
COMPETITION LAW IN THE DIGITAL AGE

MARCH 2018

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ANTITRUST ENFORCEMENT IN THE DIGITAL SECTOR: RECENT ACTIVITIES REGARDING ONLINE PLATFORMS, FINTECHS AND GEO-BLOCKING

National competition authorities (NCAs) increasingly turn to market studies and consumer protection powers to address the variety of issues raised by online platforms. But NCAs also continue to apply the competition rules when tackling related issues such as the use of most favoured nation clauses. As the article [Online platforms: NCAs look to market studies and consumer protection powers](#) shows NCAs are prepared to test the interplay between competition law and consumer protection issues or even data protection, when it comes to dealing with online platforms.

The ECJ had to rule on issues related to online third-party platforms in its long-awaited judgement in the Coty-case. The ECJ confirmed in this ruling that luxury brand owners can prevent their selective distributors from using online third-party platforms such as Amazon and eBay for the sale of their brands. This is surely good news for luxury brand owners, but possibly also for other brand owners with market shares below 30%. In other cases, a case-by-case analysis of the necessity of these platforms under the cartel prohibition will still be necessary (see the article [Selective distribution and online platforms – Coty \(update\)](#)).

As follows from the article [Increased focus on foreclosure risks for fintechs](#), competition authorities are keeping a close eye on fintechs. The Dutch ACM recently identified potential foreclosure risks for fintechs in the payment market and has stated to keep tabs on possible access issues by new entrants. The European Commission conducted dawn raids to further investigate potential exclusion of non-bank owned financial services providers.

The [Case tracker](#) shows that online restrictions, such as geo-blocking, are still closely monitored by competition authorities. Geo-blocking can only be tackled by EU competition law if it either relates to a contractual restriction – and is thus linked to an agreement between a supplier and a distributor – or is based on a unilateral decision by a dominant company. But soon the geo-blocking regulation, adopted on 27 February 2018, may fill this gap: see the article [The Geo-blocking Regulation: final approval](#).

ONLINE PLATFORMS: NCAS LOOK TO MARKET STUDIES AND CONSUMER PROTECTION POWERS

National competition authorities (“NCAs”) are increasingly turning to market studies and consumer protection powers as means of identifying and addressing issues raised by online platforms. The autumn of 2017 saw a particular hike in these activities across the EU, particularly in the UK and Germany.

UK

The UK Competition and Markets Authority (“CMA”) launched a consumer protection [investigation](#) into hotel booking sites in October 2017, targeting practices relating to the presentation of information on booking sites (such as search result rankings, “pressure selling”¹, discount claims and hidden charges). This investigation could lead to enforcement action against specific hotel platforms.

Separately, over the past four months the CMA has opened consumer protection enforcement [cases](#) against three separate car rental comparison sites over concerns relating to hidden charges. These cases build on a consumer law compliance review launched by the CMA in early 2016, and which involved a series of workshops with car rental sites and the publication of sector-specific consumer law guidance.

These developments follow the CMA’s year-long [market study](#) into digital comparison tools (“DCTs”), which came to an end in September 2017. Operating under the broad agenda of identifying ways to “maximise the benefits of DCTs for consumers”, the CMA covered a wide range of consumer protection and competition issues. While the study was focused on a number of particular DCT products (car and home insurance, energy, broadband, flights and credit cards), the analysis is intended to apply to online platforms more broadly. In particular, the CMA set out a number of high-level principles concerning the use of consumers’ personal data and how to display price information and product descriptions.

Germany

The German NCA (the Bundeskartellamt (“BKA”)) announced in October 2017 that its newly-acquired consumer protection powers would be put to use through a sector inquiry into the “transparency and objectivity” of comparison sites. Clear parallels can be drawn with the CMA’s exercise: the BKA is targeting many of the same sectors (including travel, insurance and financial services) and issues (such as result rankings, market coverage and financing of comparison sites).

The BKA is also breaking new grounds through its “test” [investigation](#) into whether Facebook’s user data processing terms amount to an abuse of dominance.

Elsewhere in the EU

Other notable studies include the Finnish NCA’s [recent study](#) into consumer protection and antitrust issues related to online platforms, and [consumer survey](#) into online hotel booking platforms.² In December 2017, the Dutch NCA announced it would be using its market study powers to review the impact of [online platforms on media markets](#), in cooperation with the Dutch Media Authority.

¹ Including claims about how many people are looking at the same room, how many rooms may be left, or how long a price is available.

² The Finnish competition authority concluded that online hotel platforms are largely beneficial to consumers and hotels, though signalled some areas as requiring improvements (e.g. clarifying when customers should apply for a refund with the hotel or through the platform).

A new strategy?

These inquiries do not mark a complete shift in approach. While recent initiatives might be centred on consumer issues or have general application, it is clear that NCAs are prepared to follow-up any finding relevant to antitrust issues with a “classic” investigation. For instance, the CMA’s DCT study led to the opening of an antitrust [investigation](#) into a home insurance DCT for using “wide” most-favoured nation clauses (requiring parity with rival comparison sites) in its agreements with insurers.

However, it is also apparent that NCAs are prepared to test the interplay between competition law and consumer protection issues when it comes to online markets – or even, in the case of the BKA, the interplay with data protection.

SELECTIVE DISTRIBUTION AND ONLINE PLATFORMS – COTY (UPDATE)

On 6 December 2017, the ECJ issued its [judgement](#) in case C-230/16 Coty Germany. The judgement is in line with Advocate General Wahl’s non-binding [opinion](#) in this case, which was discussed in the previous edition of [this Newsletter](#), and in which the AG indicated that a supplier of luxury goods should be able to prohibit its authorised retailers from selling its products on third-party platforms (e.g. Amazon or eBay).

In its judgement, the ECJ first of all confirms that a selective distribution system designed primarily to preserve the image of luxury goods complies with Article 101(1) TFEU insofar as resellers are chosen on the basis of proportionate and objective qualitative criteria that are laid down uniformly for all potential resellers and applied in a non-discriminatory fashion. The ECJ goes on to hold that in such a lawful selective distribution system, a supplier can prevent its authorised retailers from using third-party platforms in a discernible manner for the online sale of the luxury goods at hand without infringing Article 101(1) TFEU, provided that the prohibition is aimed at preserving the goods’ luxury image and that it meets the previously mentioned conditions (uniformly laid down, applied in a non-discriminatory fashion and proportionate).

Finally, the ECJ states that such prohibition does not give rise to a hardcore restriction within the meaning of Articles 4(b) or 4(c) of Regulation 330/2010, as it would neither restrict the retailers’ customers nor their passive sales to end users. It follows that a ban on third-party platform online sales in a lawful selective distribution system for luxury goods is not automatically incompatible with the benefit of a block exemption under the same regulation.

INCREASED FOCUS ON FORECLOSURE RISKS FOR FINTECHS

The financial sector appears to be high on the competition enforcement agenda. In late 2017, the European Commission conducted dawn raids at a number of banks and banking associations in various Member States. Around the same time, the Dutch Authority for Consumer and Markets (“ACM”) published a study identifying foreclosure risks for fintechs - new providers of innovative technologies - in the payment market. Meanwhile, the revised Payment Services Directive entered into force. But concerns about foreclosure risks for fintechs remain.

PSD2

The revised Payment Services Directive (“[PSD2](#)”) entered into application on 13 January 2018. One of its objectives is to increase competition in the financial sector by improving the level playing field for payment service providers. One of the ways the PSD2 facilitates this, is by making customer account information available to third parties, after the customer’s consent. Third parties, like fintechs, need access to this payment information from banks to be able to offer their services. However, notwithstanding the obvious pro-fintech scope of the PSD 2, it is not clear as to how access to users’ information should be provided. Moreover, not all EU Members States have [transposed](#) the PSD2 into national law yet and some banks and banking associations are still [contemplating](#) the actual access conditions as well as how to provide access without raising data privacy issues.

ACM study

These access conditions are one of the concerns raised by the ACM in its [study](#) on *Fintechs in the payment market* of December 2017. In its study, the ACM distinguishes between:

- (i) front-end providers, which are fintechs offering new payment initiation services, such as payment apps, or new services, such as electronic financial management programmes;
- (ii) end-to-end providers, which are fintechs arranging the entire payment process.

For front-end providers, banks are the gateway to potential customers because of the control they have over their checking account information. A front-end provider is therefore dependent on the banks’ input when providing services. And since these services may compete directly with the banks’ services, this may lead to foreclosure risks. The ACM considers that the PSD2 does not entirely fix these risks. Currently, there is insufficient clarity on the specific access conditions that apply. The ACM therefore urges the involved regulators to provide more clarity on the specific third party access conditions and to allow the banks to request a cost-based compensation they incur for facilitating third party access. In the meantime, the ACM will continue monitoring how banks handle access requests from new entrants.

Dawn raids by the European Commission

The European Commission [conducted](#) dawn raids at a number of banks and banking associations, looking into potential exclusion of non-bank owned financial services providers by refusing them access to bank customers’ accounts and account data, after the respective customers gave their consent. According to press reports, these dawn raids may have curbed Dutch banks in their enthusiasm to cooperate on the measures that may need to be taken under PSD2.

Other ways of embracing fintechs

In other jurisdictions, such as the UK and France, fintechs are also regarded as a mainstream subject. In the former, the Competition and Markets Authority (“CMA”) is planning a study on fintech innovations to help open up the sector for tech intermediaries. This survey will help the CMA to set out the criteria for a regulatory sandbox in the UK. With regard to the latter, the French regulators have indicated that there will be no French regulatory sandbox. However, they are particularly interested in promoting these innovations. Therefore, they will focus on accelerating their regulatory processes, such as the transposition of European directives into French law.

Meanwhile, with fintechs as a policy priority on the EC’s agenda, the “[EU Blockchain Observatory and Forum](#)” has just been opened, so as to observe the development of decentralised ledger technology. Blockchain technologies store blocks of information that are distributed across the network as they bring about high levels of traceability and security in economic transactions online; and it is for this reason that they constitute a major breakthrough in the digital services market.

THE GEO-BLOCKING REGULATION: FINAL APPROVAL

On 6 February 2018, the European Parliament – following a long and complex political dialogue with the European Commission and the Council of the EU – adopted the text of the geo-blocking regulation. The Council of the EU [adopted](#) the regulation on 27 February 2018. The geo-blocking regulation was [published](#) in the EU's Official Journal on 2 March 2018 and will take effect nine months from publication.

The text is a compromise between the 2016 Commission's proposal and the amendments proposed by the Council of the EU and the European Parliament.

Objective and scope

As Article 1 clearly states, the objective of the regulation is to prevent unjustified geo-blocking and other discriminatory practices directly or indirectly based on the nationality, place of residence or place of establishment of customers. However, it does not apply to purely internal situations (i.e., those in which all relevant elements of the transaction are confined to a single Member State) and to the activities listed in Article 2(2) of Directive 2006/123/EC, such as: (i) financial services, (ii) electronic communications services and networks, (iii) transport services, (iv) healthcare services, (v) audiovisual services, and (vi) private security services.

The regulation refers to “trader” as any natural or legal person (privately or publicly owned) acting for purposes relating to the trade, business, craft or profession of the trader, including through any other person acting in the name or on behalf of the trader.

Prohibited practices

First, Article 3 prohibits traders from blocking or limiting customers access to their online interface and from redirecting them to a version of their online interface different from the one the customer initially sought to access³, for reasons related to the customer's nationality, place of residence or place of establishment. However, these practices are not prohibited if necessary in order to ensure compliance with a legal requirement laid down in national or Union law and if the reasons are clearly and explicitly explained in the language of the online interface that the customer initially sought to access.

Second, Article 4 prohibits traders from applying – for reasons of nationality, place of residence or place of establishment of the customer – different general conditions of access to their goods or services in three specific situations, namely, when the customer:

- buys goods from a trader and the goods are delivered to a location in a Member State to which the trader already offers delivery or are collected from at a agreed location in a Member State, where the trader offers that option in its general conditions of access;
- receives electronically supplied services from the trader, except for access to and use of copyright protected works or other protected subject matters; or
- receives services – other than electronically supplied ones – from a trader in a physical location in a Member State the trader operates in.

³ Unless the customer expressly consents to the redirection, in which case the version of the online interface that the customer initially sought to access must remain easily accessible by the customer.

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Third, traders may not apply different conditions for a payment transaction for reasons related to: (i) the nationality, place of residence or place of establishment of the customer; (ii) the location of the payment account; (iii) the place of establishment of the payment service provider; or (iv) the place of issuance within the EU of the payment instrument, when all the following conditions are met:

- the payment transaction is carried out by credit transfer, direct debit or other card-based payment instrument within the same payment brand and category;
- authentication requirements are fulfilled; and
- the payment transaction is carried out in a currency that the trader accepts.

Other provisions

Article 6 specifies that the abovementioned prohibitions do not apply when the traders are bound by an agreement requiring them to restrict their active or passive sales and the restrictions are in accordance with Article 101 of the TFEU and the [Block Exemption Regulation on vertical agreements](#). Moreover, provisions of agreements leading traders to violate the prohibitions in relation to passive sales are automatically void. Note that restrictions of passive sales are hard core infringements that rarely are in accordance with Article 101 TFEU.

Each Member State will be obliged to designate a body responsible for enforcing the new regulation and a body responsible for assisting customers in disputes with traders arising from the application of the new regulation.

CASE TRACKER: OVERVIEW OF PENDING AND RECENT RELEVANT ONLINE DISTRIBUTION CASES

Online sales bans:

restriction on selling products/services online

- (EU) [Google](#)
(July 2016, ongoing investigation)
 - - UPDATE: (EU) [Google](#)
(June 2017, Infringement decision)
- NEW: (EU) [Guess](#)
(June 2017, Opening of proceedings)
- NEW: (EU) [Licensed merchandise](#)
(Opening of proceedings)
 - - (EU) [Sanrio](#)
(Opening of proceedings)
 - - (EU) [Universal Studios](#)
(Opening of proceedings)
 - - (EU) [Nike](#)
(Opening of proceedings)
- (EU) [Consumer electronics](#)
(December 2013 Inspections)
 - - (EU) [Asus](#)
(February 2017, Opening of proceedings)
 - - (EU) [Pioneer](#)
(February 2017, Opening of proceedings)
 - - (EU) [Philips](#)
(February 2017, Opening of proceedings)
 - - (EU) [Denon & Marantz](#)
(February 2017, Opening of proceedings)
- (F) [Bang & Olufsen](#)
(March 2014 Paris Court of Appeal judgment)
- (PL) [Roland Polska](#)
(May-June 2016, Poland Court of Appeal judgment)
- (UK) [Sports & entertainment merchandise](#)
(August 2016 Infringement decision)
 - - (UK) [Trod / GB eye](#)
 - - (UK) [Trod / GB eye](#)
(December 2016, Director disqualification)

- (UK) [Ping Europe Limited](#)
(August 2016, Statement of objections)
 - - (UK) [Ping Europe Limited](#)
(August 2017, Infringement decision)
 - - UPDATE (UK) [Ping Europe Limited](#)
(December 2017, Non-confidential decision)

Resale price maintenance:

obligation to use fixed or minimum resale prices

- (D) [Portable navigation devices](#)
(May 2015, Infringement decision)
- (D) [CIBA Vision](#)
(December 2009, Infringement decision)
- (I) [Enervit](#)
(July 2014, Commitments)
- (UK) [Ultra Finishing](#)
(May 2016, Infringement decision)
- (UK) [ITW](#)
(May 2016, Infringement decision)
- (UK) [Mobility Scooters](#)
(October 2014, Infringement decision)

MFNs/Price Parity Clauses:

guarantee to an online platform that supplier will treat the platform as favourably as the supplier's most-favoured-customer

- (EU) [Amazon e-books](#)
(Jun 2015 Opening of proceedings)
 - - (EU) [Amazon e-books](#)
(December 2016, Opening of proceedings)
 - - EU) [Amazon e-books](#)
(January 2017, Market Test Notice Art. 27(4))
 - - (EU) [Amazon e-books](#)
(January 2017, Proposed Commitments)
 - - (EU) [Amazon e-books](#)
(May 2017, Commitments accepted)
 - - (EU) [Amazon e-books](#)
(August 2017, Decision concerning the Trustees)
- (EU) [E-books](#)
(July 2013 Commitments)

CASE TRACKER: OVERVIEW OF PENDING AND RECENT RELEVANT ONLINE DISTRIBUTION CASES

Hotel bookings:

-  (D) [HRS](#)
(January 2015 Düsseldorf Higher Regional Court judgment)
-  (D) [booking.com](#)
(Dec 2015 Infringement decision)
-  (F) [booking.com](#)
(Apr 2015 Commitments)
 -  - UPDATE: (F) [booking.com](#)
(October 2015, Decision Court of Appeal Paris)
 -  - UPDATE: (F) [booking.com](#)
(November 2016, Decision Business Court Paris)
 -  - UPDATE: (F) [booking.com](#)
(February 2017, Assessment of commitments made by booking.com)
-  (I) [booking.com](#)
(Apr 2015 Commitments)
-  (SE) [booking.com](#)
(Apr 2015 Commitments)
-  (EU) [Holiday Pricing](#)
(February 2017, Opening of proceedings)
 -  - (EU) [REWE/DER](#)
(August 2017, Opening of proceedings)
 -  - (EU) [TUI](#)
(August 2017, Opening of proceedings)
 -  - (EU) [Thomas Cook](#)
(August 2017, Opening of proceedings)
 -  - (EU) [Kuoni](#)
(August 2017, Opening of proceedings)
 -  - (EU) [Melia](#)
(August 2017, Opening of proceedings)
-  (EU) [Report on ECN monitoring exercise in the online hotel booking sector](#)
(April 2017)

Geo-blocking:

preventing online cross-border shoppers from purchasing consumer goods or accessing digital content services

-  (EU) [Pay-TV](#)
(April 2016, Commitments)
 -  - (EU) [Cross-border access to pay-TV](#)
(July 2017, Commitments)
 -  - (EU) [Cross-border access to pay-TV](#)
(July 2017, Decision concerning the Trustees)
-  (EU) [Video games](#)
(March 2016, Investigation)
 -  - (EU) [Capcom](#)
(February 2017, Opening of proceedings)
 -  - (EU) [Bandai Namco](#)
(February 2017, Opening of proceedings)
 -  - (EU) [Focus Home](#)
(February 2017, Opening of proceedings)
 -  - (EU) [Koch Media](#)
(February 2017, Opening of proceedings)
 -  - (EU) [Zenimax](#)
(February 2017, Opening of proceedings)

Dual pricing:


















charging different prices for the same product/service when sold online.

-  (D) [LEGO](#)
(July 2016, Commitments)
-  (D) [Gardena](#)
(November 2013, Commitments)
-  (D) [Bosch Siemens Hausgeräte](#)
(December 2013, Commitments)
-  (D) [Bathroom fittings](#)
(December 2011, Commitments)
-  (UK) [Fridge and bathroom suppliers](#)
(May 2016, Infringement decision)

CASE TRACKER: OVERVIEW OF PENDING AND RECENT RELEVANT ONLINE DISTRIBUTION CASES

Third party platform ban:

restriction on using third-party online market places

-  (D) [Adidas](#)
(July 2015, Commitments)
-  (D) [Sennheiser](#)
(December 2013, Commitments)
-  (D) [Asics](#)
(August 2015, Infringement decision)
 -  - (D) [Asics](#)
(April 2017, Higher Regional Court of Düsseldorf)
 -  - UPDATE: [Asics](#) (December 2017, Federal Court of Justice ruling)
-  (D) [Deuter](#)
(December 2015, Frankfurt Higher Regional Court, appeal pending)
-  (D) [Coty](#)
(April 2016, request for a preliminary ruling)
 - (EU) [Coty](#)
(March 2017, Hearing)
 -  - (EU) [Coty](#)
(July 2017, Opinion)
 -  - UPDATE: (EU) [Coty](#)
(December 2017, Judgment)
-  (F) [Caudalie](#)
(February 2016, Paris Court of Appeal judgment)
 -  - UPDATE: (F) [Caudalie](#)
(September 2017, French Supreme Court judgment)
-  (F) [Adidas](#)
(November 2015, Commitments)
-  (F) [Samsung & Amazon](#)
(November 2015, request for a preliminary ruling)
 -  - (EU) [Samsung & Amazon](#)
(December 2016, preliminary ruling)
-  (NL) [Shure Distribution Benelux](#)
(May 2016, Gelderland district court ruling)
-  (UK) [BMW](#)
(January 2017, BMW changes policy)
-  (NL) NEW [Nike](#)
(October 2017, Amsterdam Court Judgment)

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