of the person making the purchase.

A brand can also be damaged if goods or services are sold on online platforms, which are basic, “no frills” websites where features such as guidance and a luxurious look and expression are removed to keep the price low. For these reasons, suppliers frequently seek to restrain distributors from selling on online platforms.

2.2.2 *Third party platforms and competition law*

There has been much debate about whether an absolute marketplace ban constitutes a hardcore restriction within the meaning of the Vertical Block Exemption Regulation (VBER), and until recently it had not been assessed by the EU courts.²⁰

In the recent and much debated *Coty case*, restrictions on sales via third party platforms was examined by the Court of Justice of the European Union (CJEU).²¹ This case emerged as a referral from a German regional court, where Coty, a supplier of luxury cosmetics, was challenged by one of its authorised distributors on the legality of a prohibition of sales through third party platforms. The CJEU was among other things asked to consider whether such a ban constituted a hardcore restriction, thus excluded from the benefits in the VBER.

In its judgement, the CJEU favoured the interests of suppliers. After recognising that the restrictions at issue did not constitute an outright ban on online sales, it stated that Coty's ban on sales via third party platforms was not a hardcore restriction. In addition, the Court found that a prohibition of sales through third party platforms can constitute a legitimate criteria in selective distribution system based on quality criteria. It is, however, a condition that the prohibition is in accordance with the general conditions for selective distribution, i.e. that it is necessary in the light of the objective pursued and applied in a uniform and discriminatory manner.

²⁰ The Final Report (COM (2017) 229 final), p. 150.

²¹ Case C-230/16, *Coty Germany GmbH v Parfumerie Akzente GmbH*, 6 December 2017.

In the *Coty*-case, the Court specifically refers to selective distribution of luxury goods, which leaves the uncertainty, whether the conclusions are limited to this specific segment. However, in the e-commerce report, the European Commission has stated that there are no indications "[...] *that marketplace bans can – at this stage – be said to be aimed at restricting the effective use of the internet as a sales channel*".²² This indicates a broader scope for the application of the conclusions in the *Coty*-case, but still under the assumption of a case-by-case assessment of the context and the application of a prohibition of sales through online platforms. Moreover, the evolution within the case law may turn out to be driven by decision from the national courts and competition authorities, where we have already heard some national opinions on the *Coty*-case pooling in the direction of a narrow interpretation of the judgement.

2.2.3 Trends in case law

In the *Coty*-case, which we discussed in section 2.2.2, the CJEU defines luxury goods as goods where "*the quality [...] is not just the result of their material characteristics, but also the allure and prestigious image which bestow on them an aura of luxury*". The assessment of which goods will be covered by this definition must be decided by the national courts and competition authorities on a case-by-case basis.

In a recent Dutch case, the district court in Amsterdam ruled that Nike's products were to be considered as luxury goods.²³ On that basis, the court found that it was not a competition law infringement for Nike to prohibit its selective distributors from selling via third party platforms. The decision predates the CJEU judgement in the *Coty* case, but the district court relied on the Advocate General Wahl's opinion in the *Coty* case²⁴.

The CJEU's decision in *the Coty case* is also in accordance with an earlier judgment of the Higher Regional Court in Frankfurt in the *Deuter case*, where that court ruled that a ban on the sale of Deuter-branded rucksacks through Amazon was legal.²⁵ The court ruled that, in principle, a supplier of branded goods is allowed to decide under which conditions its products may be sold. As far as the sales ban through Amazon was concerned, the court said that the supplier's interest took precedence to ensure its goods were perceived as high-quality products.

However, a number of other cases dating from before the Advocate General's opinion in the *Coty* case have illustrated how certain courts or competition authorities have considered platform sales bans to be contrary to competition law. In a case involving Adidas, the German competition authorities examined conditions proposed by Adidas for its distributors that wished to sell online.²⁶ The conditions for online sales included a prohibition for distributors to sell via eBay, Amazon, and other platforms. Adidas was informally notified that its ban on sales via online market places and the restrictions imposed on authorised distributors regarding search engine advertising gave cause for serious competition concerns.

In another German case, *The Alfred Sternjakob case*, the relevant distribution agreement stated that the relevant products were not permitted to be distributed through eBay or other platforms.²⁷ The Berlin Appellate Court held that this prohibition constituted an inadmissible restriction of competition as the conditions applying to the selective distribution system were being applied in a discriminatory manner. The court noted that the supplier was demanding a prohibition of sale on "eBay", allegedly to protect the quality

²² The Final Report (COM (2017) 229 final), p. 154.

²³ Amsterdam District Court, Nike vs. Action Sport, C/13/615474 / HA ZA 16-959, 4 October 2015 (please note that at the time of publication it is unknown whether the case is final or an appeal is pending).

²⁴ Case C-230/16, *Coty Germany GmbH v Parfumerie Akzente GmbH*, Opinion of Advocate General Wahl, 26 July 2017

²⁵ Higher Regional Court of Frankfurt, *An authorised dealer v. Deuter Sport GmbH*, 11 U (Kart) 84/14, 22 December 2015.

²⁶ German Federal Cartel Office, *Adidas AG*, B3-137/12, 27 June 2014.

²⁷ Berlin Appellate Court, *An authorised dealer v. Alfred Sternjakob GmbH & Co. KG*, 2 U (Kart) 8/09, 19 September 2013.

image of its products, whilst itself distributing the same products via discount chains, which did not correspond with the requirements that the supplier had given to the sales partner.

In the French *Caudalie case*, concerning the cosmetics producer Caudalie, the Paris Court of Appeal stated that a ban imposed on the distributors of Caudalie's products regarding using an online platform, whatever its features, could potentially constitute a restriction of competition. Failing to provide an objective justification, Caudalie was unable to benefit from the exemption in the Vertical Block Exemption. If Caudalie had provided an explanation and justification for the ban, then the general prohibition on selling the products through online platforms could have been justified.²⁸ However, the Court of Cassation quashed the judgment of the Court of Appeal. It found that the Court of Appeal did not prove the absence of a manifestly unlawful disturbance resulting from the harm to Caudalie's distribution network. It then underlined that the French Competition Authority in a decision from 2007 acknowledged the legality of Caudalie's selective distribution and never amended this decision²⁹ since. Hence, Caudalie was entitled to prohibit distributors of reselling its products through online platforms.³⁰

2.2.4 Conclusions

The *Coty case* will have immense importance in resolving the permissibility of third party platform restrictions in selective distribution systems, and it will without any doubt set a precedent. The *Coty case* does not lead to the conclusion that platform bans will be found to be lawful in every case. Suppliers will need to assess such a ban on a case-by-case basis, perhaps by arguing that the ban is justified by the luxury branding of the product. This will either be based on national case law, or an assessment of the consumers' perception of the product at hand in the given national market.

In that sense, it will be interesting to see how national courts and authorities will interpret the CJEU's conclusions in the *Coty case*. Shortly after the CJEU published the decision, the German Competition Authority stated on twitter that "*The #ECJ has taken care to limit its findings to genuine luxury products. #Brandmanufacturers have not received carte blanche to issue blanket #platformbans. First assessment: Limited impact on our practice*".³¹ However, this view is not shared by all experts and practitioners.

2.3 Geo-blocking: A menace to competition?

2.3.1 What is geo-blocking?

In *EU* jargon, all commercial practices intending to prevent customers in certain geographical locations from purchasing goods or services offered via an online interface located in other areas are called **geo-blocking**.

Distributors geo-block when they:

- block cross-border access to their websites;
- re-route customers to websites targeting their member states;
- refuse making cross-border deliveries in online sales;
- refuse to accept cross-border payments in online sales etc.

Applying different terms based on the customers' home country are also referred to as 'geo-filtering'. However, these practices and similar practices fall within the geo-blocking-category as they could raise some of the same competition law concerns.

²⁸ Caudalie case, Paris Court of Appeal, 2nd February 2016, n°15/01542.

²⁹ French Competition authority, 8th March 2007, decision n°07-D-07.

³⁰ Caudalie case, French Cour de cassation, 13th September 2017, n°16-15.067.

³¹ <https://twitter.com/Kartellamt>, 6 December 2017.

2.3.2 *Geo-blocking and competition concerns*

Geo-blocking constitutes a restriction on the free movement of goods or services. Moreover, the CJEU has on a number of occasions held that agreements or concerted practices that are aimed at partitioning markets according to national borders or which make the interpenetration of national markets more difficult have as their object the restriction of competition.³² Furthermore, territorial restrictions in a vertical agreement are generally considered to be hardcore restrictions and will not benefit from the exemptions in the Vertical Block Exemption Regulation.³³

However, **geo-blocking only raises competition law concerns where it is implemented through agreements or concerted practices between two or more independent parties**, i.e. a supplier and its distributors. In the absence of a dominant market position, the EU competition rules are not concerned with geo-blocking based on unilateral business decisions taken by companies.

Nonetheless, some distributors might have good reasons to geo-block. Some of the arguments that are used by distributors to justify restrictions applied to sales outside a certain territory include: the need to register at the different tax authorities where they deliver; higher shipping costs; or obligations arising from the application of foreign consumer laws. However, it is still uncertain when these reasons to geo-block are in fact justified.

To remedy this uncertainty and prevent unjustified discrimination based on customers' nationality, place of residence or place of establishment in cross border commercial transactions, the European Commission has proposed a regulation addressing unjustified geo-blocking.³⁴

The main objective of the proposed regulation is to prevent discrimination of customers' access to prices, sales or payment conditions when buying products and services in another EU country. Under the draft regulation, suppliers and distributors will not be able to discriminate between customers for reasons of nationality, place of residence or place of establishment on the terms and conditions (including price) that they offer in the following three cases:

- Where the supplier or distributor sells goods that are delivered in a member state to which they offer delivery to the customer or are collected at a location agreed upon with the customer. However, distributors will not be obliged to deliver goods to customers outside the member state(s) to which they offer delivery.
- Where the supplier or distributor provides electronically supplied services, such as cloud services, data warehousing services, website hosting and the provision of firewalls. This prohibition does not apply to certain services, where the main feature is the provision of access to or the use of copyright protected works.
- Where the supplier or distributors provide services that are received by the customer in the country where the supplier or distributor operates, such as hotel accommodation, sports events, car rental and entry tickets to music festivals or leisure parks.³⁰

The proposed regulation also prohibits unjustified discrimination of customers regarding the means of payment. Distributors will not be allowed to apply different payment conditions for customers for reasons of nationality, place of residence or place of establishment. Furthermore, distributors will not be allowed to

³² The Final Report (COM (2017) 229 final), p. 128.

³³ Article 4(b), VBER.

³⁴ Proposal for a Regulation of the European Parliament and of the Council on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC ("Proposed Regulation on unjustified geo-blocking").

block or limit customers' access to their online interface for reasons of nationality or place of residence. However, the proposed regulation on unjustified geo-blocking will not prohibit distributors and suppliers from offering different general conditions and prices to different groups of customers within the same territory.

2.3.3 Trends in case law

Geo-blocking in online distribution is a relatively new phenomenon and has not yet been dealt with in many EU cases or national cases.

One relevant national case is the Danish case, *Canett Furniture*.³⁵ Canett was charged with a violation of the Danish Competition Act by restricting passive sales to Norway and Germany. Canett demanded that Danish online retailers blocked Norwegian and German consumers from accessing their webpages. However, the district court involved found that the Danish Competition Act could only be used for anti-competitive practices taking place in Denmark. The district court, therefore, dismissed the charges. The case demonstrates that this is an issue, which can be difficult deals with at the national level and that the national courts might also be reluctant to do so.

2.3.4 Conclusions

Geo-blocking has raised new concerns from a competition law perspective. The European Commission has made establishing the Digital Single Market a priority, which is obviously not compatible with unjustified geo-blocking. However, the application of competition rules to geo-blocking cases may be difficult. To provide the authorities with the appropriate tools to prosecute unjustified geo-blocking, the European institutions are now developing **a regulation on unjustified geo-blocking that sets a legal framework for analysing the different types of cases regarding geo-blocking**. It will be necessary to pay attention to the next steps adopted by the EU institutions to determine the future limits on the use of geo-blocking.

2.4 Price comparison tools

2.4.1 Online price comparison tools and their positive effects on competition

Price comparison tools are **toolbars or websites, where online shoppers can compare the prices of various online distributors**. Following a customer enquiry, price comparison tools display gathered product information from participating distributors and display the best deal. They do not directly sell products, but lead to the distributors' online shops.

The number of different online price comparison tools is comprehensive and still increasing. In Germany alone, there are over a thousand price comparison tools and they are becoming increasingly important due to the growing use of online shopping. On the same note, online product supply is nearly endless, which is why price comparison tools are a great support for purchase decisions.

Hence, online distributors feel obliged to participate and display their products in price comparison tools in order to maintain and increase their sales by attracting new customers.

Usually price comparison tools do not charge end-customers searching for products, but instead the distributors, who wish to appear in these search tools often pay a flat fee or a commission in case of a click or a sale to the operator of the price comparison tools. In addition, price comparison tools are also monetised through advertising and click rates.

³⁵ Holstebro District Court, *Canett Furniture*, 7-1588/2016, 15 December 2016.

2.4.2 Online price comparison tools and potential competition law issues

A potential issue regarding price comparison tools is where suppliers prohibit distributors from using price comparison tools without a valid reason. However, under certain circumstances these restrictions might be justified.

Another relevant issue concerns the ‘best price’ clauses set by the operators of price comparison tools. A best price clause typically obliges the distributors to always offer the best price on the price comparison tool, and thereby prevent the distributor from offering a better price on its own webpage or on another price comparison tool. Such clauses can restrict competition if they prohibit distributors from competing or if they are used broadly in a concentrated market and thereby align the retail prices. This is a much-discussed topic and the specific assessment of the clauses is very dependent on the concrete market conditions and, of course, the particular case at hand.

A further potential issue is the *de facto* prohibition imposed by car manufacturers on their retailers, requiring these retailers only to cooperate with car portals, which do not compare prices (as typical price comparison websites do when showing the lowest prices), but instead only estimate a realistic price and display a distributor selling the product at that price.

From a different perspective, it may also be a competition law concern, if suppliers prohibit price comparison tools from linking to specific online market places, or if suppliers demand that price comparison tools compensate for the reduced pricing pressure by including other parameters (such as services offered) in their rating.

2.4.3 Trends in case law

Price comparison tools have been assessed in the case law of two of EU national jurisdictions. Nonetheless, **price comparison tools have not yet caught the attention of the majority of EU national competition authorities**. The case law on price comparison tools in Germany and France is the most extensive.

As set out in several German decisions, price comparison tools are generally considered to extend the reach of small and medium-sized distributors, which leads to higher market transparency and in general to more price competition.³⁶

However, the French Competition Authority seems to have taken a different approach to the price comparison tools. They have released an opinion on the competitive functioning of e-commerce, which has assessed the question of price comparison tools.³⁷ According to this opinion, price comparison tools entail anti-competitive risks, such as risks resulting from imprecise or incomplete information delivered by these websites.

This situation is also discussed in a guide published by the UK competition authorities.³⁸ The guide requires that online distributors publish details of their products on at least one price comparison tool authorised by the Financial Conduct Authority.

³⁶ German Federal Cartel Office, ASICS, B2 98/11, 26 August 2015; German Federal Cartel Office, Ford-/Opel-/PSA-decisions, B9-28/15-1, B9-28/15-2, B9-28/15-3, 11 November 2015 and 1 December 2015; Schleswig Higher Regional Court, Casio, 16 U (Kart) 154/13, 5 June 2014.

³⁷ French National Competition Authority, opinion n°12-A-20, 18 September 2012.

³⁸ Competition and Markets Authority, Payday Lending Market Investigation, Order 2015, 13 August 2015.

The UK competition authorities, in 2015, also launched investigations of price comparison tools, but aborted them without a decision. The investigations concerned the suspicion of competition law infringements by websites offering energy tariff comparisons.³⁹ In the closure statement, it was noted that in some circumstances agreements restricting bidding behaviour in paid online search advertising may raise competition concerns.

Within the national case law in the EU member states, there are a number of decisions on the topic of price comparison tools.

For instance, in vertical agreements, the mere prohibition of distributors using digital comparison tools, auction, sales platforms or using the brand names on third party websites to guide customers to their own online shops is viewed as a competition law infringement by the German Federal Cartel Office.⁴⁰ However, the German authorities tend to allow qualitative selective distribution systems, which rely on objective criteria, referencing to the retailer's technical eligibility, if the non-discriminatory applied criteria are necessary to ensure a prevailing need for consultation and the maintenance of brand image.⁴¹ If these conditions are met, then the manufacturer may, for example, prohibit authorised distributors from using price comparison tools, which cannot secure the maintenance of the distributor's brand image.

Concerning best price clauses in which hotel-platforms oblige hotels to ensure them the best conditions that the hotels offer, the Swedish competition authorities and German Courts have both decided that such obligations infringe competition law.⁴² Other jurisdictions have accepted commitments modifying the clauses from the hotel platforms in similar cases.

2.4.4 Conclusion

These decisions show that distributors' use of comparison tools can only be restricted under specific circumstances. Therefore, such vertical agreements should be carefully drafted.

Furthermore, it is remarkable that a couple of national competition authorities have put more focus on the field of comparison tools. However, **the activities of the different competition authorities regarding price comparison tools show that the use of price comparison tools and the related regulation has an impact on competition** in the markets. Furthermore, the different views about whether price comparison tools should be seen as only a procompetitive or also as an anti-competitive risk, might affect the trends in case law in EU jurisdictions, and cause the national authorities to move in diverging directions.

3. THE ANTITRUST ALLIANCE

The Antitrust Alliance is an EU-wide network of law firms specialised in both national competition law and EU competition law. The alliance brings together the knowledge and resources of independent antitrust teams across the EU member states to provide clients with complete competition law counselling.

The Commission's e-commerce sector inquiry shows some similar tendencies and competition law issues within selective distribution and online sales. The sector inquiry and the national case law also show that the antitrust issues, focus and assessments vary between the member states. This calls for in-depth knowledge of the case law and developments in the national jurisdictions as well as with EU developments.

³⁹ Competition and Markets Authority, Energy price comparison websites: suspected anti-competitive agreements, case reference 50332, 6 October 2016.

⁴⁰ *ASICS-, Casio-, Ford-/Opel-/PSA-decision*, see above footnote 1.

⁴¹ Frankfurt Higher Regional Court, Deuter, 11 U (Kart) 84/14, 22 December 2015.

⁴² Swedish Competition Authority, Bookingdotcom Sverige AB and Booking.com B.V, 596/2013, 15 April 2015; Düsseldorf Higher Regional Court, HRS-decision, VI (Kart) 1/14 (V), 9 January 2015.

The Antitrust Alliance's cross-border proficiency and close working relationship ensure that each national law firm has convenient access to local expertise in most of European jurisdictions.

This relationship enables us to handle our clients' antitrust needs effectively across jurisdictions, providing an efficient and flexible response.

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