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Senior co-publishing business development manager George Ingledew
george.ingledew@globalcompetitionreview.com
+44 203 780 4146

Co-publishing manager Jordan Hunter
jordan.hunter@globalcompetitionreview.com
+44 20 3780 4249

Senior production editor Simon Busby
Senior subeditor Charlotte Stretch
Chief subeditor Jonathan Allen
Head of production Adam Myers
Editorial assistant Iain wilson

Editor, Global Competition Review Pallavi Guniganti
Publisher Clare Bolton

Subscription details

To subscribe please contact
Global Competition Review
87 Lancaster Road
London, W11 1QQ
United Kingdom
Tel: +44 20 7908 9205
Fax: +44 20 7229 6910
subscriptions@globalcompetitionreview.com

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Global Competition Review is delighted to publish 2018 edition of *The European, Middle Eastern & African Antitrust Review*, one of a series of three special reports that have been conceived to deliver specialist intelligence and research to our readers – general counsel, government agencies and private practice lawyers – who must navigate the world's increasingly complex competition regimes.

Like its sister reports, *The Antitrust Review of the Americas* and *The Asia-Pacific Antitrust Review*, *The European, Middle Eastern & African Antitrust Review* provides an unparalleled annual update, from competition enforcers and leading practitioners, on key developments in the field.

In preparing this report, *Global Competition Review* has worked with leading competition lawyers and government officials. Their knowledge and experience – and above all their ability to put law and policy into context – give the report special value. We are grateful to all of the contributors and their firms for their time and commitment to the publication.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to *Global Competition Review* will receive regular updates on any changes to relevant laws over the coming year.

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European Union: E-Commerce

Becket McGrath
Cooley

E-commerce has been the subject of increased competition law scrutiny in Europe over the past year. This reflects a combination of long-standing and emerging factors. It has been clear since the early days of the internet that online retail has enormous potential to increase price transparency and facilitate the cross-border sale of goods and services, thereby increasing competition and consumer choice. As a result, the European Commission has long identified e-commerce as a significant driver of competition within the EU and an aid to the achievement of a European single market, the achievement of which remains a fundamental objective of EU competition law.

Reflecting this market integration imperative, European competition law has been consistently hostile to contractual restrictions in vertical agreements on cross-border sales within the EU.[1] In particular, since the earliest days of EU competition law the Commission and European courts have condemned manufacturers seeking to prohibit resellers in one member state from responding to unsolicited inquiries from potential customers in another member state (passive sales). Crucially, by viewing restrictions on online sales as a form of restriction of passive sales,[2] the Commission was able to import this strict case law and thus ensure that such restrictions could be treated as "object" infringments and so inherently unlawful. This European hostility to online sales restrictions in vertical agreements is a key area of divergence from most other competition regimes.[3]

The legal framework within which restrictions on online sales are assessed is largely set by article 101 of the Treaty on the Functioning of the European Union (TFEU), which prohibits anticompetitive agreements, and the Vertical Agreements Block Exemption Regulation (VBER),[4] which exempts vertical supply agreements from article 101 as long the parties' market shares do not exceed 30% and provided that they do not contain hardcore restrictions of competition. The legal status of common restrictions of the online sale of physical products is extensively considered in the Commission's 2010 Verticals Guidelines,[5] which attempt (not always successfully) to strike a balance between the often conflicting interests of brands and online retailers. As the VBER and Verticals Guidelines are set to remain in place until their expiry in 2022, the basic legal framework is effectively fixed in material respects.

While the Commission considered the legality of restrictions in vertical agreements quite regularly during the old notification-based enforcement regime, which ended in 2004, this area was largely left to the national competition authorities (NCAs) of the member states after that date. The Commission's interest in such restrictions has now increased, however, particularly where they restrict online sales. This appears to be due mainly to the increased popularity of e-commerce with consumers, which has benefited those online businesses that were able to respond to this demand and in some cases diverted retail sales away from traditional brick-and-mortar retailers. In turn, this has led to some brand owners seeking to tighten their control of distribution to protect traditional retail models. At a time when competition authorities are keen to prove their relevance for consumers in the face of politically motivated attacks on their legitimacy, taking action to promote e-commerce is an increasingly attractive candidate for scarce resources. All of this has contributed to increased enforcement activity in this area at a national and EU level. In addition, the growing risk of divergence in application of key aspects of EU competition law at a national level[6] appears to have spurred a determination on the part of the Commission to take more of a lead on verticals cases.

National enforcement cases

While it is beyond the scope of this chapter to provide a detailed survey of activity at the level of the EU member states, it is worth noting that NCAs and national courts have been at the forefront of developments in this area, reflecting the Commission's initial retreat from vertical enforcement noted above. For example, the case against Pierre Fabre's policy of requiring sales of its cosmetics to be made from a brick and mortar pharmacy that led to the ECJ's important 2011 judgment[7] originated with a French Competition Authority decision of October 2008.[8] This was followed in December 2012 by the same authority's decision condemning a ban on online sales by Bang & Olufsen.

The German Federal Cartel Office has been particularly active in this area, condemning bans on the use of online marketplaces by authorised resellers,[9] rebates that discriminated against online retailers[10] and bans on the use of price comparison sites and restrictions on Adword bidding.[11]

Verticals enforcement by the UK's Competition and Markets Authority (CMA) and its predecessor the Office of Fair Trading (OFT) has tended to focus on the potential for restrictions on online pricing to lead to resale price maintenance.[12] The CMA has nevertheless shown in its ongoing case against golf club retailer Ping that it is willing to take action against straight restrictions on online sales. The CMA has also condemned a price-fixing arrangement between online sellers of posters and related merchandise[13] and continues to dedicate significant resources to investigating various aspects of online competition, including the role played by price comparison sites.[14]

In parallel, concerns over the impact of parity clauses in online hotel booking agreements between online booking platforms and hotels led to a wave of NCA investigations. The issue in these cases was whether obligations in such agreements that limited the ability of hotels wishing to list their rooms on online booking platforms to offer more favourable prices and other terms on their own websites (narrow most-favoured-nation clauses (MFNs)) or on any website, including other booking platforms (wide MFNs) were unlawful. These investigations were ended following a series of settlements based on the proposition that narrow MFNs are acceptable, whereas wide MFNs are not. The German Federal Cartel Office refused to follow this trend, however, taking the position that both narrow and wide MFNs are unlawful.[15]

The Commission's e-commerce sector inquiry

Notwithstanding the high level of enforcement activity at a member state level, the Commission marked its increased willingness to reengage in this area in May 2015 by opening a formal sector inquiry into competition in e-commerce, as part of its wider digital single market strategy. This inquiry had the stated objective of enabling the Commission to gain a better understanding of the functioning of e-commerce markets within the EU and identify existing and emerging restrictions of competition that could infringe EU antitrust law.[16] The resulting inquiry was the largest the Commission has initiated since it gained the power to undertake sector inquiries in 2004.

The Commission's final report[17] contained extensive analysis of trends in e-commerce in the EU and the prevalence of different practices across product categories and member states. Overall, the Commission observed that the increase in e-commerce over the past decade has led to increased price transparency. While this has produced significant consumer benefits, the Commission also observed that it can also result in free-riding by online retailers on investment in physical shops (although it also acknowledges the reverse, where a physical shop free rides on investment by online retailers). The final report also noted that greater price transparency has led to increased price competition, as well as greater price monitoring by retailers and manufacturers. According to the Commission, manufacturers have responded to the challenge posed to their distribution models by e-commerce with a range of measures, including selling their products direct to consumers through their own websites and imposing a wider range of vertical restraints on retailers, especially through increased use of selective distribution.

Selective distribution is a sales model under which products are sold only to retailers that meet certain admission criteria, with members of the network being prohibited from selling to anyone except other network members or consumers. Although EU case law has long recognised that selective distribution tends to lead to higher prices, it has generally been accepted as a valid sales model, particularly for luxury goods or technically complex products. In essence, selective distribution is assumed to protect the value of brands and encourage investment by retailers in non-price aspects of their offer, such as customer service. As a result, certain forms of selective distribution fall outside article 101 TFEU altogether, while selective distribution agreements that do not contain any hardcore restrictions of competition are protected by the VBER safe harbour.

The Commission's final report noted an increased use of selective distribution by manufacturers, including for products that are neither luxury goods nor technically complex, as well as a tendency for manufacturers to introduce new selection criteria for admission, thereby making it easier for them to refuse admission to new members. While the Commission concluded that the general framework for analysing selective distribution set out in the VBER and Verticals Guidelines does not need to be changed, the final report acknowledged that selective distribution may make it easier for manufacturers to implement and monitor unlawful vertical restraints, such as resale price maintenance or online sales bans.

In light of concerns over the potential misuse of selective distribution, as well as ongoing debate between national competition authorities over the law, the sector inquiry examined particular common associated restraints, namely:

- the requirement that member retailers of a selective distribution network must operate a physical shop, effectively banning pure-play online retailers from their networks;
- bans on the use of third-party online marketplaces by authorised retailers;
- bans on the use of the use of price comparison tools; and
- bans on the use of a manufacturer's brand when bidding for online advertising.

The Commission accepts that such practices have the potential to restrict competition. For example, the final report noted that "brick and mortar" requirements may simply be designed to shield products from price competition by online retailers without enhancing competition on parameters other than price. It also noted that marketplace bans may be hard to justify if a manufacturer is selling its products on a marketplace itself or has admitted a marketplace operator into its network.

The Commission nevertheless concluded that most of these practices do not constitute hardcore restrictions of competition.[18] As such, they will be protected from challenge by the VBER safe harbour, unless the parties' market shares exceed the 30% threshold or a competition authority decides to lift the benefit of the block exemption in an individual case. This conclusion essentially restated the position that is set out in the Verticals Guidelines.

The main exception is that the final report indicated that restrictions on the use of price comparison tools may amount to a hardcore restriction if they rule out any use of such tools by retailers, without any reference to quality criteria. This is because, in the Commission's view, preventing the use of such tools restricts the effective use of the internet as a sales channel by taking away an effective means to guide customers.[19] As such, it amounts to an outright restriction of online sales.

While similar logic should be applicable to bans on the use of manufacturers' brand names for online advertising, including when bidding for paid search advertising, the final report stopped short of categorising such restrictions as hardcore, observing simply that such restrictions could "raise concerns under article 101(1) TFEU".

The final report noted that a number of respondents to the consultation on the Preliminary Report challenged the Commission's position that the charging of differential wholesale prices according to whether products are destined to be sold online or offline (dual pricing) amounts to a hardcore restriction of competition. Notwithstanding these objections, the final report stuck to the position that, while manufacturers are not obliged to offer the same prices to all retailers, applying dual pricing to a retailer that sells online and offline is a hardcore restriction. The Commission nevertheless noted that it "remains open to consider efficiency arguments" justifying dual pricing in particular cases, for example if it is essential to support investment in the offline retail environment. The burden would be on the manufacturer to demonstrate this, however, and the evidential threshold when seeking to justify hardcore restrictions is high.

The final report also noted the increased use of price monitoring software and automated repricing and observed that, combined with the increased price transparency online, such tools enable easier detection of retailers that deviate from manufacturers' pricing recommendations and may facilitate or strengthen collusion between retailers.[20] This falls well short of implying that the vendors of such software may themselves be liable for use that restricts competition unless they build in safeguards.[21]

Perhaps surprisingly, considering the proliferation of recent NCA enforcement cases noted above, the final report contains very limited analysis of "most favoured nation" or parity clauses. Observing that such clauses may have restrictive effects but may also lead to efficiencies, the Commission simply concluded that they have to be assessed on a case-by-case basis.[22]

The most interesting part of the final report is a new section on the use of data in e-commerce. Consistent with the Commission's emerging interest in "big data", the final report observed that "the exchange of competitively sensitive data such as on prices or sold quantities between marketplaces and third-party sellers or manufacturers or retailers may lead to competition concerns where the same players are in direct competition". It also noted that, where the same company operates a marketplace and a retail arm, competitively sensitive data relating to sales by third-party sellers on the marketplace could be used to boost retail activities of the marketplace operator. Similarly, the final report noted that manufacturers that sell directly online may use sensitive data from authorised distributors for "anticompetitive purposes". The final report did not develop the Commission's theories in this area, however, concluding simply that "such behaviour could potentially raise competition concerns".[23]

The final report noted that the sector inquiry revealed a persistent minority of agreements that clearly infringe competition law, primarily by imposing resale price maintenance, prohibiting cross-border sales between member states or preventing online sales. Since the law concerning such restrictions is well settled, this appears to be the most fruitful territory for future enforcement cases.

The final report limited comments on digital content to describing the results of a survey of the various commercial models for the distribution and exploitation of digital content, noting that digital content is a "key determinant of competition" in this area. The Commission noted concerns over the potential exclusionary effects of exclusive licensing and related contractual practices, which it concluded could cause and create significant barriers to entry for new market players. Ultimately, however, the Commission noted that any application of the competition rules in this area "would have to take into account the characteristics of the content industry, the legal and economic context of the licensing practice and/or the characteristics of the relevant product and geographic market".

While the final report added little to the legal position reflected in the 2010 VBER and Vertical Guidelines, the Commission appears to be treating it as justification for a newly aggressive enforcement policy regarding vertical restraints. This was already evident in February 2017, when the Commission announced the opening of three new antitrust investigations, concerning PC video games, holiday accommodation and consumer electronics pricing.[24] In the most significant part of the final report, the Commission committed to "target enforcement of the EU competition rules at the most widespread business practices that have emerged or evolved as a result of the growth of e-commerce and that may negatively impact competition and cross-border trade". The first concrete evidence of this came on 6 June, when the Commission announced a new formal investigation of clothing manufacturer and retailer Guess, which is suspected of preventing authorised resellers from selling to consumers online or to retailers in other member states.[25] This was followed soon afterwards by an announcement on 14 June that the Commission had launched separate investigations of Nike, Sanrio and Universal Studios for imposing cross-border and online sales restrictions in their licensing agreements for merchandise products.[26] Further cases seem likely to follow.

Notes

1 See, in particular, Cases 56 & 58/64 *Consten* and *Grundig v Commission* [1966] ECR 299, 340.

2 See paragraphs 51-52 of the Commission's 2010 Guidelines on Vertical Restraints (Verticals Guidelines), which expanded on the approach already established in their predecessor guidelines from October 2000. This approach was confirmed by the European Court of Justice in its seminal preliminary reference judgment of 13 October 2011 in Case C-439/09 *Pierre Fabre Dermo-Cosmétique*. The ECJ thereby imported into competition law case law that had already condemned similar restrictions as contrary to EU law on free movement of goods – see Case C-322/01 *Deutscher Apothekerverband* and Case C-108/09 *Ker-Optika*.

3 Although it is notable that the political attractiveness of being able to use competition law to tackle import restrictions has led to the incorporation of EU law principles in this area into Swiss domestic law, despite the fact that Switzerland is neither in the EU nor EEA – see, in particular, the judgment of the Swiss Federal Supreme Court of 28 June 2016 in *Colgate Palmolive Europe Sàrl (previously GABA International AG) v Wettbewerbskommission*.

4 Commission Regulation 330/2010/EU of 20 April 2010 on the application of article 101(3) TFEU to categories of vertical agreements and concerted practices.

5 Commission Notice 2010/C130/01 – Guidelines on Vertical Restraints.

6 See, in particular, the divergence in the treatment of online hotel booking contracts and online sales restrictions between the German Federal Cartel office and courts and other NCAs.

7 Case C-439/09 – *Pierre Fabre Dermo-Cosmétique*. Judgment of 13 October 2011.

8 Available at http://www.autoritedelaconcurrence.fr/pdf/avis/08d25.pdf.

9 See report of 24 October 2013 in case B7-1/13-35 *Sennheiser*, available at www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2013/B7-1-13-35.pdf?__blob=publicationFile&v=4; decision of 27 June 2014 in case B3-137/12 Adidas, available at http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2014/B3-137-12.pdf?__blob=publicationFile&v=2.

10 Report of 5 December 2013 in case B05-144/13, *Gardena*, available at www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2013/B05-144-13.pdf?__blob=publicationFile&v=3; report of 23 December 2013 in case B7-11/13 Bosch Siemens Hausgeräte, available at http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2013/B7-11-13.pdf?__blob=publicationFile&v=4; and press release of 18 July 2016, LEGO.

11 Decision of 26 August 2015 in case B2-98/11 ASICS, available at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Kartellverbot/2015/B2-98-11.pdf?__blob=publicationFile&v=3. Upheld on appeal (as far as the restriction on price comparison sites was concerned) by the Düsseldorf Higher Regional Court in its judgment of 5 April 2017.

12 See OFT decisions of 5 August 2013 against Roma Medical Aids Ltd and certain retailers, available at https://assets.publishing.service.gov.uk/media/53330299e5274a571e000005/a_non-confidential_version_of_that_Decision.pdf; OFT decision of 27 March 2014 against Pride Mobility Products Ltd and certain retailers, available at https://assets.publishing.service.gov.uk/media/54522051ed915d1380000007/Pride_Decision_Confidential_Version.pdf; CMA decision of 10 May 2016, *Bathroom Fittings*; CMA decision of 24 May 2016, *Commercial Catering Equipment*; CMA decision of 3 May 2017, *Domestic Light Fittings*; and the CMA's ongoing investigation into medical equipment. See also CMA guidance note on online competition at: www.gov.uk/government/news/cma-guides-businesses-on-online-competition-law.

13 Decision of 12 August 2016, *Trod and GB eye Ltd*, available at: https://assets.publishing.service.gov.uk/media/57ee7c2740f0b606dc000018/case-50223-final-non-confidential-infringement-decision.pdf.

14 See, for example, the CMA's ongoing market study of price comparison tools - https://www.gov.uk/government/news/digital-comparison-tools-could-offer-even-greater-benefits-cma.

15 Decision of 20 December 2013 in case B9-66/10, HRS, and decision of 22 December 2015 in case B9-121/13, Booking.com. The FCO's HRS decision was subsequently upheld on appeal by the Oberlandesgericht Düsseldorf, in a judgment of 9 January 2015. An appeal by Booking.com against the FCO's prohibition of MFNs in its agreements remains open at the time of writing.

16 It is important to note that the Commission's powers to undertake sector inquiries do not extend to the ability to impose remedies or change the law. Rather, the Commission is able to use information gathered in the course of a sector inquiry as the basis for enforcement action against specific businesses, under the antitrust provisions of the TFEU or to inform wider policy initiatives.

17 Available at: http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf.

18 While acknowledging that the legal status of marketplace bans is currently being considered by the Court of Justice of the EU on a preliminary reference in Case C-230/16 *Coty Germany v Parfumerie Akzente GmbH*.

19 Final report, paragraphs 551-552. In reaching this view, the Commission appears to be adopting the approach of the German Federal Cartel Office in the *ASICS* case (upheld on appeal in April 2017).

20 Final report, at paragraphs 607-608.

21 An approach suggested by the UK Competition and Markets Authority following their recent investigation of online poster sales (see www.gov.uk/government/case-studies/online-sellers-price-fixing-case-study) and by the EU Competition Commissioner when speaking in March – see: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/bundeskartellamt-18th-conference-competition-berlin-16-march-2017_en.

22 Final report, at paragraphs 623.

23 Ibid, paragraph 651.

24 See Commission press release IP/17/201, available at: http://europa.eu/rapid/press-release_IP-17-201_en.htm.

25 See Commission press release IP/17/1549, available at: http://europa.eu/rapid/press-release_IP-17-1549_en.htm.

26 See Commission press release IP/17/1646, available at: http://europa.eu/rapid/press-release_IP-17-1646_en.htm.

Becket McGrath
Cooley

Becket McGrath is a partner in in the antitrust and competition practice at Cooley's London office. Becket advises clients on all aspects of EU and UK competition law, with an emphasis on defending companies against investigations (before both the CMA and the European Commission), behavioural counselling, compliance, competition litigation and merger control. Although he advises clients in a broad range of sectors, he has a particular interest in e-commerce, media, technology and communications, as well as the interface between intellectual property and competition law. He has experience of enforcing UK and EU competition law at a senior level in the UK's Office of Fair Trading (now the Competition and Markets Authority). Becket is the author of the "Private Enforcement" section of Butterworths' *Competition Law*, a standard reference work, and is a member of the editorial board of *Digital Business Lawyer*. Becket was identified by *Global Competition Review* in May 2008 as one of the top 40 competition lawyers under the age of 40 worldwide. He is recommended in the current edition of the *GCR/Who's Who Legal: Competition* guide and *The Legal 500: UK*, and is recognised as a notable practitioner by *Chambers UK*.

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