China / EU Competition Week
Beijing, 12 March 2014

European Commission

Competition issues in Online Retailing

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Competition

Outline

1. EU competition rules on anticompetitive agreements
2. Main features of the EU regime on supply and distribution agreements
3. Online sales restrictions (hardcore and non–hardcore)
4. Case Study (1): Pierre Fabre
5. Case Study (2): e-Books
6. Case Study (3): Hotel Bookings

EU Competition Rules on Anticompetitive Agreements

Article 101 TFEU addresses agreements between firms which are independent from each other

- **Art. 101(1)** prohibits agreements that have as their *object* or *effect* to restrict or distort competition
- **Art.101(3)** declares the prohibition inapplicable if the agreement and its restrictions are indispensable to create efficiencies which benefit consumers, without eliminating competition

Effects based approach: overall outcome for competition and consumers determines assessment

Article 101 (ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

— any agreement or category of agreements between undertakings,

— any decision or category of decisions by associations of undertakings,

— any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Restrictions by object

Agreements that have as their object to restrict competition are considered serious restrictions of competition

- E.g price fixing cartels and RPM

Hardcore restrictions:

- Presumption of negative effects under Article 101(1)
- Presumption that it is unlikely that the conditions of Art 101(3) are fulfilled

This does not entirely exclude individual exemption in case of convincing evidence of likely efficiencies, but highly unlikely

The order of bringing forward evidence / showing effects is reversed

- First, likely efficiencies need to be shown by the defendant
- Before the likely negative effects are shown by the authority/plaintiff

Restrictions by effect

Agreements that have as their effect to restrict competition

Authority/plaintiff must show likely negative effects under Article 101(1)

Defendant must show likely efficiencies under Article 101(3) once likely negative effects are established ("consumer welfare test")

"Safe harbour" created by Block Exemption Regulations (BER) for many types of agreements below certain market share thresholds

- Net positive balance presumed
- Exception: hardcore restrictions

Guidelines help to interpret BER and provide guidance on a case by case assessment of negative and positive effects where BER do not apply (above the market share thresholds)

European Commission

Main features of the EU regime on supply and distribution agreements

European Commission

In 2010 Commission adopted:

- **Vertical Restraints Block Exemption Regulation** (Rec. 330/2010; VRBER)
- **Vertical Restraints Guidelines** (VRGL)

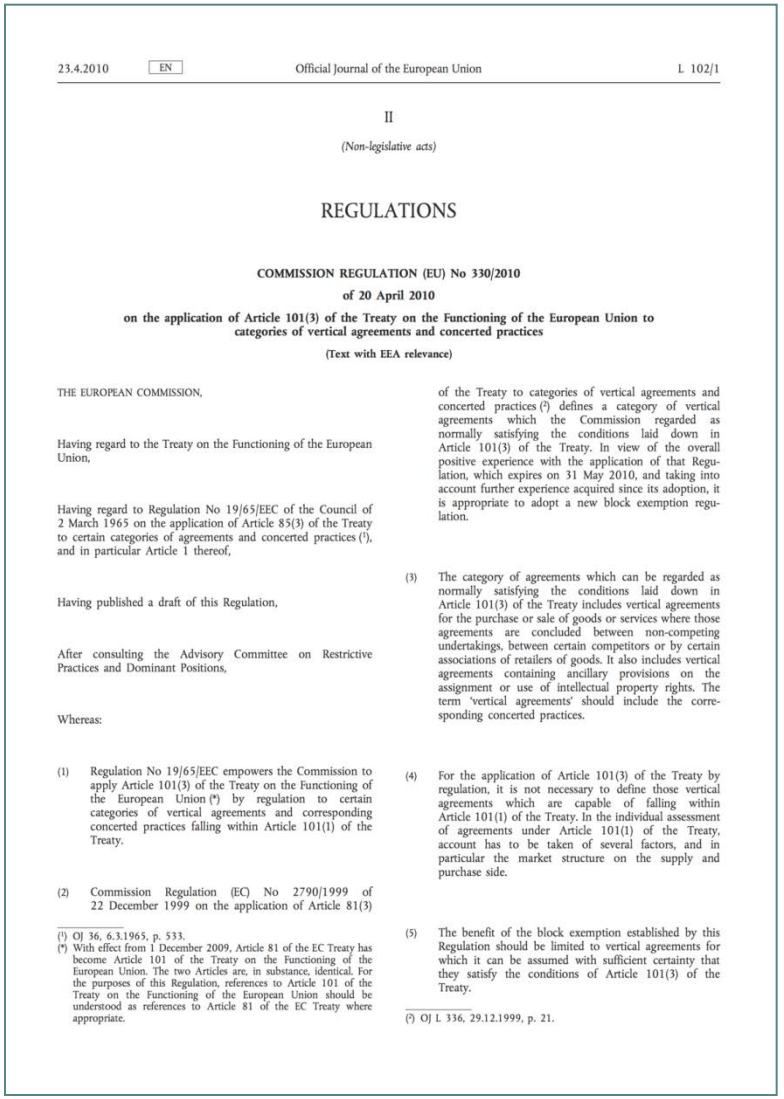
Apply to vertical agreements…

- Between two or more undertakings
- Operating, for the purposes of the agreement, at a different level of the production or distribution chain
- Concerning the conditions for the purchase and (re)sale of products

For all sectors (car specific rules remain)

Do not apply to vertical agreements between competitors

- Except dual distribution at retail level



23.4.2010 EN Official Journal of the European Union L 102/1

II

(Non-legislative acts)

REGULATIONS

COMMISSION 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

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation No 19/65/EEC of the Council of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices [1], and in particular Article 1 thereof,

Having published a draft of this Regulation,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation No 19/65/EEC empowers the Commission to apply Article 101(3) of the Treaty on the Functioning of the European Union (*) by regulation to certain categories of vertical agreements and corresponding concerted practices falling within Article 101(1) of the Treaty.

(2) Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [2] defines a category of vertical agreements which the Commission regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty. In view of the overall positive experience with the application of that Regulation, which expires on 31 May 2010, and taking into account further experience acquired since its adoption, it is appropriate to adopt a new block exemption regulation.

(3) The category of agreements which can be regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty includes vertical agreements for the purchase or sale of goods or services where those agreements are concluded between non-competing undertakings, between certain competitors or by certain associations of retailers of goods. It also includes vertical agreements containing ancillary provisions on the assignment or use of intellectual property rights. The term 'vertical agreements' should include the corresponding concerted practices.

(4) For the application of Article 101(3) of the Treaty by regulation, it is not necessary to define those vertical agreements which are capable of falling within Article 101(1) of the Treaty. In the individual assessment of agreements under Article 101(1) of the Treaty, account has to be taken of several factors, and in particular the market structure on the supply and purchase side.

(5) The benefit of the block exemption established by this Regulation should be limited to vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty.

[1] OJ 36, 6.3.1965, p. 533.

(*) With effect from 1 December 2009, Article 81 of the EC Treaty has become Article 101 of the Treaty on the Functioning of the European Union. The two Articles are, in substance, identical. For the purposes of this Regulation, references to Article 101 of the Treaty on the Functioning of the European Union should be understood as references to Article 81 of the EC Treaty where appropriate.

[2] OJ L 336, 29.12.1999, p. 21.

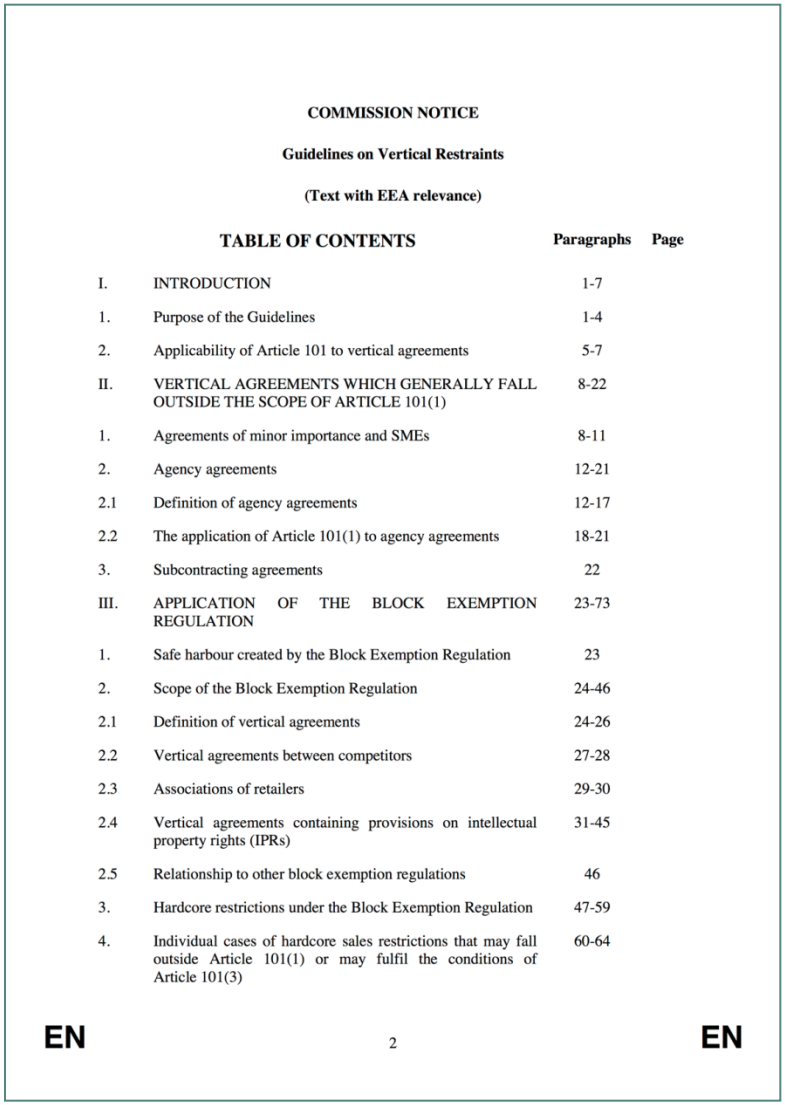
Basic features of the VRBER / GL

A wide block exemption with…

- … a limited hardcore list (cf. article 4 VRBER), and…
- … a limited list of excluded restrictions (cf. article 5 VRBER)

Safe harbour below 30% market share threshold (cf. article 3 VRBER)

- No presumption of illegality above the market share threshold



COMMISSION NOTICE

Guidelines on Vertical Restraints

(Text with EEA relevance)

TABLE OF CONTENTS **Paragraphs** **Page**

European Commission

If the conditions of the VRBR are respected, competition will generally force firms to offer best quality and prices to consumers and vertical restraints can be expected to lead to efficiencies

Commission and NCAs can still intervene by withdrawing the benefit of the VRBER and prohibit the restraints for the future if in an exceptional case consumers are harmed

Above 30% market share, individual assessment under Article 101

COMMISSION NOTICE

Guidelines on Vertical Restraints

(Text with EEA relevance)

TABLE OF CONTENTS

Hardcore Restrictions

Art. 4 BER: serious restrictions of competition which exclude the benefit of the block exemption for the whole agreement

- No severability
- While this does not exclude individual exemption in case of convincing evidence of likely efficiencies, it is unlikely (thus, high risk of fines)

Resale Price Maintenance (RPM)

- Agreeing fixed or minimum resale price

Sales restrictions on the buyer

Distinction: Hardcore restrictions / Excluded restrictions

Sales Restrictions

- Sale restrictions: concern is market partitioning and price discrimination
  - In principle buyer/distributor should be free to resell where and to whom it wants:
- Passive sales: sale in response to unsolicited requests
  - Passive sale restrictions are hardcore (main exception selective distribution)
- Active sales: sale as a result of actively approaching customers
  - Active sale restrictions are hardcore except to protect areas where there is exclusive distribution

Market definition

The Commission Notice on definition of the relevant market for the purposes of Community competition law provides guidance on the rules, criteria and evidence which the Commission uses when considering market definition issues

The VRGL deal with specific issues that arise in the context of vertical restraints

9. 12. 97 EN Official Journal of the European Communities C 372/5

COMMISSION NOTICE

on the definition of relevant market for the purposes of Community competition law

(97/C 372/03)

(Text with EEA relevance)

I. INTRODUCTION

1. The purpose of this notice is to provide guidance as to how the Commission applies the concept of relevant product and geographic market in its ongoing enforcement of Community competition law, in particular the application of Council Regulation No 17 and (EEC) No 4064/89, their equivalents in other sectoral applications such as transport, coal and steel, and agriculture, and the relevant provisions of the EEA Agreement (1). Throughout this notice, references to Articles 85 and 86 of the Treaty and to merger control are to be understood as referring to the equivalent provisions in the EEA Agreement and the ECSC Treaty.

2. Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved (2) face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure. It is from this perspective that the market definition makes it possible *inter alia* to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance or for the purposes of applying Article 85.

3. It follows from point 2 that the concept of 'relevant market' is different from other definitions of market often used in other contexts. For instance, companies often use the term 'market' to refer to the area where it sells its products or to refer broadly to the industry or sector where it belongs.

4. The definition of the relevant market in both its product and its geographic dimensions often has a decisive influence on the assessment of a competition case. By rendering public the procedures which the Commission follows when considering market definition and by indicating the criteria and evidence on which it relies to reach a decision, the Commission expects to increase the transparency of its policy and decision-making in the area of competition policy.

5. Increased transparency will also result in companies and their advisers being able to better anticipate the possibility that the Commission may raise competition concerns in an individual case. Companies could, therefore, take such a possibility into account in their own internal decision-making when contemplating, for instance, acquisitions, the creation of joint ventures, or the establishment of certain agreements. It is also intended that companies should be in a better position to understand what sort of information the Commission considers relevant for the purposes of market definition.

6. The Commission's interpretation of 'relevant market' is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities.

II. DEFINITION OF RELEVANT MARKET

Definition of relevant product market and relevant geographic market

7. The Regulations based on Article 85 and 86 of the Treaty, in particular in section 6 of Form A/B with respect to Regulation No 17, as well as in section 6 of Form CO with respect to Regulation (EEC) No 4064/89 on the control of concentrations having a Community dimension have laid down the following definitions, 'Relevant product markets' are defined as follows:

(1) The focus of assessment in State aid cases is the aid recipient and the industry/sector concerned rather than identification of competitive constraints faced by the aid recipient. When consideration of market power and therefore of the relevant market are raised in any particular case, elements of the approach outlined here might serve as a basis for the assessment of State aid cases.

(2) For the purposes of this notice, the undertakings involved will be, in the case of a concentration, the parties to the concentration; in investigations within the meaning of Article 86 of the Treaty, the undertaking being investigated or the complainants; for investigations within the meaning of Article 85, the parties to the Agreement.

The relevant **product market** comprises any goods or services which are regarded by the buyers as interchangeable, by reason of their characteristics, prices and intended use

Markets are in general not defined by the form of distribution

Cases where the supplier produces both original equipment and the repair or replacement parts for that equipment

The relevant **geographic market** comprises the area in which the undertakings concerned are involved in the supply and demand of relevant goods or services, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighboring geographic areas because, in particular, conditions of competition are appreciably different in those areas.

The geographic wholesale market is usually wider than the retail market

Retail markets may be wider than the final consumers' search area

Online sales restrictions

VRBER and VRGL apply to agreements concerning both on- and offline sale and purchase of goods and services

The VRBER Hardcore restrictions, in particular, apply to offline and online sales:

- No new hardcore restrictions

VRGL clarify and provide examples of what are hardcore online sale restrictions

- Clarification of how the distinction between active and passive sales applies to online sales (only relevant for exclusive distribution) and what are considered hardcore sales restrictions

Hardcore Online Sale Restrictions

Once distributors are appointed, they should be free to have a website and engage in internet sales to allow consumers to benefit from the internet

Confirmed by recent Pierre Fabre judgment

Distributors should not be obliged to reroute customers depending on their IP address to other distributors' or the supplier's website

Distributors should not be obliged to terminate online purchase requests depending on the consumer's IP address

A distributor should not be obliged to pay more for the product if it intends to sell it online instead of offline

Non-Hardcore Online Sale Restrictions

Suppliers should be free to choose distributors /distribution format and prevent possible free riding

A supplier may decide not to sell to online-only distributors and require its appointed distributors to have one or more brick and mortar shops

A supplier may require equivalent conditions regarding response time/expertise of personnel etc. for both off- and online sales

A supplier may require its distributors not to use third party platforms

While not hardcore, all these restrictions can be addressed under the effects-based approach

European Commission

Pierre Fabre judgment

CASE STUDY

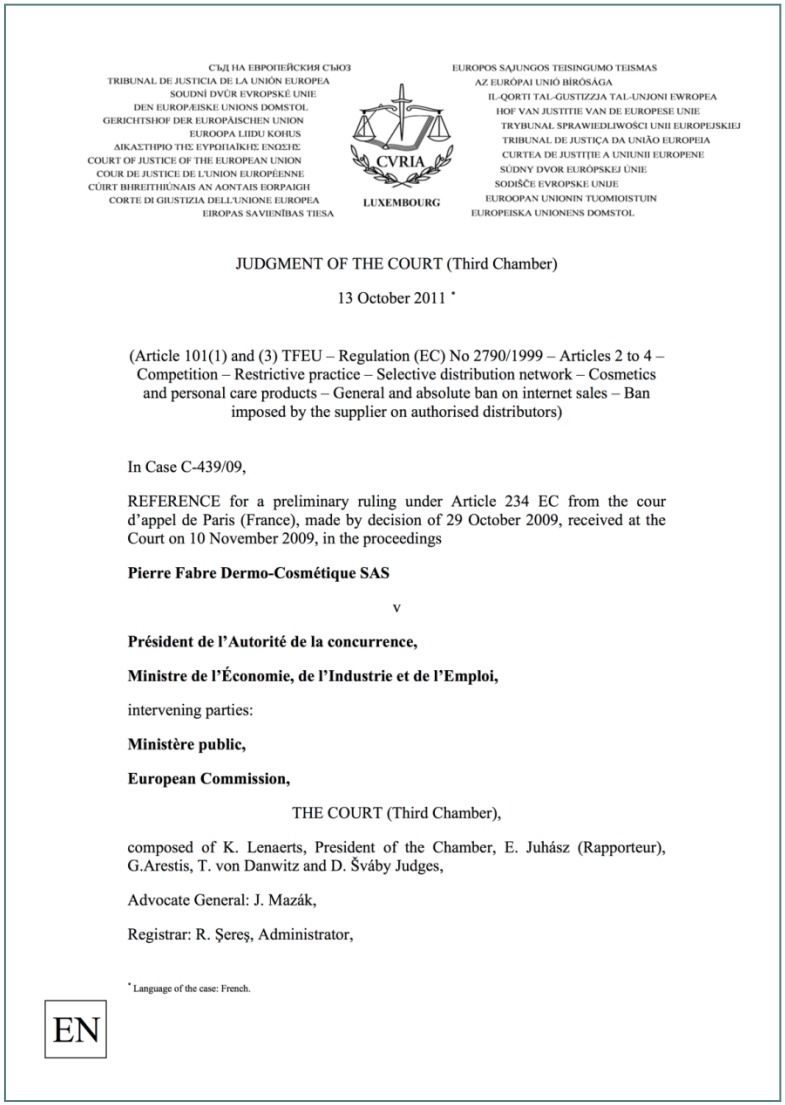
European Commission

Judgment of the Court of Justice of the EU of 13/10/2011 in Case C-439/09

Reference for a preliminary ruling from the Appeals Court of Paris

Background:

Action for annulment by Pierre Fabre Dermo-Cosmétique against a decision of 29 October 2008 of the French Competition Authority, regarding the ban imposed by Pierre Fabre (in its selective distribution contracts) on distributors which it previously chose to authorize, on the sale of its cosmetics and personal care products via the internet



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CVRIA
LUXEMBOURG

JUDGMENT OF THE COURT (Third Chamber)

13 October 2011 *

(Article 101(1) and (3) TFEU – Regulation (EC) No 2790/1999 – Articles 2 to 4 – Competition – Restrictive practice – Selective distribution network – Cosmetics and personal care products – General and absolute ban on internet sales – Ban imposed by the supplier on authorised distributors)

In Case C-439/09,

REFERENCE for a preliminary ruling under Article 234 EC from the cour d'appel de Paris (France), made by decision of 29 October 2009, received at the Court on 10 November 2009, in the proceedings

Pierre Fabre Dermo-Cosmétique SAS

v

Président de l'Autorité de la concurrence,

Ministre de l'Économie, de l'Industrie et de l'Emploi,

intervening parties:

Ministère public,

European Commission,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász (Rapporteur), G.Arestis, T. von Danwitz and D. Šváby Judges,

Advocate General: J. Mazák,

Registrar: R. Şereş, Administrator,

* Language of the case: French.

EN

Products involved:

Cosmetics and personal care products, which are not classified as medicines

Market share:

In 2007, the Pierre Fabre group had 20% of the French market

Contested agreements:

Distribution contracts for various brands stipulating that sales must be made exclusively in a physical space, in which a qualified pharmacist must be present

Particular requirements excluded de facto all forms of selling by internet

PIERRE FABRE DERMO-COSMÉTIQUE

13 Articles 1.1 and 1.2 of the general conditions of distribution and sale of the brands stipulate:

'The authorised distributor must supply evidence that there will be physically present at its outlet at all times during the hours it is open at least one person specially trained to:

acquire a thorough knowledge of the technical and scientific characteristics of the products…, necessary for the proper fulfilment of the obligations of professional practice…

regularly and consistently give the consumer all information concerning the correct use of the products...

give on-the-spot advice concerning sale of the…product that is best suited to the specific health or care matters raised with him or her, in particular those concerning the skin, hair and nails.

In order to do this, the person in question must have a degree in pharmacy awarded or recognised in France…

The authorised distributor must undertake to dispense the products…only at a marked, specially allocated outlet…'

14 Those requirements exclude *de facto* all forms of selling by internet.

15 By decision of 27 June 2006, the Competition Authority opened an ex officio investigation of practices in the distribution sector for cosmetics and personal care products.

16 By decision No 07-D-07 of 8 March 2007, the Competition Authority approved and made binding the commitments proposed by the group of undertakings concerned, with the exception of Pierre Fabre Dermo-Cosmétique, to amend their selective distribution contracts in order to enable the members of their networks to sell their products via the internet, subject to certain conditions. The proceedings opened against Pierre Fabre Dermo-Cosmétique followed their ordinary course.

17 During the administrative proceedings, Pierre Fabre Dermo-Cosmétique explained that the products at issue, by their nature, require the physical presence of a qualified pharmacist at the point of sale during all opening hours, in order that the customer may, in all circumstances, request and obtain the personalised advice of a specialist, based on the direct observation of the customer's skin, hair and scalp.

18 In view of the fact that there might be an effect on trade between the Member States, the Competition Authority analysed the practice in question in the light of the provisions of French competition law and European Union law.

I - 5

European Commission

Question raised by the national Court:

« Does a general and absolute ban on selling contract goods to end-users via the internet, imposed on authorised distributors in the context of a selective distribution network, in fact constitute a "hardcore" restriction of competition by object for the purposes of Article 81(1) EC [Article 101(1) TFEU] which is not covered by the block exemption provided for by Regulation No 2790/1999 but which is potentially eligible for an individual exemption under Article [Article 101(3) TFEU]? »

30 In its order for reference, the cour d'appel de Paris, after recalling the reasons behind the contested decision, and the content of the written observations that the European Commission presented pursuant to Article 15(3) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p.1), nevertheless noted that neither the Commission's guidelines nor its observations were binding on the national courts.

31 In those circumstances, the cour d'appel de Paris decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Does a general and absolute ban on selling contract goods to end-users via the internet, imposed on authorised distributors in the context of a selective distribution network, in fact constitute a "hardcore" restriction of competition by object for the purposes of Article 81(1) EC [Article 101(1) TFEU] which is not covered by the block exemption provided for by Regulation No 2790/1999 but which is potentially eligible for an individual exemption under Article 81(3) EC [Article 101(3) TFEU][?]'

Consideration of the question referred

32 It is to be observed at the outset that neither Article 101 TFEU nor Regulation No 2790/1999 refer to the concept of 'hardcore' restriction of competition.

33 In those circumstances, the question referred for a preliminary ruling must be understood as seeking to ascertain, firstly, whether the contractual clause at issue in the main proceedings amounts to a restriction of competition 'by object' within the meaning of Article 101(1) TFEU, secondly, whether a selective distribution contract containing such a clause – where it falls within the scope of Article 101(1) TFEU – may benefit from the block exemption established by Regulation No 2790/1999 and, thirdly, whether, where the block exemption is inapplicable, the contract could nevertheless benefit from the exception provided for in Article 101(3) TFEU.

The classification of the restriction in the contested contractual clause as a restriction of competition by object

34 It must first of all be recalled that, to come within the prohibition laid down in Article 101(1) TFEU, an agreement must have 'as [its] object or effect the prevention, restriction or distortion of competition within the internal market'. It has, since the judgment in Case 56/65 *LTM* [1966] ECR 235 been settled case-law that the alternative nature of that requirement, indicated by the conjunction 'or', leads, first, to the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied. Where the anticompetitive object of the agreement is established it is not necessary to examine its effects on competition (see Joined Cases C-501/06 P, C-513/06 P, C-516/06 P and C-519/06

« Agreements constituting a selective distribution system […] necessarily affect competition […]. However, […] there are legitimate requirements, such as the maintenance of a specialist trade capable of providing specific services as regards high-quality and high-technology products, which may justify a reduction of price competition in favour of competition relating to factors other than price. Systems of selective distribution [are] not prohibited by Article 101(1) TFEU, to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use and, finally, that the criteria laid down do not go beyond what is necessary. »

Judgment, cf. paras 39 to 41

P *GlaxoSmithKline Services and Others* v *Commission and Others* [2009] ECR I-9291, paragraph 55 and the case-law cited).

35 For the purposes of assessing whether the contractual clause at issue involves a restriction of competition 'by object', regard must be had to the content of the clause, the objectives it seeks to attain and the economic and legal context of which it forms a part (see *GlaxoSmithKline and Others* v *Commission and Others*, paragraph 58 and the case law cited).

36 The selective distribution contracts at issue stipulate that sales of cosmetics and personal care products by the Avène, Klorane, Galénic and Ducray brands must be made in a physical space, the requirements for which are set out in detail, and that a qualified pharmacist must be present.

37 According to the referring court, the requirement that a qualified pharmacist must be present at a physical sales point *de facto* prohibits the authorised distributors from any form of internet selling.

38 As the Commission points out, by excluding *de facto* a method of marketing products that does not require the physical movement of the customer, the contractual clause considerably reduces the ability of an authorised distributor to sell the contractual products to customers outside its contractual territory or area of activity. It is therefore liable to restrict competition in that sector.

39 As regards agreements constituting a selective distribution system, the Court has already stated that such agreements necessarily affect competition in the common market (Case 107/82 *AEG-Telefunken* v *Commission* [1983] ECR 3151, paragraph 33). Such agreements are to be considered, in the absence of objective justification, as 'restrictions by object'.

40 However, it has always been recognised in the case-law of the Court that there are legitimate requirements, such as the maintenance of a specialist trade capable of providing specific services as regards high-quality and high-technology products, which may justify a reduction of price competition in favour of competition relating to factors other than price. Systems of selective distribution, in so far as they aim at the attainment of a legitimate goal capable of improving competition in relation to factors other than price, therefore constitute an element of competition which is in conformity with Article 101(1) TFEU (*AEG-Telefunken* v *Commission*, paragraph 33).

41 In that regard, the Court has already pointed out that the organisation of such a network is not prohibited by Article 101(1) TFEU, to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use and, finally, that the criteria laid down do not go beyond what is necessary (Case 26/76 *Metro SB-Großmärkte*

European Commission

« Article 101(1) TFEU must be interpreted as meaning that, in the context of a selective distribution system, a ***contractual clause*** *requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present,* ***resulting in a ban on the use of the internet for those sales, amounts to a restriction by object*** *within the meaning of that provision where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue,* ***that clause is not objectively justified****. »*

Judgment, cf. para 47

v *Commission* [1977] ECR 1875, paragraph 20, and Case 31/80 *L'Oréal* [1980] ECR 3775, paragraphs 15 and 16).

42 Although it is for the referring court to examine whether the contractual clause at issue prohibiting *de facto* all forms of internet selling can be justified by a legitimate aim, it is for the Court of Justice to provide it for this purpose with the points of interpretation of European Union law which enable it to reach a decision (see *L'Oréal*, paragraph 14).

43 It is undisputed that, under Pierre Fabre Dermo-Cosmétique's selective distribution system, resellers are chosen on the basis of objective criteria of a qualitative nature, which are laid down uniformly for all potential resellers. However, it must still be determined whether the restrictions of competition pursue legitimate aims in a proportionate manner in accordance with the considerations set out at paragraph 41 of the present judgment.

44 In that regard, it should be noted that the Court, in the light of the freedoms of movement, has not accepted arguments relating to the need to provide individual advice to the customer and to ensure his protection against the incorrect use of products, in the context of non-prescription medicines and contact lenses, to justify a ban on internet sales (see, to that effect, *Deutscher Apothekerverband*, paragraphs 106, 107 and 112, and Case C-108/09 *Ker-Optika* [2010] ECR I-0000, paragraph 76).

45 Pierre Fabre Dermo-Cosmétique also refers to the need to maintain the prestigious image of the products at issue.

46 The aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU.

47 In the light of the foregoing considerations, the answer to the first part of the question referred for a preliminary ruling is that Article 101(1) TFEU must be interpreted as meaning that, in the context of a selective distribution system, a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts to a restriction by object within the meaning of that provision where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified.

European Commission

« [T]he ***block exemption [...] does not apply to a selective distribution contract which contains a clause prohibiting de facto the internet as a method of marketing the contractual products***. However, such a contract may benefit, on an individual basis, from the exception provided for in Article 101(3) TFEU where the conditions of that provision are met. »

Judgment, cf. para 59

55 According to Pierre Fabre Dermo-Cosmétique, the ban on selling the contractual products via the internet is equivalent however to a prohibition on operating out of an unauthorised establishment. It submits that, since the conditions for exemption laid down at the end of the provision, cited in paragraph 53, are thus met, Article 4 does not apply to it.

56 It should be pointed out that, by referring to 'a place of establishment', Article 4(c) of Regulation No 2790/1999 concerns only outlets where direct sales take place. The question that arises is whether that term can be taken, through a broad interpretation, to encompass the place from which internet sales services are provided.

57 As regards that question, it should be noted that, as an undertaking has the option, in all circumstances, to assert, on an individual basis, the applicability of the exception provided for in Article 101(3) TFEU, thus enabling its rights to be protected, it is not necessary to give a broad interpretation to the provisions which bring agreements or practices within the block exemption.

58 Accordingly, a contractual clause, such as the one at issue in the main proceedings, prohibiting *de facto* the internet as a method of marketing cannot be regarded as a clause prohibiting members of the selective distribution system concerned from operating out of an unauthorised place of establishment within the meaning of Article 4(c) of Regulation No 2790/1999.

59 In the light of the foregoing considerations, the answer to the second and third parts of the question referred for a preliminary ruling is that Article 4(c) of Regulation No 2790/1999 must be interpreted as meaning that the block exemption provided for in Article 2 of that regulation does not apply to a selective distribution contract which contains a clause prohibiting *de facto* the internet as a method of marketing the contractual products. However, such a contract may benefit, on an individual basis, from the exception provided for in Article 101(3) TFEU where the conditions of that provision are met.

Costs

60 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 101(1) TFEU must be interpreted as meaning that, in the context of a selective distribution system, a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified

European Commission

e-Books

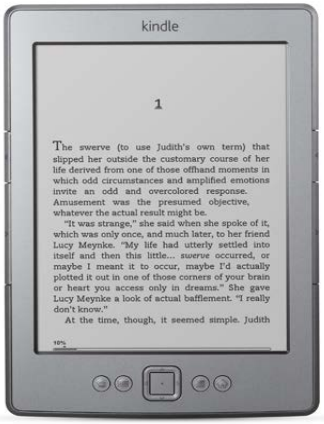
CASE STUDY

Competition

European Commission

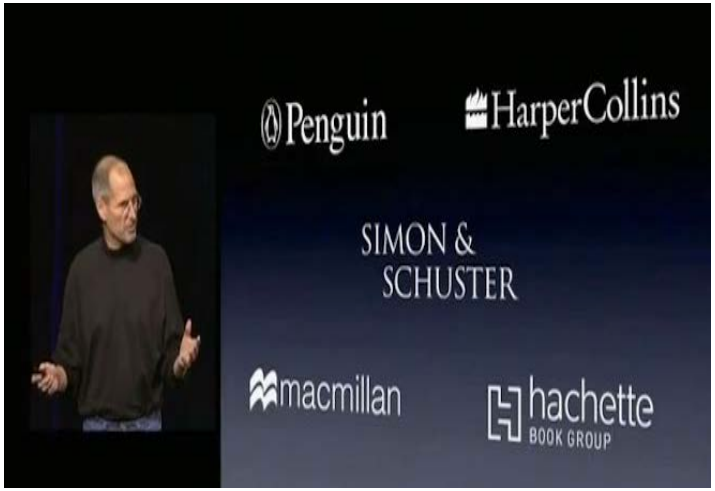
Main Features:

- Horizontal case
- Concerted practice with the object of raising retail prices
- Retail price MFN clause as a commitment device



Two Commitment Decisions:

- Hachette, HarperCollins, Holtzbrinck/Macmillan, Simon & Schuster, Apple (2012)
- Penguin Random House (2013)

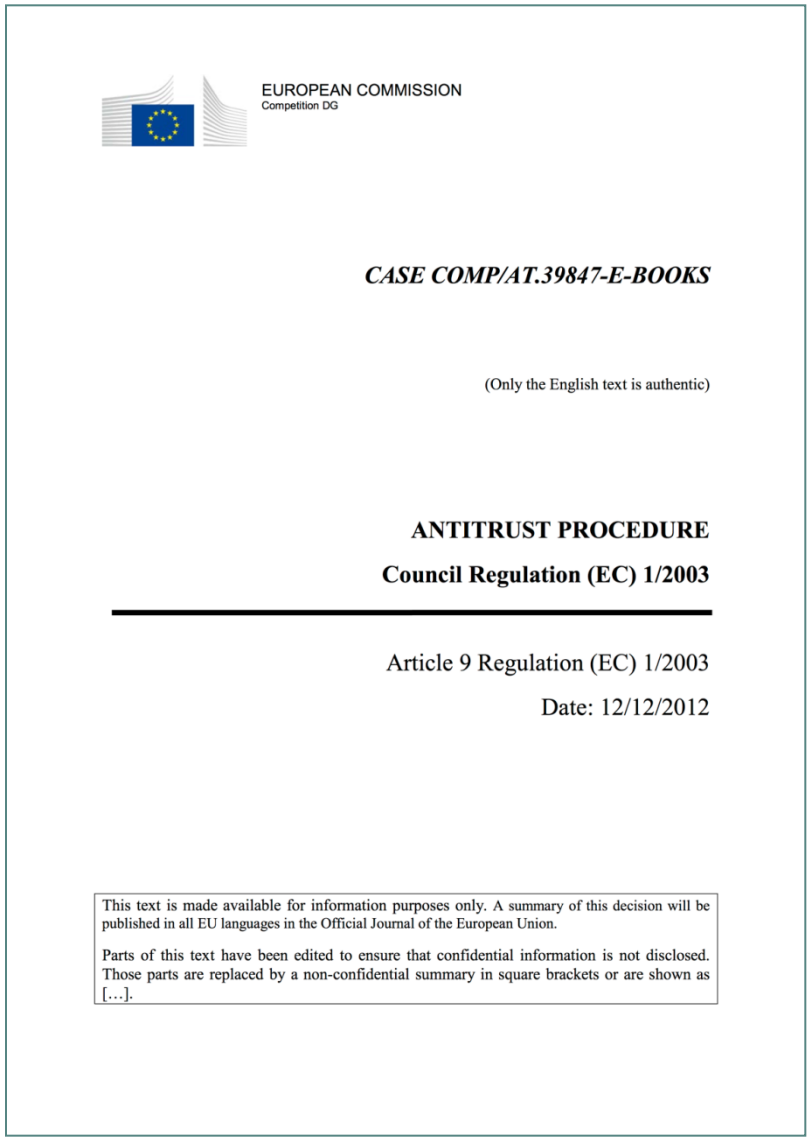


European Commission

Legal Assessment

The 5 publishers and Apple engaged in a concerted practice with the object of raising retail prices for e-books in the EEA above those of Amazon and/or of avoiding the arrival of such low prices in the first place

- Direct and indirect contacts
- Retail price MFN clause contained in the agency agreements concluded between the publishers and Apple acted as a commitment device to force Amazon on the agency model
- Restriction of competition by object: Publishers and Apple had the object of raising retail prices both in the US and in the EEA



EUROPEAN COMMISSION
Competition DG

CASE COMP/AT.39847-E-BOOKS

(Only the English text is authentic)

ANTITRUST PROCEDURE

Council Regulation (EC) 1/2003

Article 9 Regulation (EC) 1/2003

Date: 12/12/2012

This text is made available for information purposes only. A summary of this decision will be published in all EU languages in the Official Journal of the European Union.

Parts of this text have been edited to ensure that confidential information is not disclosed. Those parts are replaced by a non-confidential summary in square brackets or are shown as [...].

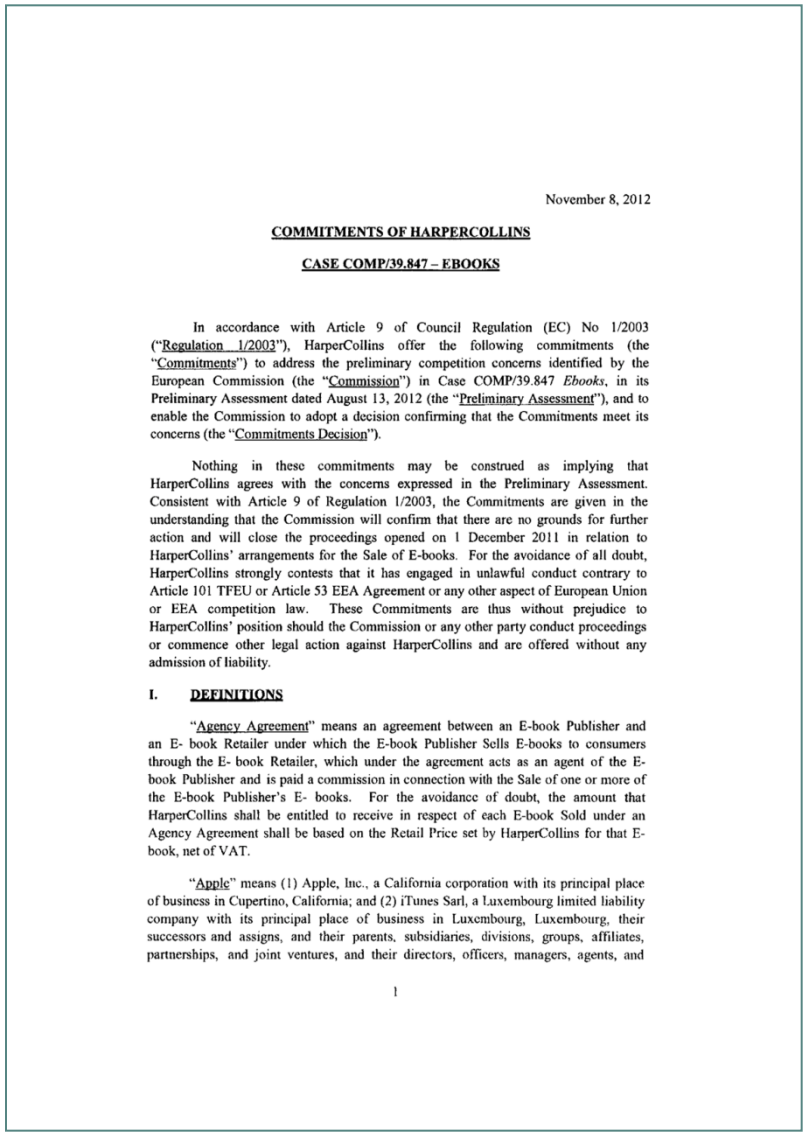
European Commission

Commitments Publishers:

- Termination of the relevant agency agreements
- 2 year cooling-off period
- During cooling-off period: discounting discretion for the retailer across the whole catalogue and up to the full aggregate commission
- 5 year prohibition on price MFN clauses

Commitments Apple:

- Termination of agency agreements with the publishers
- 5 year prohibition on retail price MFN clauses



November 8, 2012

COMMITMENTS OF HARPERCOLLINS

CASE COMP/39.847 – EBOOKS

In accordance with Article 9 of Council Regulation (EC) No 1/2003 ("Regulation 1/2003"), HarperCollins offer the following commitments (the "Commitments") to address the preliminary competition concerns identified by the European Commission (the "Commission") in Case COMP/39.847 *Ebooks*, in its Preliminary Assessment dated August 13, 2012 (the "Preliminary Assessment"), and to enable the Commission to adopt a decision confirming that the Commitments meet its concerns (the "Commitments Decision").

Nothing in these commitments may be construed as implying that HarperCollins agrees with the concerns expressed in the Preliminary Assessment. Consistent with Article 9 of Regulation 1/2003, the Commitments are given in the understanding that the Commission will confirm that there are no grounds for further action and will close the proceedings opened on 1 December 2011 in relation to HarperCollins' arrangements for the Sale of E-books. For the avoidance of all doubt, HarperCollins strongly contests that it has engaged in unlawful conduct contrary to Article 101 TFEU or Article 53 EEA Agreement or any other aspect of European Union or EEA competition law. These Commitments are thus without prejudice to HarperCollins' position should the Commission or any other party conduct proceedings or commence other legal action against HarperCollins and are offered without any admission of liability.

I. DEFINITIONS

"Agency Agreement" means an agreement between an E-book Publisher and an E- book Retailer under which the E-book Publisher Sells E-books to consumers through the E- book Retailer, which under the agreement acts as an agent of the E-book Publisher and is paid a commission in connection with the Sale of one or more of the E-book Publisher's E- books. For the avoidance of doubt, the amount that HarperCollins shall be entitled to receive in respect of each E-book Sold under an Agency Agreement shall be based on the Retail Price set by HarperCollins for that E-book, net of VAT.

"Apple" means (1) Apple, Inc., a California corporation with its principal place of business in Cupertino, California; and (2) iTunes Sarl, a Luxembourg limited liability company with its principal place of business in Luxembourg, Luxembourg, their successors and assigns, and their parents, subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and

1

« While each separate publisher and each retailer of e-books are free to choose the type of business relationship they prefer, any form of collusion to restrict or eliminate competition is simply unacceptable. The commitments proposed by Apple and the four publishers will restore normal competitive conditions in this new and fast-moving market, to the benefit of the buyers and readers of e-books. »

Joaquín Almunia
EU Commission Vice-President
in charge of Competition Policy

European Commission

Hotel Bookings

CASE STUDY

European Commission

OFFICE OF FAIR TRADING

Hotel online booking: Decision to accept commitments to remove certain discounting restrictions for Online Travel Agents

31 January 2014

OFT1514dec

Online hotel portal HRS's 'best price' clause violates competition law – Proceedings also initiated against other hotel portals

Date of issue: 20.12.2013

Bonn, 20 December 2013: Today the Bundeskartellamt prohibited HRS from continuing to apply its 'best price' clause (most favoured nation clause) and ordered the company to delete it from its contracts and general terms and conditions by 1 March 2014 as far as the clause affects hotels in Germany.

Andreas Mundt, President of the Bundeskartellamt: "*Only at first view do most favoured customer clauses used by online booking portals seem to benefit consumers. Ultimately the clauses prevent the offer of lower hotel prices elsewhere. Most favoured customer clauses thus restrict competition between existing online portals. Moreover, they make the market entry of new platforms considerably more difficult because they prevent new platforms from offering hotel rooms at lower prices. For these reasons we have now also initiated proceedings against the online hotel portals Booking and Expedia because of similar clauses in their hotel contracts.*"

The most favoured customer clauses in the contracts concluded between the HRS online platform and its hotel partners oblige the hotels to always offer their lowest room price, maximum room capacity and most favourable booking and cancellation conditions available on the Internet also via the HRS portal. Since March 2012 the hotels are even prohibited from offering guests better conditions if they book in directly at the hotel's reception desk.

HRS may file an appeal against the order with the Düsseldorf Higher Regional Court and apply for interim relief against the immediate enforceability of the order. The proceedings against Booking and Expedia were initiated because the contracts concluded by these companies with hotel partners contain similar clauses.

German Case
Prohibition decision of the Bundeskartellamt of December 2013

Complaint by a small hotel against **HRS** (a large Online Travel Agent or OTA)

Focus: parity clauses

Investigated clauses: parity clauses on prices, conditions for bookings, cancellations and room availability imposed by HRS (and possibly other OTAs) on Hotels

UK Case
Commitments Decision of the OFT of 31 January 2014

Complaint by a small OTA against **Bookings**, **Expedia** and **Intercontinental Hotels Group**

Focus: resale price maintenance (RPM)

Investigated clauses: discounting restrictions placed by Intercontinental Hotel Group (and possibly by other hotels) on Booking and Expedia (not excluding existence of parity clauses imposed by OTAs)

German Case

Product market:

- Hotel portals combining the functionalities of searching, comparing and booking of hotel rooms in one hand

Geographic market:

- Not larger than national

UK Case

Product market:

- Online supply of Room-Only hotel accommodation through OTA and Hotel websites
- Left open: inclusion of offline hotel bookings

Geographic market:

- Likely to be at least national (left open)

Possible competitive harm of parity clauses and RPM

Hinder competition among OTAs for lower room prices to end customers

Hinder competition among OTAs for lower commissions to hotels

Hinder market entry of new portals offering (e.g. innovative services)

Reduce competition among hotels