

# Restrictions on keyword bidding in online search advertising: the EC takes a stand

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There has been a lot of noise in the antitrust sector recently as to whether contractual restrictions on online search advertising (which restrict the ability to bid on, or negatively match, branded search terms) can be justified. These restrictions have been under scrutiny by several national competition authorities (NCAs) in Europe - the German Bundeskartellamt formally concluded in 2015 that online search advertising bidding restrictions imposed by ASICS on its distributors were a restriction of competition by object and do not fall within the Vertical Block Exemption Regulation (VBER), and the French and UK NCAs have signalled concerns with such practices. The US Federal Trade Commission (FTC) also recently issued a decision against 1-800 Contacts which found that settlement agreements it had reached with competitors in lieu of litigating alleged trademark infringements infringed competition law. These required the parties, when bidding at search engine advertising auctions, to take steps to ensure their ads did not appear in response to searches for 1-800 Contacts' trademarked terms.

However, the European Commission had not itself had the opportunity to take a firm position on such restrictions prior to its investigation into the clothing brand Guess. This investigation was launched following the Commission's 2017 e-commerce sector enquiry.

On 17 December 2018 the Commission [fined](#) Guess €40 million for various anti-competitive practices in its selective distribution system. The Commission found that Guess had imposed several anti-competitive restrictions on its distributors including engaging in resale price maintenance, unlawfully preventing cross-selling and sales outside of allocated territories and indiscriminately prohibiting online sales.

Notably, the Commission also found that prohibitions on bidding on the Guess brand name and trademarks on Google AdWords which Guess imposed on its distributors were a restriction of competition **by object**. It considered these restrictions to be harmful **by their very nature** to the proper functioning of normal competition, with such a high potential for negative effects on competition that it was unnecessary to demonstrate any actual or likely anti-competitive effects on the market. This decision is important as it is the first at a Commission level on this issue, and will likely be followed by other EU competition authorities and national courts.

Guess prevented its authorised distributors from bidding for the Guess brand name and associated trademarks on Google AdWords to (i) drive traffic to its own Guess.eu website instead of those of its distributors and (ii) minimise its online marketing costs. In reaching its conclusion that these restrictions were a restriction of competition by object, the Commission considered that aiming to minimise advertising costs was not a **legitimate objective**. It considered that the restriction could not be justified by trademark law as the retailers were authorised members of the selective distribution system selling genuine Guess products and there was no risk of confusion as to the origin of the products. It noted that the Court of

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Justice has held, in a judgment related to trademarks, that “*internet advertising using a referencing service on the basis of keywords corresponding to another person’s trademark(s) constitutes a practice inherent to competition as it offers internet users alternatives to the trademark proprietor’s goods or services even if it leads to the trademark proprietor having to intensify its advertising in order to maintain or enhance its profile with consumers*”. In light of this, the Commission considered that “*it cannot be said that the online search advertising restriction constitutes an aspect of competition that is compatible with Article 101(1) of the Treaty*”.

The Commission found that these restrictions were by object infringements on the basis that the online search advertising policy did not serve the legitimate objective of the selective distribution system claimed by Guess, namely to protect the brand image (para. 119), but instead had as their object to “*reduce the ability of authorised retailers to advertise and ultimately to sell the contract products to customers, in particular outside the contractual territory of area of activity, and to limit intra-brand competition*”.

Secondly, the Commission also found that these agreements would not benefit from the VBER. It considered that Guess’ online search advertising policy amounted to a restriction on both active and passive sales by restricting the ability of the authorised distributors to sell the products to customers “*in particular outside the contractual territory*” as, by “*severely curtailing the use of online search advertising by its authorised retailers, Guess limited the ‘findability’ and ultimately the viability of retailers selling its products online*”. This meant that they were “*deprived of the ability to effectively generate traffic to their own websites by means of online search advertising*”. Under Article 4(c) of VBER, a restriction on active or passive sales in the context of a selective distribution system is a hardcore restriction which removes the benefit of the block exemption.

For companies who do not operate within a selective distribution system, this may seem of limited applicability. However, there is a risk that these restrictions may be interpreted more broadly and deemed to amount to a hardcore restriction under Article 4(b) of VBER by “*restricting the territory into which, or the customers to whom*” the buyer or distributor can sell their goods. Although bidding restrictions generally do not restrict the parties from making sales to specific territories or groups of customers and instead place a general limitation on a specific form of advertising, regardless of the territory or customer group that may be targeted, Article 4(b) has been interpreted widely in practice. For example, according to the Commission’s Guidelines on Vertical Restraints, a total ban on online sales, limiting the percentage of sales made over the internet or charging higher prices for products sold online are hardcore restrictions under Article 4(b).<sup>1</sup> Bidding restrictions therefore may not be targeted at particular customers or territories but, as per the Vertical Guidelines, may nonetheless constitute hardcore restrictions which cannot therefore benefit from VBER “*given the capability of these restrictions to limit the distributor to reach more and different customers*”.<sup>2</sup>

Finally, the Commission was sceptical that any individual exemption would be available under Article 101(3) TFEU. In addition to rejecting the notion that an exemption could be justified to protect Guess’ brand image, it indicated that the restriction was unlikely to be indispensable to address free-riding as it

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<sup>1</sup> Guidelines on Vertical Restraints (OJ 2010 C131/01, 19.5.2010) (Vertical Guidelines), para. 52.

<sup>2</sup> *Ibid.*

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considered that the restriction “*did not pursue any other legitimate objectives in the context of the operation of the selective distribution system*”.<sup>3</sup> While there may yet be instances where there could be a legitimate business objective for pursuing a strategy of imposing restrictions on keyword bidding in online search advertising auctions, the bar has clearly been set high.

This decision will have significant repercussions as these restrictions are commonplace across many industries. It sends a clear message that the Commission considers these restrictions to be anti-competitive. Clients should review any such clauses in their distribution contracts and assess them for compliance with competition law. We have been advising several clients on the implications of this decision - please get in touch if this is something you would like to discuss further with us.



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<sup>3</sup> Notably, the US FTC similarly rejected arguments put forward by 1-800 Contacts that the restrictions minimised litigation costs and/or were necessary to prevent trademark infringement - while it recognised these were in theory legitimate aims, it considered these could have been achieved by less restrictive means.