

COMPETITION CONDUCT | DIGITAL PLATFORMS

Platform bans, advertising channels and the new VBER

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1 Introduction

1. Retailers selling products online increasingly face restrictive requirements by manufacturers, attracting the attention of competition authorities and courts. The European Court of Justice ("ECJ") confirmed in its decision in the Coty case in December 2017 that a sales ban on online third-party platforms (e.g. eBay and Amazon) ("platform ban") for luxury goods is permissible.¹ The extent to which such online sales restrictions are permissible in other contexts has been the subject of much debate amongst the courts and competition lawyers alike.
2. On 1 June 2022, the new Vertical Block Exemption Regulation ("VBER") and the accompanying guidelines on vertical restraints ("vertical guidelines") were enacted.² The VBER which exempts certain vertical agreements from Article 101(1) TFEU contains a new hardcore restriction covering agreements that prevent "*the effective use of the internet*".³ While platform bans are exempted from the hardcore restriction (thus codifying the Coty judgment), the regulation is much stricter towards restrictions on online advertising channels ("advertising channels"); bans on entire advertising channels are not exempted.
3. This article contains an evaluation of these changes from an economic perspective. Due to the importance of online third-party platforms ("platforms") for particular types of retailers and in some countries, it is questionable whether a general exemption for platform bans is reasonable. Moreover, the boundary between the functionality of platforms and advertising channels is becoming blurred. Platforms increasingly take over important roles in pre-sales phases, attributable to advertising, and advertising channels such as price comparison sites are increasingly offering the facility to purchase products directly. Given such dynamics, the unequal treatment under the VBER does not appear to be appropriate.

2 Selective Distribution Systems

4. Digitisation has transformed retailing. Online platforms such as Amazon and eBay prevail and e-commerce has grown significantly. As a result, manufacturers increasingly rely on vertical restraints to ensure greater control over the distribution of their products. Such vertical restraints are often part of a selective distribution system in which distributors are chosen based on defined characteristics.⁴
5. In the economic assessment of vertical restraints, both intra-brand competition (competition between retailers for the same supplier) and inter-brand competition (competition between retailers for different suppliers) are important features. Due to the exclusion of retailers that do not fulfil the criteria, a selective distribution system may restrict intra-brand competition and lead to reduced choice and higher prices for consumers. In particular, if several suppliers in a market operate a selective distribution system, it may also restrict inter-brand competition. This is because each manufacturer supplies a smaller number of retailers in the market (only those that

¹ Judgment of the Court of 6 December 2017, Coty Germany GmbH v Parfümerie Akzente GmbH, C-230/16 ("Coty judgment").

² Commission Regulation (EU) 2022/720 of 10 May 2022 and Guidelines on Vertical Restraints [2022/C 248/01].

³ VBER, Art 4(e).

⁴ In the European Commission's e-commerce sector inquiry, 56% of companies reported using selective distribution systems. 19% of the companies surveyed reported having introduced selective distribution systems in response to the growing e-commerce sector, while 67% of those already using such a system have included new criteria in their agreements (European Commission [2017], Final report on the E-commerce Sector Inquiry ("e-commerce sector inquiry"), para. 15(iii) and European Commission [2017], Commission Staff Working Document accompanying the Final report on the E-commerce Sector Inquiry ("working document e-commerce sector inquiry"), paras. 223, 225).

meet the criteria) and competition between retailers of different suppliers is thus also reduced (cumulative effect).⁵

6. On the other hand, selective distribution systems reduce the free-rider problem. Without specific distribution requirements, some retailers would benefit from the promotional activities and pre-sales services of other retailers selling the same product. This can lead to an underinvestment in these services. A selective distribution system can counteract this and fulfil the manufacturer's legitimate demand for quality standardisation and protection of brand image.⁶ It also facilitates relationship-specific investments that have no value outside the vertical relationship (the so-called "hold-up" problem).⁷
7. Selective distribution systems can also promote inter-brand competition, increasing the quality of products and services, which in turn benefits the end customer.⁸ Provided that inter-brand competition is sufficiently strong, the European Commission assumes that measures restricting intra-brand competition are likely to be harmless for consumers.⁹
8. On 1 June 2022, the new VBER and the accompanying vertical guidelines were implemented. The regulation maintained the exemption of vertical agreements from Article 101(1) TFEU provided they do not contain hardcore restrictions and the market shares of the undertakings concerned do not exceed 30% (purchasing and sales).¹⁰ Vertical agreements that do not meet these criteria may still be compatible with Article 101(1) TFEU, but require individual assessment under Article 101(3) TFEU.¹¹ Hardcore restrictions include, for example, resale price maintenance, restrictions on the customer group, and restrictions on active (targeted) or passive (non-targeted) sales in selective distribution systems.¹² A selective distribution system containing purely qualitative features is permitted provided that (i) it is necessary to preserve the quality of the product, (ii) distributors are selected on the basis of objective criteria and (iii) the requirements do not go beyond what is necessary.¹³

3 The Coty judgement and the aftermath

9. Whether the design of selective distribution systems falls under the provisions of the VBER was highlighted by the Coty judgment of the ECJ in December 2017. In this ruling, the ECJ confirmed that a selective distribution system with the primary purpose of preserving the luxury image of a product may be compatible with Article 101 TFEU, provided that the above-mentioned criteria are met.¹⁴ Hence retailers in a selective distribution system may be prohibited from selling on platforms. In the case, the luxury cosmetics manufacturer Coty wanted to prohibit retailer Parfümerie Akzente from selling Coty products on Amazon Marketplace. According to the ECJ, this did not constitute a hardcore restriction (a passive sales restriction), because online distribution was not generally prohibited, i.e., sales via the retailer's own online store, and advertising was not restricted.¹⁵

⁵ Vertical guidelines, paras. 18, 20, 22, 146.

⁶ Vertical guidelines, para. 16(b), (h).

⁷ Vertical guidelines, para. 16(e).

⁸ Vertical guidelines, para. 148.

⁹ Vertical guidelines, para. 21.

¹⁰ VBER, recital 8.

¹¹ VBER, recital 9 and vertical guidelines, para. 7.

¹² VBER, Art. 4(a) and (c).

¹³ Vertical guidelines, paras. 148-149. These are the so-called Metro criteria.

¹⁴ Coty judgment, para 36.

¹⁵ Coty judgment, paras. 52-54 and 65-68. Moreover, the ECJ concludes that there was no hardcore restriction in the form of a restriction of the customer group.

10. While the judgment provided increased legal certainty, some questions remained.
11. First, it was unclear to what extent platform bans are possible beyond luxury goods. The German FCO was generally critical of platform bans and questioned whether the resulting increase in inter-brand competition outweighed the reduction in intra-brand competition. In contrast, Advocate General Wahl emphasised that platform bans should also apply to "quality products" and the European Commission concluded that the analysis in the Coty judgment was valid independent of the product type.¹⁶ The Hamburg Higher Regional Court reached a similar conclusion.¹⁷
12. Second, the German FCO referred to the uncertainty in cases where distribution via platforms represents a relatively more important sales channel compared to the EU average referenced in the Coty judgment (e.g. in Germany). It was unclear at what point the visibility of a retailer would be so severely restricted that a passive sales restriction could be assumed.¹⁸
13. Third, how to assess other forms of restrictions in online distribution in vertical agreements was not clear cut. In December 2017, the German FCJ confirmed the German FCO's assessment that per se bans on price comparison engines constitute a hardcore restriction in the form of a passive sales restriction.¹⁹ Such a ban was imposed on the dealers of the sports shoe manufacturer ASICS. According to the German FCJ, this practice led to a substantial restriction on retailers in online distribution.²⁰ Moreover, unlike in Coty, the products were not considered to be luxury goods and the cumulative effect of the restrictions (per se ban on price comparison engines, ban on the use of the ASICS trademark on third-party platforms and in search engines) meant that customers did not have access to retailers' online offers to a practically significant extent.²¹
14. The legal profession discussed the extent to which the ASICS decision could be reconciled with the Coty judgment.²² While it was generally accepted that the cumulative restrictions made online distribution effectively impossible, it was questioned to what extent a price comparison engine ban alone constitutes a hardcore restriction, while a platform ban does not. Because a price comparison engine ban does not prevent the retailer from using many other methods of online distribution, it was considered that it cannot not be deemed to be a de facto ban on online distribution.

4 The new hardcore restriction in the VBER

15. The revised VBER addresses the issues discussed. It contains a new hardcore restriction which provides for "*the prevention of the effective use of the internet [...] to sell the contract goods and services*"²³ and exceptions are defined. First, "*other restrictions of online sales*" are permitted, which according to the vertical guidelines include indirect or direct bans on the use of online marketplaces. In addition, the vertical guidelines specify that restrictions on online sales do not

¹⁶ German FCO [2018], Competition restraints in online sales after Coty and Asics - what's next?, page 3 and European Commission 2018), EU competition rules and marketplace bans: Where do we stand after the Coty judgment? and Opinion of Advocate General Nils Wahl of 26 July 2017, para. 92.

¹⁷ Judgment of the Hanseatic Higher Regional Court of Hamburg of 22 March 2018, 3 U 250/16.

¹⁸ German FCO [2018], Competition restraints in online sales after Coty and Asics - what's next?, page 3. See section "Relevance of platforms in online sales" for the relevance of platforms in Germany.

¹⁹ German FCJ decision of 12 December 2017, KVZ 41/17 ["ASICS decision"].

²⁰ ASICS decision, para. 25.

²¹ ASICS decision, para. 30.

²² See for example <https://cms.law/en/int/publication/german-federal-court-s-asics-ruling-may-be-at-odds-with-recent-eu-judgment> as well as <https://www.whitecase.com/insi...>, last accessed on 25.11.2022.

²³ VBER, Art. 4[e].

serve the purpose of preventing the effective use of the internet, provided that "*the buyer* [i.e. retailer] *remains free to operate his own online store and to advertise online*".²⁴

16. The second exception covers "*restrictions of online advertising that do not have the object of preventing the use of an entire online advertising channel*", such as search engines or price comparison services.²⁵ While the prohibition of specific search engines or price comparison services remains possible according to the vertical guidelines, the prohibition of entire advertising channels is impermissible as this would affect the retailer's ability to target customers and direct them to its online store. In addition, the vertical guidelines specify that the prohibition of the most widely used service of an online advertising channel may well constitute a hardcore restriction if the remaining services in the advertising channel are "de facto not capable of attracting customers to the buyer's online store".²⁶
17. The revised regulation and guidelines thus codify the Coty judgment. They also go beyond ECJ case law by not limiting platform bans to luxury goods. In addition, the regulation adopts the distinction between sales channels and advertising channels and, in line with the ASICS decision, determines that per se bans of entire advertising channels are not permitted. The restriction on the ban on individual advertising channels appears particularly relevant for search engine advertising, given the high market share of Google. Hence, it can be assumed that a ban on search engine advertising in Google Ads will generally not be permitted as this would imply that search engine advertising can de facto no longer be used.²⁷
18. The aim of the VBER is to simplify enforcement by competition authorities and to help undertakings to self-assess their vertical agreements. In the regulation, exemption is limited to those agreements "*for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty*". However, it is considered that it is more important to reduce the risk of "false positives" [i.e. exempting agreements that do not fulfil this condition] than to reduce the risk of "false negatives" [i.e. not exempting agreements that do fulfil this condition].²⁸
19. According to the European Commission, it cannot be assumed with sufficient certainty that measures which prevent the effective use of the internet fulfil Article 101(3) TFEU. However, as already raised by the German FCO, it is doubtful whether a platform ban retains the visibility of the retailer to an extent that online distribution is still possible. In that case, a platform ban could not guarantee the effective use of the internet and hence an exemption under Article 101(3) TFEU cannot be presumed with sufficient certainty.
20. Moreover, while the European Commission considers that the functions of platforms are unnecessary for online distribution, this would not apply to advertising channels. According to the European Commission, platforms merely offer an additional sales channel to the retailer's online offering, and hence are not indispensable to sell goods online, while advertising channels increase users' awareness of a retailer's online store. This is considered necessary for the effective use of the internet for the online sales. However, as already discussed in the wake of the ASICS decision, the key issue is to what extent differential treatment of online sales channels and advertising channels, particularly price comparison services, is appropriate.

²⁴ VBER, Art. 4(e) (i) and vertical guidelines, para. 208.

²⁵ VBER, Art. 4(e) (ii).

²⁶ Vertical guidelines, para. 206(g).

²⁷ According to Statcounter, Google holds a market share of over 90% in the search engine market (<https://gs.statcounter.com/sea...>, last accessed 28.11.2022).

²⁸ VBER, recital 5 as well as European Commission [2020], Commission Staff Working Document, Evaluation, VBER, page 17.

5 Relevance of platforms in online distribution

21. According to the European Commission's e-commerce sector inquiry from 2017²⁹ most retailers in the EU rely solely on their own online store (61%) and few sell exclusively on platforms (4%). Almost a third of retailers (31%) use both sales channels.³⁰ Such facts lead the European Commission to conclude that platform bans do not prevent the effective use of the internet in general, independent of the market.³¹ However, the proportions differ markedly by country and retailer type. The share of retailers using platforms is 62% in Germany.³² Smaller retailers typically use platforms only or make a large part of their sales on platforms, while larger retailers usually sell solely via their own online store or generate the majority of sales there.³³ Hence, the per se ban could be problematic for countries and retailers where platforms play a greater role in online sales. Smaller retailers that are not permitted to sell their products on a platform have to compete with larger retailers (with correspondingly larger marketing budgets) on price comparison services. This could make online sales much more difficult for these retailers.
22. While the importance of platforms for online sales varies by retailer type, for consumers, platforms appear to be an important online sales channel more generally. The survey for the 2020 study on consumer purchasing behaviour in Europe, carried out for the evaluation of the VBER ("study on consumer purchasing behaviour in Europe"), found that the proportion of consumers who made their last purchase on a platform is highest for online purchases across all product categories surveyed. This varies by product category, ranging from 32% for clothing and footwear to 64% for home and garden equipment.³⁴ Platforms thus appear to be the most important sales channel for consumers buying online in all product categories surveyed and to play a greater role in some product categories than in others.
23. Assuming that platforms will continue to increase in importance among retailers (as predicted by the European Commission³⁵) and the continuing dynamic trends in online distribution, it could therefore be problematic to classify platform bans as compliant with competition law for at least 10 years, until the next revision of the VBER. Moreover, it is unclear why the VBER has not at least accounted for the varying importance of platforms depending on the product category or retailer type.

6 Platforms vs. price comparison services

24. Whether restrictions on platforms and advertising channels are to be assessed differently also depends on whether they are in the same market. In the European Commission's previous decisional practice, platforms and online advertising channels are defined as separate markets. For example, in the European Commission's decision in the "Google Shopping" case, different markets were assumed for merchant platforms, comparison shopping services (i.e. price comparison services), and online search advertising platforms.³⁶ The European Commission

²⁹ See endnote 4.

³⁰ Working document e-commerce sector inquiry, para. 447.

³¹ Working document e-commerce sector inquiry, paras. 503- 504.

³² Working document e-commerce sector inquiry, Figure B.59.

³³ Working document e-commerce sector inquiry, paras. 449-451.

³⁴ European Commission [2020], Study on consumer purchasing behaviour in Europe, in Support studies for the evaluation of the VBER, Final report. The product categories include "Cosmetics and Hair", "Clothing and shoes", "House and garden equipment" and "Consumer electronics and large electrical appliances", Figure 3-23, 3-53, 3-83, 3-113.

³⁵ Working document e-commerce sector inquiry, para. 456.

³⁶ European Commission [2017], Case AT.39740 - Google Search [Shopping] ["Google Shopping"], para. 192.

concluded that platforms serve a different purpose to price comparison services for both users and online retailers.³⁷ Price comparison services act as intermediaries that enable the user to compare offers from different retailers and platforms. The user can thus find the best offer and be directed by the price comparison service to another website to make the purchase. Platforms, on the other hand, are a place where retailers and consumers can conclude a purchase, and this coincides with consumers' perceptions of platforms.³⁸

25. Moreover, according to the European Commission, price comparison services enable online retailers to direct users to their own website while retaining full control over sales activities. Platforms, on the other hand, offer a full service that does not require a website and most aspects of commerce, such as online store design, transaction processing and customer support are provided. In addition, platforms offer after-sales support including return options, which is not the case for price comparison services.³⁹ Price comparison services therefore tend to list larger retailers which prefer to handle their business and customer interactions themselves rather than leave it to platforms such as Amazon, which they see as competitors. Platforms, on the other hand, often include small and medium-sized retailers with limited brand awareness; these may not want to or are unable set up their own online stores.⁴⁰

7 Relevance of platforms as advertising channels

26. In contrast to the European Commission's assessment in Google Shopping, platforms tend to play a greater role during the entire purchasing process rather than only at the conclusion, when the purchase is made. As stated, the European Commission found that platforms are perceived by consumers as the point in the buying process where the purchase is concluded. This was based on a market study from 2014 that included a survey in which a large proportion of respondents stated that platforms mainly serve the purchasing of products.⁴¹
27. Additionally in Google Shopping, the European Commission stated that the search function of the two types of services is not comparable from the users' point of view: while price comparison services list a large number of offers, including offers from different platforms, platforms list only offers from retailers on their platform.⁴²
28. A different picture emerges from the results of the study on consumer purchasing behaviour in Europe. The proportion of consumers who use platforms in the inspiration and information phases of the purchasing process is the highest in almost all product categories.⁴³ It is also striking that this share is at least as high or even higher than the one for price comparison services in both phases across all product groups. Even in the case of the supposedly most important function of the latter, the comparison of prices, platforms are used at least as often or more often by consumers.⁴⁴ It is clear therefore that platforms are very important, if not more important, than price comparison services for consumers during the phases prior to the actual purchase, (the

³⁷ Google Shopping, para. 217.

³⁸ Google Shopping, paras. 218-219.

³⁹ Google Shopping, paras. 218-219.

⁴⁰ Google Shopping, paras. 221-222.

⁴¹ Google Shopping, para. 220(6).

⁴² Google Shopping, para. 228.

⁴³ This share refers to the part of consumers who use online sources in this phase. Study on consumer purchasing behaviour in Europe, Figure 3-7, 3-14, 3-37, 3-44, 3-67, 3-74, 3-97, 3-104.

⁴⁴ Study on consumer purchasing behaviour in Europe, Table 3-43, 3-47, 3-51, 3-55.

“inspiration and information” phases), which are attributable to the area of advertising. This role of platforms, i.e. beyond the purchasing process, is also made clear by the commitments agreed in the European Commission’s investigation of Amazon. The tech giant committed to display a competing offer next to the so-called “buy box” to broaden consumers’ choices.⁴⁵ A platform ban would thus not only prohibit the retailer from using that sales channel but may also make it considerably more difficult to advertise its products.

8 Direct purchase functionality as decisive distinguishing feature

29. The division into platform and price comparison service appears to particularly depend on whether a purchase is possible on the corresponding page or whether the user is redirected to the retailer’s page. In fact, some price comparison services now offer the ability to purchase directly on the site (e.g. Idealo). Currently, however, this applies only to a few services and a few retailers. The European Commission stated that the direct purchase functionality can change the business model to such an extent that the service no longer falls into the category of price comparison service, especially if the function is used systematically for all or most retailers and offers. This is because the direct purchase functionality changes the relationship with the customer and other regulations apply.⁴⁶ Even if the introduction of such a direct purchase functionality is associated with high costs according to the European Commission, it is nevertheless clear that the boundaries between platforms and price comparison services can quickly become blurred based on this delineation. Consider a price comparison service initially offering a direct purchase function for 40% of its products and this share then increases to over 50%, such that the service might then be classified as a platform. For the user, there is no change in respect of whether, how and for what purpose he uses the site. Only the purchase would possibly now be processed via the platform, whereas previously the customer had to make one more click to buy the product on the retailer’s site. However, this new classification would be sufficient to prohibit the retailer from using this service if the supplier operated a platform ban.

9 Conclusion

30. Platforms play an important role in online sales, while this varies by country, product and retailer. Where platforms account for a high proportion of online sales, a ban could prevent effective online distribution. Given the dynamics of online sales and the expectation that the role of platforms will continue to grow in importance, an exemption of platform bans for 10 years under VBER appears restrictive.
31. While platforms serve the purpose of concluding purchases, they also play an important role in the pre-sales phases. This role appears to be as important as advertising channels, particularly price comparison services; platforms appear to serve the dual role of sales channel and advertising channel. It also appears that the European Commission’s market definition of platforms and price comparison services strongly depends on the use of the direct purchase functionality and the boundaries can become blurred. The legal certainty gained could be partially lost should price comparison services and listed online retailers make more use of the direct purchase option in the future.

⁴⁵ European Commission (2022), Case AT.40462 – Amazon Marketplace and AT.40703 – Amazon Buy Box, para. 274.

⁴⁶ Google Shopping, paras. 240-241.

32. Therefore, the differential treatment of platforms and advertising channels in the VBER does not appear to be appropriate given the dynamics of online retailing. To ensure the effective use of the internet and minimise the risk of a "false positive", rather than maintaining the two exceptions from the hardcore restriction, each case should be determined on the basis of the importance of the two channels. This contrasts to the aim of preventing "false negatives", to facilitate the enforcement of Article 101 TFEU and to create legal certainty for companies. Given the discussion above, however, for consistency platform bans and advertising channel bans should be treated equally.
33. It remains to be seen to what extent the national competition authorities will diverge from the vertical guidelines and possibly define "*other restrictions of online sales*" more narrowly and thus assess platform bans more stringently than the European Commission.⁴⁷ This is likely to be so for cases where the German FCO is responsible. It will also be interesting to observe how the relative importance of online advertising channels and sales channels in the relevant market is taken into account in individual assessments.

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⁴⁷ While the VBER is binding for national competition authorities and courts, this does not apply to the vertical guidelines. However, these are typically used in the evaluation [vertical guidelines, para 1.1.[2] as well as European Commission (2020), Commission Staff Working Document, Evaluation, VBER, page 18].