BY DR. ANNA BLUME HUTTENLAUCH[1]

I. INTRODUCTION

Andreas Mundt, president of the German Federal Cartel Office ("FCO"), recently emphasized the important role of competition authorities in tackling antitrust concerns related to digital markets. He thereby reacted to policymakers' aspiration to regulate issues such as the "free flow of data" between platforms. Mundt commented that tech giants such as Google, Facebook and Apple should see the FCO and other competition agencies as their ally and acknowledge that competition law enforcement is more flexible and efficient than legislation.

The FCO has been at the forefront of competition law enforcement in Europe when it comes to the digital economy. In March 2016, the FCO opened an investigation against Facebook based on an allegation of abuse of dominance: Because of the social network's popularity, the FCO suspects that users have no choice but to accept Facebook's terms of service even where these are in violation of data protection laws and such conduct, according to the FCO, could amount to abuse of market power.[2] Just a few weeks ago, the Italian Competition Authority opened similar investigations against WhatsApp, albeit based on consumer protection laws.

Apart from the FCO's Facebook proceeding, which caused quite a stir internationally, the German agency initiated a number of notable cases based on Article 101 TFEU / Section1 Act against Restraints of Competition ("ARC") allegations, namely regarding selective distribution systems, dual pricing, platform bans and most favorite nation clauses. In addition, the FCO has published several working papers over the recent months and years that deal with new challenges brought about by the digital economy.[3]

Other authorities across Europe including the European Commission are actively monitoring the economic developments in this space as well:

- The European Commission launched a sector inquiry into e-commerce in May 2015, the final findings of which will be published in the first half of 2017. Enforcement action to follow can be expected.

- The Netherlands Authority for Consumers and Markets ("ACM") will soon publish the results of its market study in relation to online platforms streaming videos and movies, including digital marketplaces and content producers. The ACM also published a paper on the role of consumers' data in the assessment of market power of online platforms and the role of competition law enforcement as a means of data privacy protection.

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1 Dr. Anna Blume Huttenlauch, LL.M. (NYU) is a partner at BLOMSTEIN, a boutique law firm specialized in antitrust and public procurement law. She is based in Berlin, Germany. Anna is admitted to the Bar in Germany (Rechtsanwältin) and to the New York Bar (Attorney at Law).

2 See also Huttenlauch, How Many Likes for the German Facebook Antitrust Probe?, in: Competition Policy International (August 2016), available at: https://www.competitionpolicyinternational.com/wp-content/uploads/2016/08/Huttenlauch.pdf.

3 See, e.g. *Vertical Restraints in the Internet Economy* (October 2013), available at: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/Vertical%20Restraints%20in%20the%20Internet%20Economy.pdf?__blob=publicationFile&v=2; *Competition Law and Data* (May 2016), available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2; Market Power of Platforms and Networks (June 2016), an executive summary in English is available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Zusammenfassung.pdf?__blob=publicationFile&v=4.

• The French Competition Authority ("FCA") launched a sector inquiry into the online advertising sector in May 2016; results will be published in 2017. In addition, the FCA issued several decisions relating to digital markets, a number of which order interim measures.

However, it is probably fair to say that most competition law enforcers in Europe are just as actively watching the actions of the German competition authority. In light of the FCO's pioneering role, this article is aimed at giving an overview of the most important enforcement actions in digital markets in Germany over the last years, mostly based on Article 101 TFEU / Section 1 ARC.

II. EXCLUSION OF INTERNET SALES

One of the burning issues is whether or to what extent online sales of certain goods can be restricted by manufacturers. While manufacturers see such restraints as a way of protecting their distributors from low-cost competition and free-riding, distributors increasingly want to make use of the commercial opportunities of the internet and mobile commerce.

On the European level, there is fairly little case law dealing with vertical restraints in relation to online sales so far. In the *Pierre Fabre* case, the European Court of Justice ("ECJ") ruled that sales through a certain sales channel cannot be per se prohibited because this would result in a loss of intra-brand competition and therefore constitutes a restriction by object ("hardcore restriction").[4] Consequently, in the context of a selective distribution system, online sales cannot be per se excluded – e.g. by requiring sales to be made in a physical space where a qualified pharmacist must be present – and the aim of a manufacturer to protect the image of a certain brand image with such restrictions does not justify any exception.[5]

The European Commission also adopted this view in their Guidelines on Vertical Restraints ("Vertical Guidelines").[6] While online sales cannot be precluded per se, the supplier is allowed to require, without limiting the online sales of the distributor, that the buyer sells at least a certain absolute amount (in value or volume) of the products offline to ensure an efficient operation of its brick and mortar shop, nor does it preclude the supplier from making sure that the online activity of the distributor remains consistent with the supplier's distribution model (paragraphs 54 and 56 of the Vertical Guidelines).

III. DUAL PRICING SYSTEMS

Companies have also been using so-called "dual pricing"systems – possibly as a reaction to the ECJ's *Pierre Fabre* decision – which do not exclude online sales per se but, as a means of incentivizing offline sales, provide worse terms and conditions for online sales. For example, distributors and retailers receive better prices or higher discounts and rebates for offline as opposed to online sales.

The FCO has dealt with dual pricing systems in several cases, the most recent being the LEGO investigation which was eventually settled.[7] Previous case law includes *Gardena*,[8] *Bosch Siemens Hausgeräte*[9] and *Dornbracht*.[10] The bottom line of the FCO's dual pricing cases is that while dual pricing systems do not necessarily raise competition concerns, they must be carefully examined. Price discrimination is only considered legal if the higher price charged for online sales reflects the fact that online retailers have lower costs. Or put differently, rebates to incentivize sales efforts by offline retailers can only be granted to the extent that such retailers have higher costs in the brickandmortar trade (e.g. investing in their shop by hiring a space, employing

4 European Court of Justice, Judgment of 10.13.2011, C-439/09, para. 39.

5 European Court of Justice, Judgment of 10.13.2011, C-439/09, para. 47.

6 2010/C 130/01, para. 52.

7 See press release of 7.18.2016.

8 FCO, Decision of 11.28.2013, B5-144/13.

9 FCO, Decision of 12.23.2013, B7-11/13.

10 FCO, Decision of 12.13.2011, B5-100/10.

sales personnel and providing advice to customers). Such specific costs may be reimbursed in the form of fixed subsidies that are unrelated to turnover and quantities. Here, the retailer is still free in his choice of a certain sales channel, as fixed amounts usually do not influence the setting of prices. In *Bosch Siemens Hausgeräte*, so-called hybrid dealers who sold both offline and online were put at disadvantage vis-à-vis offline retailers, which the FCO considered unlawful. In the *Dornbracht* case, the Higher Court of Düsseldorf considered discounts linked to quality requirements that could typically not be fulfilled by online retailers – and therefore effectively excluded online retailers – as by-object-restrictions.[11]

IV. PLATFORM BANS

One of the most controversial questions in relation to online sales at present is whether or to what extent manufacturers using a selective distribution system can restrict or exclude sales on third party platforms, such as eBay or Amazon. While it is acknowledged that a selective distribution system may be permissible provided that the nature of the goods requires selective distribution to ensure proper distribution, there is considerable legal uncertainty for manufacturers and distributors surrounding the permissibility of restrictions of sales through online marketplaces. While small retailers want to use such marketplaces to gain greater exposure with customers, luxury-goods manufacturers are concerned that their brands will be devalued by the fact that high-end products are sold through low-end shops.

In the past, German courts have assessed third party platform bans differently from the German competition watchdog and even among different courts, the decisional practice has varied. Additional uncertainty stems from the fact that at the EU level, the Vertical Guidelines take a different view. Eventually, the split between German courts triggered the recent decision of the Higher Court of Frankfurt in the Coty case concerning the distribution of luxury perfume and cosmetics to refer to the ECJ the following questions:[12]

- Is the protection of a "luxury image" a legitimate reason for a selective distribution system? The Court seeks guidance on whether the protection of a luxury image itself meets the requirements for a permissible selective distribution system.

- If this is assumed, there are inconsistent rulings by German courts on whether third party platform bans are excessive for ensuring that the branded goods are distributed under appropriate conditions. Hence the second question: Is it permissible to impose on distributors an outright ban on sales via third party platforms regardless of whether the distributor failed to meet legitimate quality criteria set by the manufacturer?

- In case the ECJ confirms that Coty's selective distribution system is not in line with competition law, the Court seeks to clarify further whether – based on the European Vertical Block Exemption Regulation – a justification of such terms and conditions would be possible:

    - Is it an intended restriction of a customer group if distributors are prohibited from selling products on online platforms such as Amazon or eBay?

    - Does a sales ban on internet platforms result in a restriction of "passive sales"?

Depending on the outcome of the decision of the ECJ, which is expected for mid 2017, substantial revisions of existing and future distribution agreements between suppliers and distributors might become necessary.

The European Commission takes the view that the Vertical Guidelines should apply to the case, which, under certain conditions, allow luxury-goods makers to prohibit the use of online marketplaces in the context of selective distribution systems. Brand owners can curb sales by distributors that use online platforms displaying the platform's own name or logo. The Commission's view is supported by the governments of Austria, Italy, France and the Netherlands who have all submitted observations in the

11 Judgment of 11.13.2013, VI-U Kart 11/13.

12 Decision of 4.19.2016, 11 U 96/14.

Coty case. Germany and Luxemburg have taken the view that the platform bans should be considered as hardcore restrictions.

Below is a quick look at the different views that were taken by German courts in the past and that eventually triggered the referral to the ECJ:

- In the *Scout* case,[13] the Higher Court of Berlin took the view that in exceptional cases platform bans can be permitted in the context of a selective distribution system provided the criteria for selective distribution are fulfilled, namely where the selection of resellers is based on objective qualitative criteria concerning their professional skills, staff or equipment, and where such criteria are applied in a non-discriminatory manner. In the case at hand, however, the criteria were not applied consistently as the manufacturer itself sold its school rucksacks to discounters who equally did not fulfil the qualitative criteria and therefore the ban of sales on eBay could not be upheld as justified.

- In the *Casio* case,[14] the Higher Court of Schleswig-Holstein considered the distribution system of a manufacturer of digital cameras unlawful (by-object restriction) for lack of necessity and because the system applied inconsistently. The Court did not consider the selective distribution system necessary to ensure quality and correct use of the product as the cameras in question were not considered to be "technically complex" or in need of comprehensive explanations beyond what could be achieved by the instruction sheet. In addition, the cameras were equally distributed via large electronic discounters where, according to the Court, it is pure coincidence whether you encounter knowledgeable sales personnel or not.

- In the *Deuter* case, the Higher Court of Frankfurt[15] found that selective distribution systems – including platform bans – can be legal if they are applied in a non-discriminatory manner. Therefore, and given that all other criteria were met, a ban of selling premium rucksacks on Amazon was considered in line with competition law.

The FCO has dealt with third party platform bans in several investigations and has voiced a rather clear opinion on such restrictions, albeit only in *obiter dicta*.

- Both in its *Sennheiser*[16] decision and in *Adidas*,[17] the FCO investigated distribution systems which prohibited sales via Amazon Marketplace and other third party platforms. Both cases were eventually settled because both Sennheiser and Adidas agreed to change their distribution contracts.

- The issue of platform bans came up again in the *ASICS*[18] case. The company had introduced a distribution system which imposed several restrictions on ASICS distributors: (1) they were not allowed to use the ASICS trademark for Internet advertising; (2) they were prohibited from collaborating with price-comparison portals; and (3) selling via online platforms, such as Amazon Marketplace and eBay, was not allowed. The FCO did not take a decisive view on the platform ban because it considered the selective distribution system in its entirety to be in breach of competition law based on (1) and (2) being hardcore restrictions. In its *obiter dictum*, however, it stated that there were good reasons for assuming that the platform ban constitutes a by-object restriction in violation of Article 101 TFEU / Section1 ARC and, as a hardcore restriction within the meaning of Article 4 (c) VBER, was not open for efficiency considerations within the meaning of Article 101 Section 3 TFEU. A similar view had already been taken in the investigation against Adidas.[19]

13 KG Berlin, Judgment of 9.19.2013, 2 U 8/09; before: District Court of Berlin, Judgment of 4.21.2009, 16 O 729/07.

14 Higher Court of Schleswig-Holstein, Judgment of 6.5.2014, 16 U 154/13; before: District Court of Kiel, Judgment of 11.8.2013, 14 O 44/13.

15 Higher Court of Frankfurt am Main, Judgment of 12.22.2015, 11 U 84/14.

16 FCO, Decision of 10.24.2013, B7-1/13-35.

17 FCO, Decision of 8.19.2014, B3-137/12.

18 FCO, Decision of 8.26.2015, B2-98/11.

19 FCO, Decision of 6.27.2014, B3-137/12.

V. MOST-FAVORED-COSTUMER CLAUSES

A further hot area of antitrust enforcement in digital markets are so-called most-favored-customer-clauses ("MFNs"), namely in the contracts between online travel agents ("OTAs") and hotels, which have triggered a vivid debate among enforcement agencies, legislators and economists. Such clauses, also referred to as parity clauses, oblige hotels to offer to OTAs the same or better room prices as the hotel makes available on all other online and offline distribution channels. The FCO has also dealt with similar MFNs in previous proceedings against Amazon and Verivox which both ended with a removal of the clauses from all relevant contracts.

According to the FCO, such MFNs ultimately harm consumers because they prevent competition on price and lead to an artificially high price floor in the market. The theory of harm specifically in relation to MFNs used by OTAs is that (1) MFNs restrict competition between existing hotel booking platforms since platforms charging lower commission from the hotels cannot offer lower hotel prices or better cancellation conditions and therefore no OTA has an incentive to charge lower commission fees; (2) MFNs increase the barriers to entry of new OTAs as potential new platforms cannot offer lower commission rates in exchange for lower prices in order to gain market shares; and (3) MFNs potentially have a negative effect on the competition between hotels because they cannot price-differentiate across distribution channels.

In its proceedings against HRS,[20] the FCO found such clauses anticompetitive. HRS's clauses obliged hotels to always match their HRS price with the lowest available price for their hotel rooms and to offer their most favorable booking conditions and cancellation terms to the OTA. After the Higher Court of Düsseldorf confirmed the FCO's view, the authority opened two probes against Booking.com and Expedia based on similar grounds.

Based on the fairly narrow market definition adopted by the FCO who assumed a national market for booking services provided by OTAs (no interchangeability of online and offline services), the Vertical Block Exemption did not apply because of shares above 30 percent. The FCO left open whether MFNs qualify as hardcore restrictions under Article 4 lit. a VO 330/2010/EU. However, it noted that MFNs had the effect of establishing minimum prices and therefore a similarly anticompetitive effect as RPM clauses. Even if they do not prescribe a certain price level, they have the effect of a minimum resale price obligation given the strong market position of HRS and its monitoring and sanctioning mechanism in case of any deviations.

Parity clauses were subject to parallel investigations by competition authorities in France, Sweden, Italy, Austria, Denmark, Greece, Ireland and the UK. The European Commission did not open their own investigation but coordinated the market test of EEA-wide commitments offered by Booking.com in relation to the investigations in France, Sweden and Italy. Under the settlement eventually reached, Booking.com agreed to remove its "wide" parity clause, i.e. to no longer require hotels to grant to the OTA the same, or better, room rates, conditions and availability than the hotels extend to other sales channels. However, it allowed to keep its "narrow" parity clauses, which require hotels to give the OTA the same rates and conditions as those published on the hotel's own website but not the same room availability. Expedia settled on similar terms. As a result of these settlements, hotels are free to offer their rooms to only certain OTAs or to none. They can also offer lower rates to customers who make a booking on the hotel's own website or receive emails as part of a loyalty program.

There is still considerable uncertainty across Europe, however. This is due to the fact that legislation was passed in some Member States, notably France ("Loi Macron"), which provides that hotels are free to charge lower prices on their own websites than on hotel booking platforms, i.e. banning both narrow and wide MFNs. This is consistent with the view taken by the FCO in its recent decision against Booking.com,[21] according to which MFNs are illegal irrespective of whether they are broad or narrow because they restrict both competition between portals and competition between the hotels themselves. In Italy, legislation was considered but has not been adopted yet. Trade Associations representing OTAs have filed complaints at the European Commission claiming that such legislation is incompatible with EU competition rules and fundamental principles of EU law, such as the freedom to provide services. Another angle was added to the discussion by a recent decision of the Paris Commercial Court,

20 FCO, Decision of 12.20.2013, B9-66/10, confirmed by the Higher Court of Düsseldorf, see 1.9.2015, VI 1/14 V.

21 FCO, Decision of 12.22.2015, B 9-121/13.

which declared contracts between Booking.com and French hotels void finding that MFNs were in breach of competition law, not only to the extent they related to room rates but also in as far as general conditions and room availability were concerned. It also found that clauses prohibiting hotels to enter in direct contact with customers, e.g. by telephone or marketing mailings, are unlawful.[22]

VI. ECONOMIC CONSIDERATIONS

Economists have cautioned against over-enforcement in digital markets and have pointed out that in some cases, vertical restraints could mitigate the price-driven competition that online retailers tend to gravitate towards and restore the balance between price and service competition, which would eventually benefit consumers. There is also some concern that competition authorities may not sufficiently acknowledge the economic importance of brand-image and the significant investments made by manufacturers in the value of their brand which needs protection against free-riding.

Particularly in relation to MFNs, it has been criticized that potential benefits of such clauses have not been adequately taken into consideration. The defense put forward by the OTAs was that MFNs could effectively prevent free-riding by clients on the investments made by the platforms. If clients use the platform to search and compare, but then buy or book elsewhere where it is cheaper, the platform cannot recoup its investments. As a consequence, no platform has an incentive to invest in improving the quality of its services ("hold-up problem"). While the FCO concluded that there was insufficient evidence of such efficiency gains, at least in Germany, and therefore decided to prohibit the MFNs used by OTAs, the French, Italian and Swedish competition authorities implicitly recognized that some level of protection against free-riding was necessary in their respective jurisdictions on the basis of the evidence submitted to them.

The significance of these economic considerations and their weight in the analysis of antitrust authorities eventually depend on factual evidence and empirical studies. The main insight gained from enforcement measures taken in digital markets so far is probably that more empirical analysis remains yet to be done on the effects of certain restraints and on the respective counterfactuals. For example, in relation to MFNs used by OTAs, there was a debate on whether there is sufficient correlation between the investments made by the OTAs and the free-riding problem: do OTAs make hotel-specific investments or do they mainly invest to increase their overall visibility, i.e. by spending advertising costs? Is it legitimate not to take advertising investments into consideration in the efficiency analysis? In addition, some took the view that structural differences across various national markets impact the possibility of hotels to react to high commissions and/or to possibly forego the intermediation services of booking platforms as such – which explains the different outcome of analysis in different jurisdictions. Finally, more empirical analysis was called for in relation to alternative ways of addressing the free-riding problem and their effect in the market (e.g. by using alternative remuneration models discussed by the FCO in its HRS decision).

VII. CONCLUSION

Competition cannot be adequately protected without an in-depth understanding of a market's operation and enforcement tools must be designed in response to it in order to effectively tackle competitive restraints. The main challenge of digital markets lies in their dynamic nature and the fast pace of technological innovation which makes it difficult for enforcers to catch up with the rapidly evolving market characteristics before being able to recognize and effectively address anticompetitive effects of certain practices. However, competition law enforcers are probably still better placed than legislators in this respect as they can react more flexibly and fine-tune their appropriate response to certain behavior. Digital markets will pose challenging questions in the coming years and competition authorities around the globe are eager to build up relevant know-how in order to deal with them. The role that the FCO has been playing in this regard over the past years is remarkable as it has sparked the debate amongst competition law enforcers, economists and stakeholders on various issues and in many ways. Irrespective of whether one agrees with the position taken in relation to the outcome of the cases picked up by the FCO and the individual issues at stake, the role that the authority has taken on for itself is crucial for the development of competition law in the digital economy in the years to come and will therefore continue to be watched carefully across Europe and within the European Competition Network.

22 Decision of 11.29.2016.


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