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CASE TRACKER

ANTITRUST ENFORCEMENT IN THE DIGITAL SECTOR: AN ONGOING BATTLE WITH AN EXPANDED FOCUS?

The case tracker below shows that enforcement of anti-competitive behaviour in online markets remains a hot topic among competition authorities. And since there is not currently an EU-wide approach to tackling antitrust issues in digital markets (for more on this see our [newsletter of March 2016](#)), any guidance provided by the EU courts is welcome.

Recent activity in the digital sector takes a number of forms:

Advocate General Wahl delivered his long-awaited opinion regarding a market place ban imposed by Coty, a supplier of luxury cosmetics, on its authorised resellers.

In the online hotel booking sector, further divergence is emerging as Italy outlaws price parity clauses.

The European Commission's record EUR 2.42 billion fine imposed on Google for favouring its comparison shopping service underlines that Article 102 investigations are also high on the antitrust enforcement agenda. The ECJ's recent endorsement of an effects-based approach to abuse of dominance cases should help dominant companies in their assessment of whether conduct falls under Article 102.

EUROPEAN COMMISSION FINES GOOGLE €2.4 BILLION

On 27 June the Commission [announced](#) that it had fined Google Inc. (Google) €2.4 billion for infringing Article 102 by leveraging its dominance as a search engine to promote Google Shopping over rival comparison shopping services for the past 9 years. The fine is the largest ever issued for an Article 102 infringement.

Background to the investigation

The decision relates to one of three antitrust cases the Commission has opened against Google. The other ongoing investigations concern Google's [Android mobile operating system](#) and its [AdSense advertising program](#). The Commission first began [investigating](#) Google's practices in online search in November 2010. Following a series of settlement discussions and failed attempts to reach a satisfactory commitments package, the Commission issued a [Statement of Objections](#) in April 2015. A [supplementary Statement of Objections](#) followed in July 2016.

The Commission's decision and Google's response

The full decision has not yet been released, but the Commission has published a press release and [factsheet](#) providing some detail on its reasoning.

The Commission argued that Google abused its dominant position by leveraging the popularity of its flagship search product to support its comparison shopping service, typically positioning results from its own service in a rich format at the top of the first page of search results. By contrast, results from rival comparison shopping services only appeared, on average, on the fourth page.

Google responded to the decision by denying any wrongdoing, with Kent Walker, Google's Senior Vice President and General Counsel, publishing a [blog post](#) disputing the Commission's findings, arguing that "while some comparison shopping sites naturally want Google to show them more prominently, our data shows that people usually prefer links that take them directly to the products they want, not to websites where they have to repeat their searches". The post also raised concerns over the Commission's decision to exclude Amazon and eBay from its investigation into comparison shopping, on the basis that these websites were merchant platforms rather than comparison shopping services. Walker doubted this distinction, noting that Amazon's offering included "comparison tools" and describing it as a "formidable competitor" which had "become the first port of call for product searches".

Fine and duty to implement a compliance plan

The Commission has not released any detailed commentary on its rationale for imposing the record-breaking fine. Its [press release](#) notes that the record €2.4 billion figure "takes account of the gravity and duration of the infringement" in the 13 EEA states in which Google's comparison shopping service was available.

The size of the Google fine has attracted international media attention and raised concerns in some jurisdictions, particularly the United States. These concerns were evident at a special hearing of the House of Representatives Regulatory Reform, Commercial, and Antitrust Law Subcommittee, held two days after the decision was announced. Tom Marino, the Republican chairman of the committee, [opened the session](#) by criticising "competition rules in several foreign jurisdictions [which] include inherently subjective concepts such as protecting fair competition and social public interest", and stressed that it was "essential we ensure US companies are treated fairly, consistently and objectively by international institutions".

In addition to imposing a fine, the Commission gave Google 90 days to cease the practices identified in the Decision and refrain from any measures with the same or equivalent object or effect.

Further developments

In line with the implementation timetable set by the Commission, Google introduced [changes](#) to Google Shopping and product search results in EEA countries and Switzerland on 26 September. Comparison shopping services in those countries will now be able to bid for placement in a new “Shopping Unit”, alongside and on equal terms to Google Shopping. No advertisement slots in this “Shopping Unit” are reserved for Google Shopping (or any competitor comparison shopping service).

Google filed an appeal against the decision at the lower-tier General Court of the Court of Justice of the European Union on 11 September.

ECJ CONFIRMS EFFECTS-BASED APPROACH FOR ASSESSING REBATES

The Court of Justice of the European Union recently rendered its long-awaited judgment in the Intel-case. The ECJ found that even though exclusivity and loyalty rebates may constitute abuse, this should be a rebuttable presumption only. It is up to the dominant company to refute this presumption by proving that its conduct was not capable of restricting competition, also taking into account counterbalancing efficiencies which benefit consumers. A central theme in the analysis as to whether there has been of abuse is the ‘as efficient competitor’ (AEC) test, i.e. does the practice have the intrinsic capability of foreclosing competitors which are at least as efficient as the dominant company. Specifically, the ECJ told the General Court to re-examine Intel’s arguments against its EUR 1.06 billion fine. The ECJ’s ruling is a welcome confirmation of an effects-based approach to abuse of dominance. As a result, certain dominant companies may have greater leeway when granting rebates to their customers. The approach does, however, mean that dominant companies must ‘self-assess’ whether their rebates are capable of restricting competition.

The European Commission [imposed](#) a fine of EUR 1.06 billion on Intel for excluding competitors from the market for x86 central processing units (CPUs). The Commission found that Intel had abused its dominant position on this market by, among other things, granting rebates to customers on condition that they bought all, or almost all, their CPUs from Intel. On [appeal](#), the General Court upheld the Commission’s reasoning that once a rebate qualifies as an exclusivity or loyalty rebate, there is no longer a need to consider all the circumstances to verify that the conduct is capable of restricting competition. That capability can then be assumed. According to the General Court, it was therefore also not necessary to further look into the assessment carried out by the Commission as a fall-back, including the Commission’s application of the AEC test.

The [ECJ](#) agreed with Intel that the General Court had been wrong to not examine its exclusivity and loyalty rebates in light of all the circumstances of the case. According to the ECJ, even though exclusivity and loyalty rebates are indeed presumed to constitute an abuse, this is a rebuttable presumption. Dominant companies can refute the presumption by providing evidence that the conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects. It is then up to the Commission to conduct an AEC test to determine the foreclosure effects of the rebate concerned. The General Court should have therefore examined all of Intel’s arguments in regard of the AEC test carried out by the Commission and the ECJ referred the case back to the General Court, giving it a second chance to do so.

SELECTIVE DISTRIBUTION AND ONLINE PLATFORMS

Advocate General Wahl recently delivered his non-binding [opinion](#) in case C-230/16 *Coty Germany*. In his opinion, the Advocate General 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).

Coty, one of the leading suppliers of luxury cosmetics in Germany, markets some of its brands through a selective distribution network. Authorised retailers are permitted to offer Coty's products on-line. However, following an amendment of the distribution contracts in 2012, they can only do so provided that products are offered through an 'electronic shop window' of the authorised shop and that the luxury character of the goods is preserved. Furthermore, authorised retailers cannot make discernible use of unauthorised third parties for internet sales of the products.

Parfümerie Akzente, one of Coty's distributors, refused to approve the amendment introduced in 2012. Coty brought an action before the German courts seeking an order prohibiting Parfümerie Akzente from distributing its products via the Amazon platform. The German court dealing with the matter sought a preliminary ruling from the Court of Justice in order to determine whether the prohibition in question is compatible with EU competition law.

Advocate General Nils Wahl first confirms that, according to precedents, luxury goods can require the implementation of a selective distribution system in order to preserve the quality of those goods. The Advocate General considers that clauses preventing the use of third party platforms is not necessarily restrictive of competition provided that (i) it is dependent on the nature of the product, (ii) it is determined in a uniform fashion and applied without distinction and (iii) it does not go beyond what is necessary. It will ultimately be for the referring court to examine whether such conditions are fulfilled.

Furthermore, the Advocate General *prima facie* considers that the contested clause does not appear to be restrictive of competition. In particular, he considers that the prohibition established by the clause is likely to increase competition based on qualitative criteria, as it is likely to improve the luxury image of the products concerned (by ensuring that those products are sold in an environment that meets certain qualitative requirements and by making it possible to guard against the phenomena of parasitism).

The Advocate General adds that Coty does not impose an absolute prohibition on online sales. The clause still entitles distributors to distribute the contract products via their own internet sites and to make use of third party platforms in a non-discernible manner in order to distribute those contract goods. Notably, the Advocate General indicates that, at this stage in the development of e-commerce, distributors' own online stores are the preferred distribution channel for distribution via the internet and, hence, a prohibition to make use in a discernible manner of third-party platforms cannot, in the present state of development of e-commerce, be assimilated to an outright ban on or a substantial restriction of internet sales.

Even if the clause at issue is found to be restrictive of competition, the Advocate General considers that the contested prohibition does not constitute a serious restriction within the meaning of the [Vertical Agreements Block Exemption](#) (as it would neither restrict the retailer's customers nor the passive sales to end users). Therefore, it should not be automatically excluded from the benefit of the block exemption established by such regulation.

The ECJ is expected to rule on this case on 6 December 2017.

ITALY PROHIBITS HOTEL PRICE PARITY CLAUSES

After a legislative process that dragged on for nearly three years, the Annual Bill for Market and Competition was adopted by the Italian parliament on 2 August 2017 and entered into force on 29 August. This new law prohibits online hotel booking platforms from including both “wide” most favoured nation clauses (MFN) (parity in respect of any other channel) and “narrow” MFN clauses (parity in respect of an accommodation’s own website) in their agreements with accommodations in Italy.

Italy is the third country in the EU (alongside France and Austria) to outlaw these provisions. This legislation comes shortly after the conclusion of a major year-long monitoring exercise carried out through the European Competition Network, whose [report](#) found no evidence that “narrow” MFN clauses are anti-competitive.

This reform has been welcomed by tourist accommodation operators and by the market’s main associations – which actively lobbied for the introduction of such legislation. Conversely, online travel agencies (OTAs) have expressed strong disagreement, noting that the law reduces transparency and consumer choice, and allows accommodations to free-ride on OTA’s investments.

The European Commission is reported to be currently assessing complaints filed against France and Austria alleging that similar laws infringe EU rules.

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)
 - - UPDATE: (UK) [Ping Europe Limited](#)
(August 2017, Infringement 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)
 - - UPDATE: (EU) [Amazon e-books](#)
(December 2016, Opening of proceedings)
 - - UPDATE: (EU) [Amazon e-books](#)
(January 2017, Market Test Notice Art. 27(4))
 - - UPDATE: (EU) [Amazon e-books](#)
(January 2017, Proposed Commitments)
 - - UPDATE: (EU) [Amazon e-books](#)
(May 2017, Commitments accepted)
 - - UPDATE: (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)

NEW:

-  (EU) [Holiday Pricing](#)
(February 2017, Opening of proceedings)
 -  - UPDATE: (EU) [REWE/DER](#)
(August 2017, Opening of proceedings)
 -  - UPDATE: (EU) [TUI](#)
(August 2017, Opening of proceedings)
 -  - UPDATE: (EU) [Thomas Cook](#)
(August 2017, Opening of proceedings)
 -  - UPDATE: (EU) [Kuoni](#)
(August 2017, Opening of proceedings)
 -  - UPDATE: (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)
 -  - UPDATE: (EU) [Cross-border access to pay-TV](#)
(July 2017, Commitments)
 -  - UPDATE: (EU) [Cross-border access to pay-TV](#)
(July 2017, Decision concerning the Trustees)
-  (EU) [Video games](#)
(March 2016, Investigation)
 -  - UPDATE: (EU) [Capcom](#)
(February 2017, Opening of proceedings)
 -  - UPDATE: (EU) [Bandai Namco](#)
(February 2017, Opening of proceedings)
 -  - UPDATE: (EU) [Focus Home](#)
(February 2017, Opening of proceedings)
 -  - UPDATE: (EU) [Koch Media](#)
(February 2017, Opening of proceedings)
 -  - UPDATE: (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)
 -  - UPDATE: (D) [Asics](#)
(April 2017, Higher Regional Court of Düsseldorf)
-  (D) [Deuter](#)
(December 2015, Frankfurt Higher Regional Court, appeal pending)
-  (D) [Coty](#)
(April 2016, request for a preliminary ruling)
 -  - UPDATE: (EU) [Coty](#)
(July 2017, Opinion)
(December 2017, ECJ ruling expected)
-  (F) [Caudalie](#)
(February 2016, Paris Court of Appeal judgment)
 -  - UPDATE: (F): Cour de Cassation [orders](#) Paris Court of Appeal to rehear the case (September 2017)
-  (F) [Adidas](#)
(November 2015, Commitments)
-  (F) [Samsung & Amazon](#)
(November 2015, request for a preliminary ruling)
 - UPDATE: (EU) [Samsung & Amazon](#)
(December 2016, preliminary ruling)
-  (NL) [Shure Distribution Benelux](#)
(May 2016, Gelderland district court ruling)
-  (UK) [BMW](#)
(January 2017, BMW changes policy)

COMPETITION LAW IN THE DIGITAL AGE

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