BELGIUM

Steffie De Cock

1. Introduction

The purpose of this report is to examine the effects of the new digital economy on (Belgian) competition law. One of its main goals is to assess what the major competition issues generated by the growth of online sales platforms are and how they should be resolved. Online sales platforms are indeed one of the big novelties that have arisen in the last few years with growth of the digital economy. They constitute one example of many different types of online platforms, such as: online advertising platforms, search engines, social media and creative content outlets, application distribution platforms, communication services and payment systems.[1]

This contribution will mainly focus on the effects in Belgium. However, one cannot deny the role European Union legislation is playing in the field of competition law.

Over the last few years, the Belgian Competition Authority ("**BCA**") has not dealt with many vertical competition cases, and therefore the case law on online sales platforms is also quite limited. However, this trend is changing and the BCA has declared in its 2016 annual report that the distribution sector will remain a priority in 2017 as contracts between distributors and suppliers could lead to anti-competitive restraints. For example, suppliers can limit the opportunities for distributors to offer suppliers' products or services online.[2] Recently, the BCA has conducted investigations in different distribution sectors[3] and also has issued a decision on vertical restraints in agreements between an undertaking selling fresh bakers' yeast and bakeries.[4]

This report will first briefly describe recent developments at the European level regarding online sales platforms. Second, it will discuss the most important Belgian decision concerning online sales platforms. Third, the impact of online sales on Belgian mergers will be outlined. Fourth, even in the absence of Belgian decisions on selective distribution and online sales platforms, the report provides an overview of recent

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[1] European Commission (2016) Communication on Online Platforms and the Digital Single Market: Opportunities and Challenges for Europe, 25 May 2016, 2. http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0288&from=EN. Accessed 19 May 2017; European Commission, Staff working document on Online Platforms, 1. https://ec.europa.eu/digital-single-market/en/news/commission-staff-working-document-online-platforms. Accessed 19 May 2017.

[2] Belgian Competition Authority (2017) Year Report 2016. https://www.bma-abc.be/sites/default/files/content/download/files/2016_jaarverslag_bma_0.pdf. Accessed 19 May 2017.

[3] Belgian Competition Authority (2017) Press release n°9-2017 The Belgian Competition Authority confirms the inspection at an undertaking active in the distribution and sale of cooking utensils and wine accessories. https://www.belgiancompetition.be/sites/default/files/content/download/files/20170508_press_release_9_bca.pdf. Accessed 19 May 2017.; Belgian Competition Authority (2017) Press release n°8-2017 The Belgian Competition Authority confirms the inspection at an undertaking active in the distribution and sale of water softeners. https://www.belgiancompetition.be/sites/default/files/content/download/files/20170505_press_release_8_bca.pdf. Accessed 19 May 2017.

[4] BCA, Case MEDE-I/O-13/0001, *Algist Bruggeman N.V.*, 22 March 2017.

developments at the EU level. This report concludes with some future recommendations and an evaluation about whether different competition law criteria should be applied to the new economy.

2. Background: online market places at the European level

The European Commission attaches great value to the internet as a sales channel for reaching a wide variety of customers in different countries.[5]

On 25 May 2016, the Commission issued a Communication on online platforms and the digital single market in which it recognised that online platforms play a key role in innovation and growth in the digital single market and it stated that: "they have revolutionized access to information and have made many markets more efficient by better connecting buyers and sellers of services and goods."[6] The Commission Staff working document accompanying the Communication identified the benefits of online platforms for consumers, for businesses and their general economic and social benefits.[7]

On 10 May 2017, the Commission published its Final Report on the E-Commerce Sector Inquiry ("**Final Report on the E-commerce sector inquiry"),**[8] together with a Staff Working Document accompanying the Final Report on the E-commerce Sector Inquiry[9] ("**Staff working document on the E-commerce sector inquiry**").[10] These reports will be further discussed in section 4 of this report.

The treatment of competition issues arising in the context of online sales at the EU level, is important for Belgium as it might be expected that the BCA and the Belgian courts will follow the guidance offered at the EU level for dealing with future cases.[11]

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[5] European Commission, Guidelines on Vertical Restraints, OJ 2010, C 130, p. 1 ("**Vertical Guidelines**").
[6] European Commission (2016) Communication on Online Platforms and the Digital Single Market: Opportunities and Challenges for Europe, 25 May 2016, 15. http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0288&from=EN. Accessed 19 May 2017.
[7] European Commission, Staff working document on Online Platforms, 11-15. https://ec.europa.eu/digital-single-market/en/news/commission-staff-working-document-online-platforms. Accessed 19 May 2017.
[8] Commission (2017) Final Report on the E-commerce Sector Inquiry. http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf. Accessed 1 June 2017.
[9] Commission (2017) Staff working document on the E-commerce sector inquiry. http://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf. Accessed 1 June 2017.
[10] Together referred to as the "**E-commerce sector inquiry report**".
[11] Cass. 9 juni 2000 , *Brussels International Trade Mart / S.C. Barlow en Amadeus B.V.B.A.*, Arr. Cass. 2000, 1071, www.cass.be, J.L.M.B. 2000, 1284, T.B.H. 2000, 493.

3. Belgian legislation and jurisprudence related to online sales

3.1. Legislation

3.1.1. Restrictive competition practices

In Belgium, competition legislation is enshrined in Book IV of the Belgian Code of Economic Law ("**CEL**").[12] The prohibition on agreements, decisions of associations of undertakings and concerted practices which have as their object or effect the restriction of competition and the prohibition on the abuse of dominant position are respectively laid down in Articles IV. 1 and IV.2 of the Belgian CEL. The rules are quite similar to Articles 101 and 102 of the Treaty on the Functioning of the European Union[13] ("**TFEU**"). According to Article IV.4 of the CEL, the prohibition laid down in Article IV.1 of the CEL does not apply to agreements that enjoy the exemption provided for in Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices ("**Vertical Block Exemption Regulation" or "VBER**").[14] There exist no specific Belgian guidelines or directives about vertical restraints. However, the BCA and the Belgian courts and tribunals tend to apply the Guidelines on vertical restraints issued by the Commission ("**Vertical Guidelines**").[15] As they date from 2010, they are not fully up-to-date with the current reality of internet-related and computer-software enterprises. However, most of the general rules still apply and are relevant for internet-related enterprises just as they are for any other undertaking.

3.1.2. Mergers

The rules on mergers are embedded in Article IV.6 to IV.11 of the CEL.

3.1.3. Private enforcement

Private enforcement of the competition law rules is also possible in Belgium. First, in the shape of damages claims. On 12 April 2017, the Belgian legislator issued a legislative proposal for the implementation of Directive 2014/104/EU of the European Parliament and the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the European Union ("**Damages Directive").** On 18 May 2017, the Belgian Parliament adopted this legislative proposal implementing the Damages

[12] Code of Economic Law, *BS* 29 March 2013, p. 19975.
[13] Treaty on the Functioning of the European Union, OJ 2012, C 326, p. 47.
[14] Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010, L 102, p. 1 ("**Block Exemption Regulation**").
[15] European Commission, Guidelines on Vertical Restraints, OJ 2010, C 130, p. 1 ("**Vertical Guidelines**").; Antwerpen 28 september 2009, *Handelspraktijken & Mededinging*, 979.; Gent 7 maart 2016, *TBM* 2016, jg. 4, , 403-408.; BCA, Case MEDE-I/O-13/0001, *Algist Bruggeman N.V.*, 22 March 2017, 7, 20 -22, 28.

Directive and it is now ready for ratification by the Government.[16] This proposal, to a large extent, follows the rules set out in the Damages Directive. The new rules only apply to court actions initiated since 26 December 2014.[17] Court actions initiated before this date will be governed by the general rules on extra-contractual liability.[18] This legislative proposal means that any person suffering harm caused by any competition law infringement is able to obtain full compensation for that harm under the principles of general law.[19] In Belgium, according to general law, damages should provide for the full recovery of the damaged person (including direct and indirect damages, such as loss of profits, etc.).[20] However, awarding punitive damages is not generally accepted in Belgium.[21]

In this regard, it is also worth noting that since 1 September 2014, consumer organisations and other authorised organisations may introduce collective damages actions on behalf of any group of consumers.[22] Following the Damages Directive's implementation, these rules have also been reviewed.

Second, claimants alleging competition law breaches may also bring a cease-and-desist action on the basis of Article XVII.1 of the CEL before the competent President of the Commercial Court.[23]

Third, competition law is also occasionally used as a defence against allegations of breach of contract by arguing that the breached provision contravenes competition rules. We are not aware of any precedent regarding online sales in this respect.

3.1.4. The Belgian Competition Authority

The BCA is composed of an investigation and prosecution body, the BCA's Investigation and Prosecution Service, and a decision-making body, the Competition College.[24]

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[16] Legislative Proposal regarding the insertion of a Title 3 "Actions for damages for competition law infringements" in Book XVII of the Code of Economic Law, regarding the insertion of definitions set out in Book XVII, Title 3 and Book I and regarding different modifications to the Code of Economic Law, 18 May 2017, Doc 54 2413/004 ("**Legislative Proposal implementing the Damages Directive**").
[17] Art. 45 of the Legislative Proposal implementing the Damages Directive.
[18] Article 1382 of the Belgian Civil Code; Rb. Kh. Brussel 24 november 2014, A.R.A/08/06816, Commissie/Otis e.a., *TBM* 2015, 37-46.; Brussel 14 januari 2015, 2010/AR/3112, NMBS/Electrabel, *TBM* 2016, 33-47.; Rb. Kh. Brussel 24 april 2015, A/12/02291 en A/12/02293, Belgische Staat/Liftenproducenten, *TBM* 2015, 212-227.; D. Gerard, Belgium. In: Knable Gotts, The Private competition enforcement review, Law Business Research Ltd 2016, p. 62.
[19] Art. 15 of the Legislative Proposal implementing the Damages Directive.
[20] D. Gerard, Belgium. In: Knable Gotts, The Private competition enforcement review, Law Business Research Ltd 2016, p. 62.
[21] In article 49, §1, 1° of the Royal Decree of 14 January 2013 regarding the determination of the implementation rules of public procurement and of public works concessions, *BS* 14 February 2013, err., *BS* 26 March 2013, an example of punitive damages can be found.
[22] Art. XVII.35-69 CEL.; E. De Baere, A. Maertens, K. Willems, Belgische class action. Tien pijnpunten, NJW 2015, pp. 522-535
[23] Procedure laid down in Article XVII.1-34 of the CEL. It concerns summary proceedings and gives rise to a judgment on the merits. However, urgency does not have to be proved to initiate these proceedings.
[24] Article IV.16, §2, 2° and 4° of the CEL.

3.2. Case-law

3.2.1. The *Immoweb* decision (Article 101 and 102 TFEU and their Belgian equivalents)

The most important decision in Belgium for online sales platforms is the *Immoweb* decision that BCA issued on 7 November 2016.[25]

On 15 January 2016, the BCA's Investigation and Prosecution Service opened an *ex officio* investigation against Immoweb. Immoweb is the company behind www.immoweb.be, Belgium's most important real estate platform, which offers a large overview of real estate properties to buy or rent all over Belgium. The platform works as a matching platform between sellers and lessors of real estate on the one hand and candidate buyers and lessees on the other hand. It works in two directions and also produces network effects. The more visitors the website has, then the more useful it is for sellers and lessors to place their offers on this particular website. Potential buyers and lessees will also tend to visit platforms with as many offers as possible. The placement of an offer by real estate agencies and individuals costs a small amount of money. The real estate portals also gain money by selling advertising space to third parties who want to advertise their products and/or services on the platform.

In this decision, the BCA's Investigation and Prosecution Service stated that 'Most Favoured Customer clauses' inserted in the contracts between Immoweb and developers of software for real estate agencies could be at odds with the prohibition laid down in Article 101 and 102 TFEU and Articles IV.1 and IV.2 of the CEL. However, Immoweb offered commitments and therefore the BCA did not definitively rule on the question of whether the MFC clauses in the contracts between Immoweb and the developers of real estate software infringed Article 101 and 102 TFEU (and their Belgian equivalents, Articles IV.1 and IV.2 of the CEL).

In what follows, first the market definition will be discussed and then the possible competition law restrictions.

3.2.1.1. Market definition and Immoweb's position in this market

The Investigation and Prosecution Service decided that the relevant product market included online platforms exclusively offering real estate, as well as online platforms offering an important amount of real estate properties, as both these platforms displayed similar characteristics, user conditions and prices. These platforms were held not to be substitutable with websites from real estate agencies, advertising material, advertisements in journals[26] and street advertisement boards, for different reasons. First, the geographic scope of online platforms was wider than the geographic scope of the offers on websites from real estate agencies, advertisements in journals and street advertising. Second, even at the local level, an online platform had a clear added-value in

[25] BCA, Case MEDE-I/0-15/0002, Immoweb, 7 November 2016.

[26] The German Bundeskartellamt and the Higher regional tribunal of Düsseldorf have already decided in the same sense that online real estate platforms and real estate advertisements in journals constitute separate markets: Bundeskartellamt (2015) Clearance of Merger of Online Real Estate Platforms. http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Fusionskontrolle/2015/B6-39-15.pdf?__blob=publicationFile&v=2. Accessed 5 June 2017.

comparison to all other channels, as it offered a large amount of real estate properties targeted at the localities in which the buyer would be interested. Third, a swift reaction was very important when buying or renting a real estate property and online real estate platforms were updated much more rapidly in comparison to the other channels. Fourth, the information provided on a real estate platform (with images) was not comparable to the information provided in most of the other advertisements.

In its decision on the relevant product market, the BCA referenced a decision from the German Bundeskartellamt *Immowelt/Immonet.*[27] Even if the German Bundeskartellamt had not definitively decided on the relevant product market in that decision, it indicated a certain preference for a separate market for online real estate platforms. To substantiate its position, the Bundeskartellamt stated that the interplay between the two groups of users of such an online platform (the sellers and lessors on the one hand and the buyers and lessees on the other) did not have to be distinguished for the purpose of the market definition.

As regards the relevant geographic market, the BCA's Prosecutor stated in the preliminary analysis that the relevant geographic market should be national, as national regulation of online platforms existed, the real estate on offer was located principally in Belgium and that these platforms operated on a national basis.

The Prosecutor decided that Immoweb had a dominant position on the relevant market, based on three considerations. First, the Prosecutor took into account the average number of daily visitors to the website. Second, the number of available goods was, at the time of the Prosecutor's preliminary analysis, two times higher than the average number of offers on competing platforms. Third, the *sales conversion ratio* of the goods offered on Immoweb was higher than the *sales conversion ratio* of competing undertakings. This was also in line with the views expressed as a response to requests for information from the BCA by real estate agencies, real estate platforms and software developers. Immoweb contested the findings of the Prosecutor about its dominant position.

3.2.1.2. Restrictive competition practices

The BCA decided that the Most Favoured Customer clauses inserted in the agreements between Immoweb and developers of software for real estate agencies could be anti-competitive and could infringe not only Article 101 TFEU (and its Belgian equivalent, Article IV.1 of the CEL), but also Article 102 TFEU (and its Belgian equivalent, Article IV.2 of the CEL). The relationship between Immoweb and the developers of software for real estate agencies works as follows. In Belgium, real estate platforms pay a fixed amount to the software developers per real estate offer that the developers transfer to the online real estate platform. This means that real estate platforms must conclude agreements with real estate software developers to be included in their listing of platforms that the developer's clients, the real estate agencies, can access. Thus, the real estate software developers offer software to real estate agencies enabling them to put their portfolio online on one or more platforms (like, for example, Immoweb) included in the software developer's listing. The Most Favoured Customer clauses in the contracts between Immoweb and the developers stipulated that the developers had to offer more advantageous financial conditions to Immoweb if they offered these more advantageous conditions to a competitor of Immoweb. Given the important position of Immoweb in the market, a software developer must have Immoweb in its portfolio, otherwise no real estate agent would be willing to conclude an

[27] BCA, Case MEDE-I/0-15/0002, Immoweb, 7 November 2016, §13-14.

agreement with this software developer. The BCA concluded that the system, as described here, had the effect that the entry, maintenance or development costs on the market of the online real estate platforms had been kept artificially high. The MFC clauses had the effect that the software developers were not able to conclude an agreement with Immoweb's competitors at a price lower than the fee agreed with Immoweb.

To remedy these preliminary concerns of the BCA's Investigation and Prosecution Service, Immoweb decided to offer commitments. Immoweb committed itself to unilaterally put an end to the MFC clauses in the contracts with the software developers. In addition, Immoweb committed itself to including no MFC clauses in contracts with software developers for a period of 5 years. Consequently, the BCA closed the investigation.

3.2.1.3. Comment on the *Immoweb* decision and discussion of MFN clauses

In the *Immoweb* decision, the BCA used the term "Most Favoured Customer" clause as a variation on the notion of "Most Favoured Nation" clauses or "MFN clauses" in international commercial law.[28] These clauses are also sometimes called "price parity" clauses. The decision concerned clauses that oblige a seller of a product or service to offer more advantageous conditions to a buyer of a product, the customer, if it offers these more advantageous conditions to any other customers. Therefore, it could be considered as a wide MFN clause, as the price offered to Immoweb is compared to the price offered to any other customer of the real estate software developers.

The Most Favoured Customer clauses that Immoweb inserted in its agreement with the real estate software developers have not been visible at the retail level of trade. In this sense, the case differs from the Commission's *E-books* case, which concerned the price offered at the retail level (to end-consumers).[29] The situation in the BCA's *Immoweb* decision is more comparable to the Commission's *Amazon* case, where it also investigated clauses inserted in the agreements between Amazon and E-books suppliers that came down to the fact that E-books suppliers should offer conditions to Amazon as favourable as the conditions offered to any other E-book retailer.[30] In the Commission's *film studios* case, the pay-TV broadcasters agreed to pay the film studio at least a price as high as the price offered to competing film studios.[31] The latter case concerned the (favourable) conditions offered to the supplier of the product, while the *Immoweb* decision concerned the conditions offered to the customer of the services offered by the real estate software developers. In the Commission's *film studios* case, the goal is for the supplier to receive a price as

[28] F.E. Gonzalez-Diaz, The law and economics of most-favoured nation clauses, Competition law and policy debate 2015(1), p. 26.
[29] Commission Case AT.39847, *Ebooks*, 25 July 2013.
[30] In this case, however, also some other clauses were under investigation that were related to the price offered by the E-book retailers (Amazon and its competitors) at the retail level.; Commission Case COMP/AT.40.153, *E-books MFNs and related matters*, 13 January 2017.
[31] See Press release in Commission Case COMP/38427, *Pay Television Film Output Agreements*: Commission (2004) Press release Commission closes investigation into contracts of six Hollywood studios with European pay-TVs. http://europa.eu/rapid/press-release_IP-04-1314_en.htm?locale=en. Accessed 19 May 2017.

high as possible, while in the *Immoweb* decision the goal was for the customer to receive a price as low as possible.

The above examples and comparisons show that Most Favoured Nation clauses come in different variations and should therefore be examined on a case-by-case basis depending on the specific circumstances of the market.[32] It is difficult to draw any definitive conclusions about the treatment of Most Favoured Nation's clauses under competition law in Belgium and at the EU level, as all the cases were solved following the acceptance of commitments by the Competition Authorities.[33] However, it is clear that MFN clauses may give rise to competition concerns when: (i) they are adopted by dominant undertakings or undertakings with significant market power; (ii) in markets characterised by barriers to entry; (iii) in concentrated markets; (iv) they have high market coverage; (v) they may facilitate collusion by increasing transparency and/or decreasing the incentive to lower prices.[34] The Staff working document on the E-commerce sector inquiry has also stated that price parity clauses may reduce competition between marketplaces and make entry or expansion for competing marketplaces more difficult.[35]

Even if the BCA had not come to a definitive conclusion, as commitments were offered, the Most Favoured Customer clauses in the agreement between Immoweb and the developers of real estate software had as an effect that Immoweb's competitors could not conclude agreements with real estate software developers on more advantageous conditions than Immoweb itself. The BCA found that this situation has led to artificially high entry, maintenance and development costs on the market of the online real estate platforms, as in practice all real estate software developers had to have Immoweb in their platform listing. Consequently, the MFC clauses probably were leading to the exclusion of Immoweb's competitors from the market for online real estate platforms. These practices could be at odds with not only Article 101 TFEU, but also with Article 102 TFEU, as Immoweb was found to have a dominant position on the Belgian market for real estate platforms. Immoweb's position certainly played an important role in the BCA's assessment, as MFN clauses to the benefit of dominant companies or companies enjoying significant market power could give rise to strong foreclosure or softening of competition effects.[36]

3.2.2. Merger control

On 16 May 2017, the BCA has announced that the turnover thresholds for notification of mergers in Belgium might be reviewed in the future, following the Commission's public consultation on the

[32] F.E. Gonzalez-Diaz, The law and economics of most-favoured nation clauses, Competition law and policy debate 2015(1), p. 42.
[33] Please note that in Commission Case *Pay Television Film Output Agreements*, the investigation against Universal and Paramount remained open, as they did not offer any commitments.
34 F.E. Gonzalez-Diaz, The law and economics of most-favoured nation clauses, Competition law and policy debate 2015(1), p. 42.
[35] Commission (2017) Staff Working Document to the Final Report on the E-commerce Sector Inquiry. http://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf. Accessed 19 May 2017.
[36] F.E. Gonzalez-Diaz, The law and economics of most-favoured nation clauses, Competition law and policy debate 2015(1), p. 42.

reform of the Merger Regulation and the reforms in several member states, such as Germany and Austria.[37] The Commission is examining whether the merger thresholds are still adapted to current reality as, for example, 'big data' might be a source of market power, even for an undertaking with limited turnover.[38] The insertion of a threshold criterion that is not (only) based on turnover, is one of the issues that is part of the public consultation. The E-commerce sector inquiry report has also noted that all marketplaces participating in the inquiry reported that they collect individual customer data.[39]

The Belgian thresholds are quiet high in comparison to other countries, and therefore the BCA does not see any reason to increase the thresholds.[40] The BCA does not see any particular need to decrease the thresholds as a response to the digital economy and considers, at the moment, that if the thresholds are decreased, then it should only apply to specific sectors.[41]

Online sales and their effects on competition law have also been considered in Belgian merger control decisions.[42] One of the questions that frequently has come up in the assessment of mergers is whether online sales of a particular good or service belong to the same product market as the physical sales. Some cases will be discussed below in which the BCA has decided that online and offline sales form different markets, where online and offline sales were held to belong to the same product market and where the BCA did not reach a definitive conclusion on the question.

3.2.2.1. Online and offline sales belong to separate product markets[43]

In the *Rexel Belgium SA/La Grange Beheer SA – Immo LG SPRL* case of 21 May 2012, the Prosecutor held the downstream market for electrical products comprising electrical installation

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[37] BCA (2017) Evaluation des seuils de notification des concentrations en Belgique, p. 5. https://www.belgiancompetition.be/sites/default/files/content/download/files/20170516_evaluation_seuils.pdf . Accessed 31 May 2017.

[38] E.g. Commission case M.7217, *Facebook/Whatsapp*, 3 October 2014.

[39] Commission (2017) Staff Working Document to the Final Report on the E-commerce Sector Inquiry, §635-636. http://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf. Accessed 19 May 2017.

[40] BCA (2017) Evaluation des seuils de notification des concentrations en Belgique, p. 5. https://www.belgiancompetition.be/sites/default/files/content/download/files/20170516_evaluation_seuils.pdf . Accessed 31 May 2017.

[41] BCA (2017) Evaluation des seuils de notification des concentrations en Belgique, p. 5. https://www.belgiancompetition.be/sites/default/files/content/download/files/20170516_evaluation_seuils.pdf . Accessed 31 May 2017.

[42] This section does not give an exhaustive overview of all Belgian merger decisions in which online sales have been discussed. The research was focused on decisions from 2010 in the wholesale/retail sectors and the sector of media, telecommunication and ICT.

[43] In the BCA's *Nationale Loterij* case, it was also found that the physical and non-physical distribution of sports betting belonged to separate product markets. However, this case did not concern a merger, but a complaint of infringement of Articles 101 and 102 TFEU and their Belgian equivalents.; BCA, Case MEDE-P/K-13/0012 and CONC-P/K-13/0013, Stanleybet Belgium NV/Stanley International Betting Ltd en Sagevas S.A./World Football Association S.P.R.L./Samenwerkende Nevenmaatschappij Belgische PMU S.C.R.L. t. Nationale Loterij NV, 22 September 2015.

materials, lighting, cables and networks, HVAC products, security and communication products, the downstream market for electrical appliances and the downstream market for direct sales from producers to professional installers were separate markets.[44] As regards internet sales by the wholesalers, the Prosecutor found that internet sales were more a complement than a substitute for physical sales by the wholesalers and that pure online players did not exercise any competitive pressure on the wholesalers that were physically present in Belgium.[45] The notifying party in this case did not agree with the Prosecutor's findings.

In the *Phone House* case, Proximus argued that consumer behaviour had changed since the imposition of the commitments on Proximus in the BCA's decision of 23 December 2011.[46] Operators had adapted to this new consumer behaviour by developing an omni-channel strategy in which the client had the opportunity to buy when and where (online, brick & mortars, call centre, etc.) that he or she demands.[47] Furthermore, Proximus produced a study in which it became clear that customers compared their purchases more and more online.[48]

The Prosecutor discussed two relevant markets in this case: the upstream retail market for mobile phone services and the downstream market for the distribution of electronic communication products and services. Regarding the downstream market for the distribution of electronic communication products and services, the Prosecutor decided that online sales were not included in the downstream market for the distribution of electronic communication products and services.[49] However, he also noted that he would take into account the competitive pressure from non-physical points of sale.[50]

3.2.2.2. Online and offline sales belong to the same product market

In the merger between Delhaize NV and Koninklijke Ahold some online sales issues were also discussed.[51] Delhaize had supermarkets in 7 countries and also offered some online services, with which consumers could buy products online from the Delhaize supermarket.[52] Delhaize.be allowed consumers to order online and pick up their purchases in a Delhaize store. Caddy Home was another online service in which purchases were delivered at home and, lastly, Delhaize Wineworld

[44] BCA, Case CONC-C/C-12/0004, Rexel Belgium SA/La Grange Beheer SA – Immo LG SPRL, 21 May 2012, §40-41.
[45] BCA, Case CONC-C/C-12/0004, Rexel Belgium SA/La Grange Beheer SA – Immo LG SPRL, 21 May 2012, §41.
[46] BCA, Case MEDE-C/C-11/0010, Phone House, 23 June 2015.
[47] BCA, Case MEDE-C/C-11/0010, Phone House, 23 June 2015, §115.
[48] BCA, Case MEDE-C/C-11/0010, Phone House, 23 June 2015, §117.
49 BCA, Case MEDE-C/C-11/0010, Phone House, 23 June 2015, §158.
[50] BCA, Case MEDE-C/C-11/0010, Phone House, 23 June 2015, §158.
[51] BCA, Case MEDE-C/C-10, Delhaize NV/Koninklijke Ahold NV, 15 March 2016.
[52] BCA, Case MEDE-C/C-10, Delhaize NV/Koninklijke Ahold NV, 15 March 2016, §16-18, §39.

left the choice for customers to pick-up their wine or to have it delivered at home.[53] Ahold is active in the field of online sales of non-food products in Belgium through the website, Bol.com.[54]

The BCA's Prosecutor found that horizontal overlaps existed on the markets for sales and for the purchase of daily consumption goods and on the market for offering franchising services in the supermarket sector.[55] As Bol.com was an online non-food retailer and to the extent that Bol.com could be able to use the Delhaize stores as pick-up points, there was also a vertical relationship between Ahold and Delhaize.[56]

As regards the relevant market, the Prosecutor decided first that the online sales of consumption goods in which the consumer ordered the products online and consequently picked them up in a physical pick-up point, formed part of the market for the sales of daily consumption goods and did not constitute a separate market.[57] The Prosecutor left the question open for home delivery services as the development of that activity by Delhaize was still very limited.[58] Consequently, it is interesting to note that the Prosecutor distinguished between online sales in which the consumer had to pick up his or her purchases in the store and online sales in which the purchases were delivered at home. Second, the Prosecutor stated that the market research did not permit drawing definitive conclusions on the market about the purchase of daily consumption goods. Therefore, for further analysis, the Prosecutor took into account, on the one hand, a segment of the market for the purchase of daily consumption goods according to product categories and, on the other hand, a segment for branded products and private labels.[59] Third, the Prosecutor decided that it was not necessary for the purposes of this merger notification to decide whether there existed a separate market for the offer of franchising services. [60]

3.2.2.3. Question on market for online and offline sales left open

In a case concerning the acquisition of *Club NV and Club Luxemburg SA by ZuidNederlandse Uitgeverij NV and Standaard Boekhandel NV*, the Prosecutor left the question open about whether a different market should be withheld for online and offline sales of books to consumers. The Prosecutor stated that online sales are only 0-5% of Standaard Boekhandel's sales.[61] Moreover, an economic study had shown that in the Dutch book market, online sales only constituted 9.5% of the market turnover.[62]

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[53] BCA, Case MEDE-C/C-10, Delhaize NV/Koninklijke Ahold NV, 15 March 2016, §18.
[54] BCA, Case MEDE-C/C-10, Delhaize NV/Koninklijke Ahold NV, 15 March 2016, §22 and §46.
[55] BCA, Case MEDE-C/C-10, Delhaize NV/Koninklijke Ahold NV, 15 March 2016, §47.
[56] BCA, Case MEDE-C/C-10, Delhaize NV/Koninklijke Ahold NV, 15 March 2016, §48-49.
[57] BCA, Case MEDE-C/C-10, Delhaize NV/Koninklijke Ahold NV, 15 March 2016, §104.
[58] BCA, Case MEDE-C/C-10, Delhaize NV/Koninklijke Ahold NV, 15 March 2016, §105.
[59] BCA, Case MEDE-C/C-10, Delhaize NV/Koninklijke Ahold NV, 15 March 2016, §136.
[60] BCA, Case MEDE-C/C-10, Delhaize NV/Koninklijke Ahold NV, 15 March 2016, §150.
[61] BCA, Case MEDE-C/C-14/0007, Acquisition of Club NV and Club Luxemburg SA by ZuidNederlandse Uitgeverij NV and Standaard Boekhandel NV, 10 June 2014, §64.
[62] BCA, Case MEDE-C/C-14/0007, Acquisition of Club NV and Club Luxemburg SA by ZuidNederlandse Uitgeverij NV and Standaard Boekhandel NV, 10 June 2014, §63.

However different third parties expressed the view that a segmentation was necessary according to whether sales were made online or offline, as both channels were characterised by different promotion dynamics, different velocity and a different geographical reach.[63]

The Prosecutor stated that two scenarios were possible for defining the relevant markets. In the first scenario, there would be: (i) a market for the sales of books in the Dutch part of Belgium irrespective of language (but with the exception of French titles), and (ii) a market for the sales of books in the French part of Belgium irrespective of language (but with the exception of Dutch titles).[64] In the second scenario, the markets would be defined according to a geographical division: (i) all books sold to consumers in Wallonia and Brussels irrespective of language, and (ii) all books sold to consumers in Flanders, irrespective of language.[65]

Furthermore, the Prosecutor concluded that there was only a limited horizontal overlap on the market for sales of books to consumers in the Dutch part of Belgium.[66] Therefore, no real competition concerns arose in this case. To come to this conclusion, the Prosecutor also considered that traditional book shops would experience more and more competitive pressure from online sales through, for example, bol.com, amazon.com, etc.[67] The Prosecutor also found that Standaard Boekhandel would only achieve very limited market shares in the internet segment during the following 3-5 years, as some very big players were active in this segment.[68] Finally, the Prosecutor also stated that Standaard Boekhandel's concept, in which it offered physical book shops as full service points almost in every city and/or village centre encouraged competition between online and offline sales points *within the same product market*.[69]

As in the case *Rexel Belgium SA/La Grange Beheer SA – Immo LG SPRL* case, the Prosecutor noted in case *Cebeo/Cheyns* that sales by pure online players should not be included in the downstream market for the wholesale supply of electrical materials.[70] However, in the competition analysis, the Prosecutor took into account that wholesalers did not need a local branch, as wholesalers' clients mostly placed their orders by phone or via a website, and deliveries were often

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[63] BCA, Case MEDE-C/C-14/0007, Acquisition of Club NV and Club Luxemburg SA by ZuidNederlandse Uitgeverij NV and Standaard Boekhandel NV, 10 June 2014, §59 and 60.

[64] BCA, Case MEDE-C/C-14/0007, Acquisition of Club NV and Club Luxemburg SA by ZuidNederlandse Uitgeverij NV and Standaard Boekhandel NV, 10 June 2014, §69.

[65] BCA, Case MEDE-C/C-14/0007, Acquisition of Club NV and Club Luxemburg SA by ZuidNederlandse Uitgeverij NV and Standaard Boekhandel NV, 10 June 2014, §70.

[66] BCA, Case MEDE-C/C-14/0007, Acquisition of Club NV and Club Luxemburg SA by ZuidNederlandse Uitgeverij NV and Standaard Boekhandel NV, 10 June 2014, §131.

[67] BCA, Case MEDE-C/C-14/0007, Acquisition of Club NV and Club Luxemburg SA by ZuidNederlandse Uitgeverij NV and Standaard Boekhandel NV, 10 June 2014, §140.

[68] BCA, Case MEDE-C/C-14/0007, Acquisition of Club NV and Club Luxemburg SA by ZuidNederlandse Uitgeverij NV and Standaard Boekhandel NV, 10 June 2014, §141.

[69] BCA, Case MEDE-C/C-14/0007, Acquisition of Club NV and Club Luxemburg SA by ZuidNederlandse Uitgeverij NV and Standaard Boekhandel NV, 10 June 2014, §150.

[70] BCA, Case CONC-C/C-16/0035, Cebeo NV/Group Cheyns NV and Cheyns NV, 14 December 2016, §94.

made on the whole national territory and competitive pressure was exercised by specialist-wholesalers and by pure online players.[71]

The Competition College stated that it could be left open whether pure online sales could be excluded from the downstream market for the wholesale supply of electrical material.[72] However, it considered that these pure online sales could be included in the relevant market for the reason stated by the notifying party and the development potential of online sales. The notifying party, Cebeo, had argued first that more and more manufacturers had their own website and offered their products in this way directly to the final customer, without any need to pass through a wholesaler.[73] Second, Cebeo asserted that online sales constituted a real alternative distribution channel to offline sales and that pure players in the sector proposed a large offer at very attractive prices for professional installers.[74]

4. Restrictions of online sales and selective distribution

The E-commerce sector inquiry report indicated that retailers in Belgium have rarely reported having marketplace restrictions.[75] The results of the sector inquiry also reported that restrictions to sell on marketplaces were mostly found in selective distribution agreements.[76] Even if suppliers in Belgium often used selective distribution systems to control the distribution of their products, we are not aware of any cases reported in Belgium that are related to systems of selective distribution and online sales platforms. Should any such case arise in Belgium, it is likely that the BCA or the Belgian courts would follow the guidance by the Court of Justice of the European Union and the Commission in its Vertical Guidelines and its recently published E-commerce sector inquiry report on selective distribution and sales via online marketplaces.

Even if the BCA's decisional practice regarding mergers often treats online and offline sales as separate markets, the Vertical Guidelines provide that a supplier may impose criteria on online sales made by its distributors that are equivalent to the criteria imposed offline in the context of selective distribution.[77] In the same vein, a supplier may require that its distributors use third party platforms to distribute the contract products only in accordance with the particular criteria agreed between the supplier and its distributors for the distributors' sales via the internet. The Guidelines have clarified that when the distributor sells via a third party platform, the supplier may require that customers do not visit the distributor's website through a site

[71] BCA, Case CONC-C/C-16/0035, Cebeo NV/Group Cheyns NV and Cheyns NV, 14 December 2016, §136-149.
[72] BCA, Case CONC-C/C-16/0035, Cebeo NV/Group Cheyns NV and Cheyns NV, 14 December 2016, §20.
[73] BCA, Case CONC-C/C-16/0035, Cebeo NV/Group Cheyns NV and Cheyns NV, 14 December 2016, §66.
[74] BCA, Case CONC-C/C-16/0035, Cebeo NV/Group Cheyns NV and Cheyns NV, 14 December 2016, §66.
[75] Commission (2017) Staff working document on the E-commerce sector inquiry, §463. http://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf. Accessed 31 May 2017.
[76] Commission (2017) Staff working document on the E-commerce sector inquiry, §470. http://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf. Accessed 31 May 2017.
[77] Vertical Guidelines, §54.

carrying the name or logo of the third party platform.[78] Therefore the supplier may require that the distributor displays the logo and/or brand of the goods on the website.[79] In its Staff working document on the E-commerce sector inquiry, the Commission has stated that sales via online marketplaces may be *de facto* excluded by a supplier if the distributor is prohibited from selling via marketplaces that visibly have their logo.[80]

In the E-commerce sector inquiry report, the Commission has confirmed the approach laid down in paragraph 54 of the guidelines and has not considered marketplace bans as hardcore restrictions of competition law. It has stated that the question about sales via third party platforms concerns *how* the distributor can sell products over the internet and does not have as its object the restriction upon *where or to whom* distributors can sell the products.[81] The Commission has stated that "marketplace bans do not generally amount to a de facto prohibition on selling online or restrict the effective use of the internet as a sales channel irrespective of the markets concerned".[82] Consequently, according to the findings of the e-commerce sector inquiry, (absolute) marketplace bans should not automatically be considered as hardcore restrictions within the meaning of Article 4, b) and 4, c) of the VBER. The Commission has also made it clear that this does not mean that absolute marketplace bans never infringe the EU competition rules.[83] The Commission also has been applying the test introduced by the Court of Justice of the European Union in the *Pierre Fabre case* to online marketplaces. This would mean that a ban or restriction on the use of online marketplaces should only constitute a hardcore restriction if it *de facto* constitutes a complete ban on online sales.[84] The Court of Justice decided in *Pierre Fabre* that: "in the context of a selective distribution system, a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts to a restriction by object within the meaning of that provision where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified."[85] However, it should be noted that the Court of Justice's ruling in *Pierre Fabre* arose in the context of a selective distribution system, while the Commission's findings are also related to online sales platforms outside the context of selective distribution. Finally, the Commission

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[78] Vertical Guidelines, §54.
[79] N. Petit and D. Henry, Vertical Restraints under EU Competition Law: conceptual foundations and practical framework, Larcier 2010, 165.
[80] Commission (2017) Staff working document on the E-commerce sector inquiry, §467. http://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf. Accessed 31 May 2017.
[81] Commission (2017) Staff working document on the E-commerce sector inquiry, §509. http://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf. Accessed 31 May 2017.
[82] Commission (2017) Final Report on the E-commerce Sector Inquiry, §41. http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf. Accessed 1 June 2017.
[83] Commission (2017) Final Report on the E-commerce Sector Inquiry, §43. http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf. Accessed 1 June 2017.
[84] Commission (2017) Staff working document on the E-commerce sector inquiry, §502-503. http://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf. Accessed 31 May 2017.
[85] CJUE, C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la Concurrence*, ECR 2011 I-09419, pt 47.

has also stressed that its findings may be altered following the Court of Justice's judgment in the *Coty* case.[86]

In general, sales through third-party internet platforms in selective distribution systems are not very likely to restrict "intra-brand" competition. However, they may restrict intra-brand competition when free-riding occurs (e.g. when consumers visit a brick-and-mortar shop and receive information and services on a high-end good, which justifies the recourse to selective distribution, and then buys the good in question via a third party platform). It is recognised in the E-commerce sector inquiry report that sales via third party platforms offer opportunities more than limitations or barriers for small and medium-sized dealers, as sales via online marketplaces do not require high initial investments.[87]

Finally, the E-commerce sector inquiry report has also stated that marketplaces offer more and more features to address quality requirements from well-known brands. In this sense, the report has stated that some marketplaces offer the ability to design their own seller shop within a special area of the marketplace or to have specific showrooms designed in line with the requirements of the brand.[88]

5. Conclusion and recommendations for the future

The main competition issues generated by the growth of online sales platforms that have been discussed in this report are: first, "Most Favoured Nation" clauses; second, the question about whether the value of big data should be taken into account for the Belgian merger notification thresholds; third, the impact of online sales in the market definition of merger cases; fourth, the ban on sales via online sales platforms, which are mostly in selective distribution systems. A fifth important competition issue, not discussed in detail in this report, is increased price transparency.[89] On the one hand, consumers are able to compare prices more easily online which leads to increased price competition and can affect competition on other factors, such as quality.[90] On the other hand, companies, which are in a horizontal or vertical relationship with each other, are also able to monitor more easily each other's prices.[91] This new feature of the digital economy will certainly affect competition law assessments.

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[86] CJEU, C-230/16, *Coty Germany vs. Parfümerie Akzente GmbH* (not yet published).
[87] Commission (2017) Staff working document on the E-commerce sector inquiry, §442, §449-451, §456. http://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf. Accessed 31 May 2017.
[88] Commission (2017) Staff working document on the E-commerce sector inquiry, §490-492. http://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf. Accessed 31 May 2017.
[89] Commission (2017) Final Report on the E-commerce Sector Inquiry, §13 and §56. http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf. Accessed 1 June 2017.; R. Eccles, Online sales and competition law controls, International Journal of Franchising Law 2015 (13), p. 7.; T. Kramler, The European Commission's E-commerce sector inquiry, Journal of European Competition Law & Practice 2017, p. 81.
[90] Commission (2017) Final Report on the E-commerce Sector Inquiry, §12. http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf. Accessed 1 June 2017
[91] Commission (2017) Final Report on the E-commerce Sector Inquiry, §13. http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf. Accessed 1 June 2017

In spite of the competition issues that have arisen with the new digital economy and the growth of online sales platforms, in my opinion there is absolutely no need to modify the basic and substantial competition law principles or objectives in the context of the new economy. In this regard, it should also be taken into account that digital markets are evolving very fast. Therefore, the criteria applied to the new economy may not be too specific, as they would probably be very rapidly out-of-date and not adapted to the fast-evolving realities of the new economy.[92]

In contrast to the Vertical Guidelines, the current version of the VBER does not contain any specific rules on online sales. An update of the Vertical Guidelines to include clearer rules on features of the new digital economy, like online sales platforms, might be useful to enhance uniformity within Europe and legal certainty for undertakings. However, the Commission has announced –after its e-commerce sector inquiry- that it did not find it necessary to issue new Vertical Guidelines before 2022.[93] On the other hand, the Commission is seeking to complement the basic competition law principles with its Proposal for a geo-blocking regulation.[94] This regulation will enhance uniformity and legal certainty within Europe, as it seeks to prevent discrimination within the internal market. Its objectives include giving customers throughout the EU better access to goods and services in the Single Market by preventing direct and indirect discrimination by traders artificially segmenting the market based on customers' residence.

As regards the application of competition law in specific cases, we highly-support that the courts and competition authorities take into account the features of the new digital economy when assessing specific cases. However, it is our opinion that this brings nothing new as it is required for any proper competition law assessment that the relevant market and economic context of the case is thoroughly examined. A thorough examination of the economic context in a specific case might require that competition authorities, courts and lawyers master new technologies and have the capacity to interpret data and algorithms for the competition law assessment. The increased price transparency will also have to be taken into account.

The diverging case-law in different EU member states regarding MFN clauses (for example, in the hotel sector) shows, on the one hand, the need for uniformity and legal certainty for undertakings at the EU level, and on, the other hand, the need to take into account the specific market characteristics for any proper competition law assessment. However, on 17 February 2017, the European Competition Network stated in its final report on the results of the monitoring exercise in the hotel sector that it was committed to ensuring consistency in future cases.[95] Belgium participated in the hotel monitoring exercise together with the Czech Republic, France, Germany, Hungary, Ireland, Italy, Netherlands, Sweden and the UK.

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[92] One might think of artificial intelligence, robots, self-driving cars, smartphones integrated in the human body.

[93] The current VBER expires on 31 May 2022.

[94] Proposal for a regulation of the European Parliament and of the Council of 25 May 2016 on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC ("**Proposal for a geo-blocking regulation**").

[95] ECN (2017) Outcome of the meeting of ECN DG's on 17-02-2017. http://ec.europa.eu/competition/antitrust/ECN_meeting_outcome_17022017.pdf. Accessed 31 May 2017.