

LIDC 2017, Question A: Online sales platforms and competition law

Austrian Report

By the national reporters:¹

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Introductory, reference is made to the fact that with regard to EU / Austrian competition law, the term “online sales platforms” might be easily misunderstood. Based on competition law practice (as outlined below), “online sales platforms” in general is interpreted in a narrow sense. Following such narrow approach, these platforms are exclusively equated with “third party online sales platforms” of providers like Amazon or Ebay. However, for the purposes of the report, it is understood, that question A refers to a broader concept of online sales platforms, including all new digital economy in general, irrespective of whether the provider exclusively offers online platform services or not. Therefore, in the following, the term “online sales platform” follows that broad concept, including new digital economy as such. Only if it is referred to “*third party* online sales platforms”, the report points out to online sales platforms in the narrow sense.

The present Austrian report consists of two sections. While the first part provides an overview of the main legal background, the relevant authorities and courts and a summary of Austria’s legal practice in relation to online sales platforms, the second part discusses possible (further) competition issues in relation to online sales platforms and the question of whether new competition law concepts are needed to overcome these problems or whether the existing toolbox is sufficient.

1. The competition law context of online sales platforms in Austria

1.1. Legal Background

In Austria, competition law issues concerning online sales platforms are covered by the general antitrust provisions, i.e. the Austrian Cartel Act 2005 (“Cartel Act”)² and the Competition Act,³ which complements the Cartel Act and contains rules on the Federal Competition Authority (*Bundeswettbewerbsbehörde* – “FCA”), its tasks and some procedural rules. As a consequence to the EU’s Directive 2014/104/EU on antitrust damages actions, which the Member States needed to implement in their legal systems by 27 December 2016, new amendments of the Cartel Act and the Competition Act entered into force on 1 May 2017. The amendment primarily intends to implement the Directive and therefore creating legal certainty for the enforcement of claims for damages arising from infringements of competition law. However, the amendment is more far-reaching and also includes provisions, which are not related to the Directive, e.g., a new threshold in merger control based on the value of the transaction. Furthermore, the Cartel Supreme Court will be entitled to decide also on substance (at least to a limited extent).

EU Cartel law must be directly applied in Austria if the infringement affects trade between Member States and – in general - can be also applied in analogy on purely national facts.

Art 101 TFEU and § 1 Cartel Act prohibit all agreements, decisions of associations and concerted practices which have as their object or effect the prevention, restriction or distortion of competition (and – concerning EU law – affect trade between Member States). Both provisions include a non-exhaustive list of infringements, e.g. price fixing, market sharing or limitation of production.

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² Bundesgesetz vom 5.7.2005 gegen Kartelle und andere Wettbewerbsbeschränkungen (Kartellgesetz 2005), BGBl I Nr. 61/2005 idF BGBl I Nr. 56/2017.

³ Bundesgesetz über die Einrichtung einer Bundeswettbewerbsbehörde (Wettbewerbsgesetz—WettbG), BGBl I Nr. 62/2002 idF BGBl. I Nr. 56/2017.

Also in reference to abuse of market dominance, the general rules (§ 5 Cartel Act and Art 102 TFEU) apply to online sales platforms.⁴ The Cartel Act hereby does not provide for any definition of the term "abuse". However, it generally prohibits any abuse and again provides an indicative (but not exhaustive) list of respective practices of abuse. Reference, e.g., is made to limiting production, disadvantaging of contractual partners, sale of goods below cost price, etc.

The FCA defines "abuse of market power" on its website (www.bwb.gv.at; English version) as follows: *"Abusive practices by dominant companies may lead to disadvantage for other companies and customers that would not naturally occur or be possible in a setting of effective competition. Abusive practices include: imposing unfair prices, restriction of sales, deprivation of certain contractors, and selling goods below cost."*

In the last 6 years, there had been one decision of the Cartel Court, where the Court found that an undertaking had abused its market dominance.⁵ In some further proceedings, applications by the authority or private claimants have been dismissed for various reasons. None of the proceedings however, touched upon online sales platforms.

Besides the FCA, another competition authority in Austria is the Federal Cartel Prosecutor (Bundeskartellanwalt, "FCP"). Both, the FCA and the FCP cannot impose an antitrust fine, but are (exclusively) entitled to initiate a fining proceeding in front of the Cartel Court ("Oberlandesgericht Wien als Kartellgericht"). The latter can (exclusively) impose a fine for competition law infringements. However, the fine imposed by the Cartel Court may not be higher than requested by FCA and FCP. On appeal, the Cartel Supreme Court ("Oberster Gerichtshof als Kartellobergericht") decides on the Cartel Court's rulings.

The above named competition authorities and courts in Austria are also the competent authorities for online sales platforms.

1.2. Voidness

Based on the respective competition law clauses of § 1 (3) Cartel Act and Art 101 (2) TFEU (but also as a consequence of basic legal standards), cartel infringements result in voidness of the respective agreements and decisions. Voidness applies *ex-tunc*, i.e., invalid clauses cannot be enforced in general. Furthermore, parties can rely on voidness, even if they knew from beginning that the clause/contract was infringing competition law and was/is therefore invalid. Hence, in Austria competition law can be used as a defense against allegations of breach of contract, regardless of whether the contract party was aware of the infringement or not.

Concerning contracts including cartel infringements, the Court of Justice of the European Union ("CJEU") ruled that only that part of the contract becomes invalid that violates competition law. The consequences for the rest of the contract have to be determined in accordance with national law. Following settled case law in Austria, the question whether an infringement results in voidness of the whole contract or only a part of, must be interpreted in the context of the protective purpose of the rule ("*Schutzzweck der Norm*") and whether the remaining agreement can be reasonably separated from the invalid clauses.⁶

Regarding the consequences under civil law, the Cartel Supreme Court has held that for lack of a legal basis, in cartel proceedings the contracts concluded between the defendant and third parties cannot be declared void by the Cartel Court (but only by the respective civil courts).

1.3. Private Enforcement

Aggrieved competitors as well as harmed customers may bring a tort claim. Private plaintiffs may also invoke contractual claims and concepts such as illicit gains. The Cartel Act contains a number of measures intended to strengthen private enforcement. Damage actions and other private motions claiming infringements of

⁴ With regard to the Austrian approach concerning abuse of market dominance in detail, reference can be made to the Austrian LIDC National Report 2015, Question A, by Dr. Tahedl, Prof. Schuhmacher and Mag. Fussenegger.

⁵ Cf., Supreme Cartel Court, decision of 11 November 2012, 16 Ok 1/12.

⁶ Cf., Supreme Court, decision of 13 March 2012, 10 Ob 10/12m.

competition rules can be brought before the civil courts. So far, it was commonly understood, that the prohibition of cartels as well as prohibition of abuses of market dominant positions are so-called protective rules within the meaning of section 1311 of the Austrian General Civil Code primarily protecting customers (and not only competitors). As mentioned before, the amendment of the Cartel Act 2017 brought substantial improvements for private claimants, including an explicit right for damage compensation for competition law being violated. Additionally, the new rules, inter alia, include a revision of statutory limitation periods which deviate from general Austrian tort law. Furthermore, the amendments refer to an introduction of a presumption of harm, joint and several liability and privileged status of immunity recipients.

Punitive damage compensations cannot be imposed in Austria.

1.4. Relevant Market

So far, in Austrian court decisions, there had been no definition of relevant markets concerning online sales platforms. Based on the general approach of demand substitution⁷, i.e., in general also in Austria one has to look at the range of products or services which are viewed as substitutes by the consumer / customer. So far, there had been some legal commentary⁸, but no indications by Austrian authorities and courts that the market definition approach would have to change if it comes to new economy / online sales platforms. Based on the traditional approach, the Cartel Court recently defined a national market with regard to online-gambling and online-betting. The national scope of the market was reasoned by the existing, consistent offer throughout whole Austria.⁹

1.5. Case Law concerning online sales platforms

Concerning online sales platforms, so far no specific legislation or guidance exists in Austria – except the ban on hotel booking portals to demand “best price” clauses from accommodation establishments, which was recently incorporated into the Austrian Unfair Competition Act¹⁰. Embedded in the general legal system of Austrian competition law, no difference is made with regard to the justification of restrictions of competition regarding online sales platforms. Therefore, the benchmark for special competition law issues (e.g., most favored nation clauses) concerning online sale platforms is always based on general and traditional principles of competition law, at least in a first step. It might be of course that undertakings concerned would apply on special reasoning due to the special economic circumstances of online sales platforms. However, so far, such approach was not reflected in judgements in Austria.

Furthermore, also Austrian Cartel Courts did not specifically rule on “online sales platforms” or “new economy” companies. In the following, the authors will provide an overview with regard to certain actual topics in Austrian and EU competition law, which, to a certain extent, can be connected with the subject of the report.

- Restrictions on Internet Sales

The FCA, in its last years’ cartel investigations, generally focused on vertical infringements. Regarding cartel-infringements of Art 101 TFEU (and Section 1 Cartel Act as the national equivalent), over the last 5 years approximately 40 proceedings were dealt before the Cartel (Supreme) Court, whereas in approximately 30 of these cases a fine was imposed. Several of these cases addressed internet sales issues. Mostly, producers tried to prohibit their distributors from selling (certain) products online or below certain minimum prices.

⁷ Cf., Commission Notice on the definition of relevant market for the purposes of Community competition law Official Journal C 372 , 09/12/1997, p5 – 13, para 15.

⁸ Cf., ÖZK 2016, 203, *Alexander Hiersche, Anna Theresa Mayer*, Die Ermittlungen der Europäischen Kommission gegen Google: Auf der Suche nach dem Produktmarkt, Marktmacht und Missbrauch (Teil I und Teil II).

⁹ Cartel Supreme Court, decision of 21 December 2016, 16 Ok 11/16b.

¹⁰ See below – Hotel Booking Platforms.

E.g., Pioneer was fined in the amount of EUR 350,000¹¹ for violating Art 101 TFEU, namely agreeing in vertical price restrictions; as an aside, Pioneer was also fined for hindering distributors in selling electronic products online. So far, the highest fine which also covered restrictions on online trading amounted to EUR 2.9mn and was imposed on Philips for coordination regarding retail prices of its distributors. The investigations of the FCA concerned were based on complaints of online-distributors.¹² Furthermore, MediaSaturn and its suppliers had participated in vertical pricing agreements, partly also with regard to restricting online sales concerning various electronic goods. Saturn was fined in the amount of EUR 1.2mn¹³

Also Grundig was found to have engaged in vertical restrictions on (online) resale prices. Following the press, approx. 50 online retailers, who sold Grundig products to/in Austria, were contacted by Grundig and urged to either increase their selling prices or take the products off their respective website. Grundig, inter alia, threatened to negatively evaluate the distributors or to stop supplies at all. A fine of EUR 372.000 was imposed on Grundig.¹⁴

Samsung – also being involved in several vertical concerted practices – partly requested from its distributors to increase online sales prices concerning certain electronic goods such as TVs or tablets. A fine of EUR 1.05mn was imposed.¹⁵ Last, also Hewlett Packard engaged in vertical pricing agreements and was therefore fined to the amount of EUR 640,000.¹⁶ Among other things, Hewlett Packard required online retailers to set their selling prices to a specified amount. Otherwise, Hewlett Packard threatened to withhold its supply. De Longhi, inter alia, urged its dealers not to use price search engines and was fined in the amount of EUR 650,000 for participating in vertical pricing agreements.¹⁷

- Hotel Booking Platforms

In 2015, based on investigations of NCAs (amongst them the FCA), booking.com and Expedia changed their general terms and conditions concerning hotel booking platforms and withdrew their parity price clauses as agreed upon with hotels in 2015. Following these changes, hotels were able to offer cheaper rates (and conditions) via all channels (telephone, fax, brochures, direct contact, also other booking platforms) except the hotel's own websites, in relation to which the booking platforms maintained their best price clause exclusivity.

The FCA was one of the EU-NCAs to accept the changes in substance as remedies. Apparently, it had been initially planned that the platforms concerned would have to submit a remedy package to the FCA in exchange for a “comfort letter” stating that, on the basis of the facts known to the FCA at the relevant point in time, they do not see a reason to file an application with the Cartel Court or at least in exchange for a letter confirming that the proceedings would not be continued.

However, the “remedies process” ultimately was not finalized as some legislative change in the Austrian Unfair Competition Act became effective and would have to be taken into account. Based on these changes in law, price-exclusivity-clauses (“best price” clauses) for hotel booking platforms are prohibited per se, i.e. that those platforms are also not entitled to agree with hotels on exclusivity clauses regarding the hotel's own website anymore. The legislator hereby introduced an amendment to the law, following which the request of a booking platform to contractually oblige the hotel operator not to underprice is now considered as „an aggressive business practice” in any case (with regard to all possible sales channels; in the law, reference is also explicitly

¹¹ Cartel Court, decision of 25 March 2014, 27 Kt 20/14.

¹² Cartel Court, decision of 26 March 2013, 29 Kt 26/13-6.

¹³ Cartel Court, decision of 23 April 2014, 26 Kt 19/14.

¹⁴ Cartel Court, decision of 21 May 2014, 24 Kt 17/14.

¹⁵ Cartel Court, decision of 09 September 2015, 24 Kt 35/15.

¹⁶ Cartel Court, decision of 01 December 2015, 29 Kt 34/15.

¹⁷ Cartel Court, decision of 14 November 2016, 25 Kt 6/16v.

made to the hotel's own website). Following the law, such "aggressive business practice", under any circumstances, infringes the Austrian Unfair Competition Act.¹⁸

The change in law is currently challenged by booking platforms in front of the Austrian Constitutional Court. It is argued that the general prohibition on best-price-clauses amounts to an undue legal discrimination under national (constitutional) law. In the public consultation of the respective legal changes, the FCA confirmed that it considered the commitments as agreed of being sufficient.¹⁹ One might indeed doubt why only and explicitly hotel booking platforms are banned to demand best-price-clauses and why they are considered to act unlawful of whether they are dominant or not and independent of the circumstances of the case.

- Online Sales Platforms

To the author's knowledge, third party online sales platforms in the narrower sense, i.e. software applications that allow online businesses to manage their sales and operations, so far have been only occasionally been touched upon in cartel proceedings in Austria. Yet, court decisions so far do not particularly refer to online sales platforms as such. As outlined above, in one recent decision of the Cartel Court,²⁰ "price search engines" were mentioned in the summary of the facts, but not in the legal findings (which focused on the prohibited ban on internet sales).

However, as Austria is a member of the European Union, the currently ongoing preliminary ruling proceedings regarding *Coty*²¹ before the CJEU, which also addresses sales restrictions for third party online sales platforms, could have a major impact on Austria. Even in purely national cartel cases, national Cartel Courts, at least in analogy, might refer to case law of the CJEU.

To the facts: *Coty* focuses on distributing perfume in Germany from luxury brands such as Calvin Klein, Jill Sanders etc. *Coty* uses a selective distribution system in which their retailers must comply with certain guidelines. These guidelines include a total ban of online sales via third-party online sales platforms, such as Amazon and eBay. According to *Coty* this measure is intended to preserve the prestige character of the distributed brands. *Parfümerie Akzente*, one of *Coty*'s retailers, used Amazon to sell the products. *Coty* initially applied for an injunction against *Parfümerie Akzente*'s actions. However, the district court Frankfurt dismissed the complaint, stating that the clause in question, banning online sales on third-party platforms, violates § 1 GWB as well as Art 101 TFEU. *Coty* then lodged an appeal to the higher regional court Frankfurt. In its appeal, *Coty* disclaimed that its distribution policy implies a general ban on online sales. Though, a prohibition to sell via online sales platforms would be necessary in order to protect its luxury brands.

The Higher Regional Court Frankfurt sought guidance from the CJEU. In its preliminary reference, the following questions were being presented to the CJEU:

- 1) Is it possible that selective distribution systems regarding luxury goods with the intent of preserving this "luxury image" of the goods are compatible with Art 101 TFEU?
- 2) If question 1) is being answered in the affirmative:
Is it possible that a regulation is compatible with Art 101 Sec 1 TFEU if there is a blanket ban for retailers in a selective distribution system to use outwardly apparent third parties when it comes to online sales, regardless of whether the quality requirements of the producer have been met or not.

¹⁸ Cf., Austrian Unfair Competition Act, Annex, para 32 in conjunction with § 1a (4) Austrian Unfair Competition Act, according to which the unlawful agreement shall be null and void; see also § 7 Austrian Price Indication Act.

¹⁹ https://www.parlament.gv.at/PAKT/VHG/XXV/SNME/SNME_07075/imfname_543571.pdf.

²⁰ Cartel Court, decision of 14 November 2016, 25 Kt 6/16.

²¹ ECJ, C-230/16, Request for a preliminary ruling from the Oberlandesgericht Frankfurt am Main (Germany) lodged on 25 April 2016 — *Coty Germany GmbH v Parfümerie Akzente GmbH*.

- 3) Is Art 4 lit b of the Commission Regulation (EU) No 330/2010 to be understood as meaning that a prohibition from using outwardly apparent third parties when it comes to online sales, constitutes as its object a restriction of the retailer's customer segment?
- 4) Is Art 4 lit b of the Commission Regulation (EU) No 330/2010 to be understood as meaning that a prohibition from using outwardly apparent third parties when it comes to online sales, constitutes as its object a restriction of passive sales to final consumers?

So far, the CJEU did not rule on the questions submitted.

In principle, it is generally acknowledged in (EU) Competition law, that a total ban of online sales is considered as a restriction of passive sales which infringes Art 101 TFEU. In its judgment in *Pierre Fabre*²², the CJEU pointed out that, in the light of the freedoms of movement, it does not accept arguments relating to the need to provide individual advice to the customer and to ensure his protection against the incorrect use of products, put forward to justify a ban on internet sales. Furthermore, it was ruled that 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.

However, it is also generally acknowledged that several restrictions may be allowed regarding the protection of qualitative requirements in selective distribution systems. Therefore the main question is, whether EU Competition law allows prohibiting the sale on third party online sales platforms in order to justify and to protect selective distribution systems. In its vertical Guidelines, the EU Commission states that “*where the distributor's website is hosted by a third party platform, the supplier may require that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform.*”²³ Following legal commentary, the Commission hereby accepts a general ban on the sale on online sales platforms.²⁴

Such general ban was also accepted by German Courts:

E.g., in the “Scouts”-proceedings, Scout prohibited its distributors to sell Scout school bags on auction platforms such as eBay. The Berlin Court of Appeal ruled that in general a distributor can be prohibited from re-selling the schoolbag on auction platforms such as eBay as part of a selective distribution system. However, following the court, such ban is only valid if it is applied unanimously. In this particular case ‘Scout’, which claimed that its schoolbag’s high quality image would be impaired if they were sold on auction platforms like eBay, distributed Scout products through a discount chain itself. The Court therefore found that the prohibition of using online sales platforms was discriminatory and therefore invalid.

Just recently, the Higher Regional Court Düsseldorf confirmed in its “Asics”-ruling that the general prohibition for distributors to use price comparison sites constitutes a restriction of competition.²⁵ Following the Court, the prohibition is also not justified by branding and advisory services, as consumers would not necessarily need or want to be advised in the case of running shoes or would also be able to get information on the internet. Interestingly, the question, whether the former distribution system of Asics was also in breach of core antitrust rules because of Asics’ prohibition on its distributors to use Google AdWords and third party online marketplaces, was left open (please note that the Court ruled at a point of time, when the preliminary reference proceeding in *Coty* was already pending at the CJEU). The German Federal Cartel Authority (Deutsches Bundeskartellamt) had ruled in first instance (and later argued before the Higher Regional Court Düsseldorf) that such a general ban on sales on third-party online sales platforms is a hardcore infringement for its own.

- Commission launches e-commerce sector inquiry

On 6 May 2015, the European Commission – as part of its Digital Single Market strategy and on the basis of Article 17 of Regulation 1/2003 – launched the sector inquiry into e-commerce. As part of the sector inquiry, the Commission requested information from a variety of stakeholders in e-commerce markets throughout the EU

²² Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la Concurrence and Others*.

²³ EUROPEAN COMMISSION, Guidelines on Vertical Restraints (2010/C 130/01), para 54.

²⁴ See, e.g., *Schultze/Pautke/Wagener, Vertikal-GVO, Rz 774*.

²⁵ Higher Regional Court Düsseldorf, Decision of 5 April 2017, VI Kart 13/15 [V].

both in relation to the online sales of consumer goods (such as electronics, clothing, shoes and sports equipment) as well as in relation to the online distribution of digital content.

On 10 May 2017, the Commission adopted the Final Report on the e-commerce sector inquiry²⁶ and published an accompanying Staff Working Document²⁷, which set out the main findings of the e-commerce sector inquiry. The views and comments submitted by stakeholders during the public consultation were taken into account. The report itself focuses in its first section on e-commerce of consumer goods, while the second section refers to e-commerce of digital content.

In its main findings, the Commissions found the following conclusions:

- More and more manufacturers use own retail shops in order to sell their products directly to the consumer. As a consequence, manufacturers are increasingly in direct competition with their distributors;
- Manufacturers more and more rely on selective distribution systems. Hence, manufacturers are able to better control their distribution networks (especially in terms of quality of distribution, but also concerning the retail price);
- Manufacturers more and more include restrictions in its distribution contracts in order to better control its distribution. Examples include, inter alia, pricing restrictions, marketplace (platform) bans, restrictions on the use of price comparison tools and exclusion of pure online players from distribution networks.

The report also pointed out licensing practices, which, following the Commission “may” be in breach of competition law. The Commission hereby referred to the fact that such assessment of licensing practices must consider the characteristics of the content industry.

- The FCA’s comments on the sector inquiry in the public consultation

From an Austrian perspective it is of special interest that the FCA published some comments in the Commission’s public consultation phase.²⁸ In its opinion, the FCA points out that e-commerce distributors very often are small undertakings which are economically dependent on the manufacturers, especially in selective distribution systems.²⁹ Therefore, in the FCA’s view, distributors might be hesitant in submitting claims to the respective competition authorities. Hence, in the FCA’s view, it might be that competition restraints will not be disclosed in the course of sector inquiries, but only based on investigations and – especially – dawn raids.

In substance and based on non-disclosed evidence, the FCA refers to the fact that manufacturers are increasingly introducing selective distribution systems in order to exclude traders which compete on prices. Quality criteria are very broadly defined, which allows the manufacturer to decide on a wide margin of discretion whether price-aggressive distributors can be excluded from the distribution system. Often, the manufacturer’s threat to exclude dealers already helps to stabilize the (high) price level.

The FCA therefore also opposes a general ban on distributors to sell via third party online platforms (or to sell on online platforms in certain other EU member states), especially if the manufacturer itself sells its products via Amazon. The FCA also refers to the fact that Amazon itself might be a member of the respective selective distribution system. Furthermore, due to the often small size of the distributors concerned, third party online sales platforms are of essential importance to compete on the market, while self-operated websites might be a too high burden with regard to both, time and money constraints.

The FCA also doubts that online sale prohibitions for certain premium products can be reasoned on the alleged necessary image of the product or that “offline”- advice in brick and mortar shops is necessary. Often, in the

²⁶ http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf.

²⁷ http://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf.

²⁸ http://ec.europa.eu/competition/antitrust/e_commerce_files/bundeswettbewerbshorde_de.pdf.

²⁹ From the authors’ practical experience, dependent from the special circumstances of the case and the business segment concerned, it cannot be excluded upfront that there might be also dominant (or at least powerful) e-commerce distributors, where manufacturers must rely on in order to succeed. However, also the FCA in its opinion does not exclude that this might be the case.

FCA's view, such bans in truth can be considered as measure to stabilize prices (again, especially, if the producer itself sells via online sales platform).

- Commission's subsequent cartel investigations in online trade

In direct consequence of its sector inquiry, the European Commission announced in February 2017 that it had opened three investigations concerning consumer electronics, video games publishers and tour operators / hotels.³⁰

Following the press release, allegedly, online retailers of electronic goods had been restricted by the respective manufacturers (namely Asus, Denon & Marantz, Philips and Pioneer) to set their own prices (incl pricing software that automatically adapts retail prices). The investigation in the video games sector focuses on geo-blocking practices, where companies prevent consumers from purchasing digital content, in this case PC video games, because of the consumer's location or country of residence.

Last, following complaints from customers, the Commission is investigating agreements regarding hotel accommodation concluded between the largest European tour operators on the one hand (Kuoni, REWE, Thomas Cook, TUI) and hotels on the other hand (Meliá Hotels). Again, the agreements allegedly discriminate customers on the basis of their location. E.g., based on their location, customers would not be able to see the full hotel availability or book hotel rooms at the best prices.

Very recently, i.e., beginning of June 2017, the Commission announced that it is investigating whether clothing company Guess' distribution agreements restrict authorized retailers from selling online to consumers or to retailers in other Member States.³¹

2. Major competition/antitrust issues generated by the growth of online sales platforms and possible solutions?

Generally speaking, online sales platforms may trigger competition concerns only under specific conditions. In broad terms, the areas where issues could arise relate on the one hand to market power and unilateral conduct such as market power abuse and on the other hand to questions of anticompetitive behaviour between different market players. It may be stressed at this point however, that online sales platforms genuinely enhance competition and have led to various positive effects for consumers and retailers, as prices decreased and became more transparent.

However, with regard to market power, online sales platforms might have a self-reinforcement effect, meaning, the more users are present and the more products are traded the more attractive a platform becomes which in turn attracts even more users. In this regard, online sales platforms are comparable to other platforms on which goods are being traded in particular exchanges or exchange platforms, which success depends on their liquidity. Again such high liquidity of course generally also has positive effects and may foster competition as well as additional ways of distribution, which is characterized by high transparency and competitive pricing.

However, online platforms may create a lock-in effect, in the sense that certain products may only be available through the platform and no multi-homing exists. The combination of market power and lock-in effects may create specific competition concerns – in case of an abuse of market power, such as (unjustified) high fees for platform users, a concentration of data (as a means of “payment”), exclusivity contracts or possible manipulation by the owner of the platform who may also sell on the platform himself. In essence, there is no difference to other potential abuse of dominance cases and online platforms should be treated like any other market participant in this context.

Ways to overcome this problem however very much depend on whether producers and users are enabled to make use of other online platforms either alternatively and in parallel. If lock-in effects happen possible remedies may relate to a strict approach towards exclusionary practices apt to foster dependencies of producers or users to one single platform. In cases “payment” is made by personal data excessive data collection the German Federal Cartel Authority seems to bring this in analogy for excessive pricing as an existing concept under the rules of

³⁰ http://europa.eu/rapid/press-release_IP-17-201_en.htm.

³¹ http://europa.eu/rapid/press-release_IP-17-1549_en.htm.

market power abuse [*Astrid, Bitte Quelle*]. So both tools (prohibition of exclusionary contracts, excessive pricing) are widely used tools in existing antitrust practice – and there does not seem to be the need for new concepts or further legal tools.

Apart from market power scenarios, online sales platforms could raise other competition concerns by facilitating the monitoring of pricing recommendations, the maintenance of prices or the conduct of collusive practices. In particular certain algorithm might lead to price coordination and the unsolved question remains whether the use of such platforms may constitute an infringement under Art 101 TEUF / §1 Cartel Act.

Due to online sales platforms both manufacturers and retailers also became able to easily monitor online retail prices and nowadays sometimes use pricing software. Consequently, the detection of deviations, for instance, from price recommendations has been significantly facilitated. It did not only become easier for producers to retaliate deviations from their expected price levels, but also the incentives for retailers not to consider maximum/minimum prices prescribed by manufacturers may have been limited. Increased price transparency may also have the effect of facilitating or strengthening collusion between retailers, without the need to exchange sensitive information. However, the increase of price transparency via online platforms is to be considered as procompetitive and only an abuse of advantageous effects may infringe competition rules.

Another specific competition restriction was the application of so-called “best price clauses” in Hotel booking platforms which meanwhile has become irrelevant, since the Austrian legislator amended the Austrian Unfair Competition Act by putting this practice on the black list of inadmissible aggressive business practices (see details above, 1.5., 2nd bullet point).

Finally competition concerns may arise and have already vastly arisen through the avoidance of online sales platforms:

Issues in this regard for example relate to selective distribution schemes, by means of which producers could make use of strategies to maintain prices at a certain level. In order to restrain online sales to local areas, producers separate offline from online authorisation while refusing the latter, if the domain name differs from the offline shop name. The intention is to prevent passive online sales beyond the local sales area, which is particularly questionable with regard to hybrid retailers (selling on- and offline). The prohibition of passive (online) sales as such would, however, not be in compliance with competition rules.

In this context, one of the main criteria for (or against) an authorisation for online sales is the behaviour of the retailer, more specifically the retailer’s pricing policy. Retailers known for regularly undercutting the market price level would be given an authorisation to sell online by themselves or via sales platforms. Producers can (miss-)use online sales platforms to monitor pricing policies of their retailers and exclude from their distribution system those among them who conduct an aggressive pricing policy. Still, in many cases exclusion will be based on objective and qualitative criteria justifying certain restrictions.

Increased price competition on sales platforms may lead some producers to more frequently require in their distribution agreements the operation of a “brick and mortar shop” by retailers, thereby effectively excluding pure online retailers from the distribution. It may be stressed that the Vertical Block Exemption Regulation (VBER) in principle allows for requirements which are meant to promote distribution quality or proper (technical) advice.

As outlined above, another competition issue arises where producers prevent retailers from selling on online marketplaces altogether. The question on the extent to which such a restriction complies with competition rules is not clarified yet, since a reference for a preliminary ruling on this very question is currently pending before the Court of Justice of the EU (see C-230/16, *Coty Germany*). For details, reference is made to section 1.5. above.

Ways to overcome? There does not seem to be a panacea for the wide range of possible competition restrictions that might relate to online sales platforms. Competition issues triggered by online sales platforms in many cases will not constitute competition law infringements and may well be justified. Moreover, restrictions still would have to be assessed against the background of procompetitive effects online sales platforms as such bring with

them. Again there does not seem to be the need for further or more specific tools in antitrust legislation - but existing tools may need to adapt to the new digital environment.

