

### Internet & Antitrust: An overview of EU and national case law

**Anticompetitive practices, Foreword, Internet, Distribution agreement, Abuse of dominant position, Remedies (antitrust), Market definition, Market power, Dominant position, Predatory pricing, Vertical restrictions, Judicial review, Exemption (block), Exemption (individual), Preliminary ruling (Art. 267 TFEU), Margin squeeze, All business sectors**

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

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## I. Introduction

The last decade has seen Internet-based “disruptive innovation” in many sectors of the economy, not least communications, media, advertising and retail. This unprecedented development has brought about changes that would have been unimaginable until very recently: Websites, podcasts, online video and e-books enrich the diversity of content and the user experience while threatening to displace the traditional print and electronic media. Online advertising offers new platforms, ads based on user preferences or context (which many users prefer over the irrelevant display ads that used to clog websites) and auction-based dynamic pricing, while competing with offline advertising. Small and large businesses alike enjoy a new global reach thanks to online retail, while small shops lead an increasingly precarious existence. Innovation is rife in this sector, and new developments from left field can wrongfoot firms whose position appeared unassailable. The recent growth of social networking is an example. This constant innovation and the new business models made possible by the Internet require the European Commission, National Competition Authorities (“NCAs”) and courts to refine and adapt well-worn antitrust principles for use in this new context.

This special e-Competitions edition brings together articles discussing competition law developments at both the national and EU levels, as competition authorities seek to apply antitrust principles to the new world of online services. The changes brought about by the Internet are sweeping and cut across various sectors of the economy; hence, the cases reported in this special edition concern numerous industries and legal issues. From amongst this wealth of material, we select a few key themes: Section II will address the application of antitrust law to online services. Section III comments on the distribution issues which have arisen with the advent of online sales, and in particular the application of the EU antitrust rules on vertical restraints to online distribution. Finally, Section IV will deal with the telecommunications sector, including the provision of Internet access, and the challenges of applying antitrust law to this recently liberalized sector.

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## II. Online Services

The area of online services is characterized by spectacular growth. A variety of online search engines have emerged (such as *Google*, *Bing*, *Yahoo!*, but also newcomers with colourful names such as *Wolfram Alpha*, *Blekkio*, and *DuckDuckGo*, social search providers, and a host of specialist search providers), online shopping and price comparison sites, online video and music streaming services (e.g., *YouTube*, *Spotify*), and online social networks (e.g., *Facebook*, *Twitter* and *Google+*). The emergence of these online services – mostly free and advertising-funded - has created new products, dramatically increased consumer welfare, and changed consumer habits. New products and firms capture the imagination for some time, enjoy rapid growth, and may attract the attention of antitrust regulators, before they are leapfrogged by rivals with an unexpected new angle. A variety of antitrust complaints (primarily based on Article 102 TFEU or its national equivalents) have been filed at both the EU and national levels, by both traditional and online businesses that, at times, struggle to adapt to the continuously shifting online landscape. It seems fair to say that never in the history of antitrust has innovation been so rampant, creating the risk that antitrust decisions “fix” yesterday’s problems, or impose remedies with an impact on product design that are outdated by the time they are adopted.

The focus of complaints to antitrust authorities thus far has been in the areas of online search and advertising [1]. Authorities face the challenge of both properly delineating the relevant markets and assessing the strength of a player’s market position, in novel circumstances where antitrust principles are difficult to apply. Market definition and dominance analysis are complicated by the fact that online services inhabit a particularly dynamic competitive space, and consumers and advertisers can relatively easily switch and multi-home [2]. Competition is cutthroat. The lines between categories (such as “general search”, “vertical search”, “social networking search”, “product comparison”, etc.) are constantly moving, while at the same time online services continue to compete against their “real-world” equivalents (for example, as the Commission recognized in *Microsoft/Yahoo*, online search engines may compete against online directories or even offline search formats) [3]. Further, online services are typically made available for free to the end user, making it impossible to apply the traditional SSNIP test for market definition and defying realistic attempts to prove dominance. If market power is defined as “power over price”, and, as the Commission found in *Microsoft/Skype*, consumers tend to resist attempts to impose any price for free services, how can there ever be a finding of dominance in free services? [4] If dominance is defined as the ability to behave independently of competitive pressure, how can there be dominance in online markets where service suppliers have to innovate or die? In multisided markets where the trading relationship between the end user and suppliers is replaced by a trading relationship between supplier and advertiser, it seems that the relevant consumer-facing antitrust “market” should be defined as advertising. Indeed, the European Commission has to date not defined a market for free Internet search engines, but has based its analysis in merger decisions on the parties’ positions in the relevant advertising markets [ 5].

The decisions reported in this volume show that courts and NCAs continue to grapple with these issues. Both the European Commission and NCAs have taken the view that online advertising is sufficiently different from traditional forms of offline advertising to constitute a separate product market. The European Commission has suggested that since online advertising allows advertisers to precisely target their audience by combining various types of information (e.g., geographical location, time of day, areas of interest, the previous Internet use record of the user and their search preferences), it constitutes a separate market from offline advertising, where such precise targeting is not possible [6]. While the question of whether further submarkets should be delineated within online advertising has been left open at the EU level [7], NCAs have explored the possibility of further segments, such as, e.g., separate markets for ads which appear on search engines (“search ads”) and those appearing on other websites (“non-search ads”) [ 8]. One can legitimately ask whether these narrow markets are a reflection of reality, in a world where advertising agencies base their budget allocation decisions on relative changes in the conversion rate of different kinds of advertising. In other words, where a Euro invested in a television ad has roughly the same return on investment (“ROI”) as a Euro invested in a search advertising campaign for the same product, and budget allocations are adjusted in response to relative shifts in ROI for each type of ad, does that not suggest a single advertising market instead of separate submarkets?

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Beyond market definition and the assessment of market power, the free business models employed by online service providers may also lead careless courts or authorities astray. For example, if “predatory pricing” is defined as selling at a price below an appropriate cost measure, applying this rule to free online services without appropriate modification may lead to absurd results. At least one national court has recently done just that: in the recent *Bottin Cartographescase*, the Paris Commercial Court condemned *Google’s* offer of some of its *Google Maps* services as “predatory”, on the simplistic ground that they are made available to consumers for free (and therefore by definition at a price below *Google’s* average variable costs). Remarkably, the Court ignored the two-sided nature of the business, and did not engage in any analysis of whether *Google* covered its costs through sales of advertising [9]. It is to be hoped that this judgment will be overturned on appeal: such an analysis calls into question the essence of the advertising-funded business model in multisided markets that has spurred recent innovation in online services, enabling countless new web services to be made available for free to consumers.

As a result of complaints alleging abuse of dominance in the domain of online search and advertising, NCAs have in some cases imposed remedies. For example, following a complaint from the Italian Federation of Newspaper and Periodical Publishers, *Google* modified its online search engine and advertising policies. In particular, *Google* allowed website publishers to opt out from a listing in *Google* News results, and committed to enhanced transparency *vis-À-vis* its advertisers (e.g., providing information on the total number of displays by ad, the number of clicks, the click-through rate, the cost of a thousand displays by ad, and an estimate of the total revenue produced) [10]. Similarly, following an investigation by the French NCA, *Google* committed itself to enhancing the transparency of its AdWords online advertising policies [11]. In fast-moving online environments, such settlements seem more appropriate and efficient than protracted negotiations. But they also present a danger, to the extent that settlements might in certain cases hamper product innovation or hinder legitimate competitive response to unforeseen new developments. They also raise the spectre of inconsistencies in policy objectives: One wonders what the French Ministry of Transport thinks of an antitrust policy that forces *Google* to advertise the very radar detectors that allow French speed devils to avoid the speed detectors that the Ministry designed to improve traffic safety.

## IV. Internet Sales and Vertical Restraints

Over the past decade, the web has quickly become a powerful channel for the distribution of goods. Its development has brought about significant changes in distributors’ strategies, depending on whether they saw the Internet as an opportunity or a threat to their existing sales networks. The expansion of the Internet has also created new economic players, including online-only sellers, such as *eBay* and *Amazon*.

Until recently, EU law gave little in the way of guidance on the application of the rules on vertical restraints to the online distribution of goods. The 1999 Vertical Restraints Block Exemption Regulation (“VRBER”) [ 12] and the accompanying Guidelines [13] left significant discretion to suppliers in how they controlled online distribution. Indeed, the few paragraphs in the 1999 VRBER on online sales were only added in a penultimate draft by the European Commission. The Guidelines prohibited blanket bans on online sales, but questions such as free-riding and online sales in a selective distribution context were not addressed in detail. This may go some way to explaining the lack of coherency in the application of antitrust rules regarding vertical restraints to online sales by NCAs and national courts. The 2010 VRBER and its accompanying Guidelines go some way to remedying this deficit [14].

The evolution of the Internet as a new distribution channel, together with the lack of guidance on how antitrust law should be applied to it, has resulted in a variety of national case law attempting to balance competition concerns against distributors’ efforts to control their distribution networks. Some distributors banned the use of Internet sales in their distribution networks altogether, citing varying reasons such as consumer health concerns [15] or the fear that online sales would damage the prestigious image of a brand [16]. When approached by NCAs, most distributors entered into

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settlements and abandoned such blanket bans. In some cases, however, NCAs had to assess whether a ban on online sales restrained both “active” and “passive” sales, thus rendering it a “hardcore” restriction that could not benefit from the VRBER. In all cases, the NCAs answered this question in the affirmative, confirming that a ban on online sales deprived the enterprises of the benefit of the block exemption.

The ECJ confirmed this principle in 2010 in a preliminary ruling in the *Pierre Fabre* case. *Pierre Fabre*, a multinational pharmaceuticals and cosmetics company, had prohibited their selective distributors from selling online. The referring court asked whether such a general and absolute ban on selling contract goods via the Internet could constitute a ‘hardcore’ restriction, which would not be covered by the VRBER, but would be potentially eligible for an individual exemption under Article 101(3) TFEU. The ECJ held that such a ban on Internet sales would amount to a restriction on both active and passive sales, and therefore could not benefit from the block exemption. Interestingly, the ECJ did not consider a website to be a “place of establishment”, but rather an alternative means of selling and marketing goods. In so finding, it rejected the argument that operating through the Internet is the equivalent of operating out of an “unauthorized place of establishment” (a practice that can legitimately be prohibited in a selective distribution agreement without infringing Article 101 TFEU). Finally, while the ECJ confirmed that such a ban could, in principle, benefit from an individual exemption under Article 101(3) TFEU, the ECJ declined to give further guidance on the issue [17].

National precedents have yet to provide a clear example of a legitimate objective that could be used to justify a ban on Internet sales. While undertakings routinely claim that such restrictions are justified by the nature of the products at issue (e.g., by definition, online perfume stores cannot allow customers try products before ordering), NCAs seem more and more reluctant to take this factor into consideration. For example, in a 2006 decision, the French NCA noted that a restriction on the online sales of certain products and services (such as perfumes and hi-fis) could be justified because their characteristics cannot be described or reproduced, but dismissed the same argument in relation to the sale of watches [18]. Similarly, in 2008, the French NCA found *Pierre Fabre’s* restriction of Internet sales of personal care and cosmetics products to be anticompetitive [19].

Restraints on Internet sales other than outright bans have led to diverging approaches in the case-law, but it is difficult to discern whether these differing outcomes result from the extent of the restrictions in question or from the different approaches of NCAs. The German NCA has issued the strictest decision in this regard. In *CIBA*, the German NCA rejected the argument that restrictions imposed on online sales of contact lenses were, given the specific nature of the product, necessary to protect consumer health. The German NCA found that less restrictive options could have been adopted to fulfill this purpose, such as requiring proof of a recent contact lens fitting. Further, in the case of *eBay*, the German NCA found that CIBA’s real concern was the price pressure that sales on *eBay* would exert on its products. It concluded that the restrictions in question were illegal [20].

On the other hand, a Dutch court held that a distributor had successfully invoked the Block Exemption Regulation through its issuance of different sets of supply conditions to online retailers compared to traditional retailers, because of the difference in added value between the two distribution channels. For example, the traditional retailers offered personalized advice and installation, whereas the online retailers did not [21]. Likewise, in *PMC distribution v. Pacific Cr ation*, the Paris Court of Appeal upheld the legality of a selective distribution network that required a one-year period between physical and Internet sales, and that prohibited the online distribution of new products for a year following their introduction to the market [22].

In most of these decisions, it appears that a pragmatic approach was taken to restrictions on distribution of goods via the Internet, with NCAs and courts acknowledging the need to protect investments by selective distributors against free riders, while balancing this with the interests of the online rival, albeit to varying degrees. At times, however, somewhat controversial decisions have been issued. For example, in *Christian Dior, Kenzo Parfums, Parfums Givenchy and Guerlain*

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v. *eBay*, the Paris Commercial Court appeared to favour the traditional “bricks and mortar” business model when it condemned *eBay*'s online sales. The Commercial Court laid the burden of proof on *eBay* to show that the selective distribution network in question restricted competition and as such, could not benefit from the EU block exemption [23]. Unless one assumes that the Paris Court took it as a given that perfumes must be tested each time a consumer buys a bottle, and past olfactory experience is unreliable, this reasoning arguably runs contrary to [Regulation 1/2003](#) [24], which states that it is for the party claiming the benefit of an exemption to prove that its requirements are fulfilled. The Commercial Court also held that the Internet resale of products belonging to selective distribution networks would not be permissible. This runs counter to previous decisions of the French courts, which held that the reselling of products by an unauthorized distributor, even where the supplier has set up a selective distribution network, is not in itself an unlawful act.

The Guidelines accompanying the 2010 VRBER [25] set out detailed guidance for agreements involving restrictions of online sales. Although they are not binding on them, these Guidelines are likely to exert a good deal of influence over the decisions of national courts and NCAs, and will hopefully ensure greater consistency between decisions in the future. The Guidelines reiterate the principle that a ban on Internet sales amounts to a ban on passive sales and is therefore a hardcore restriction that cannot qualify for exemption – a rule that could be criticized in situations where free-rider problems undermine investments by brick-and-mortar outlets as a result of which overall output decreases. Further, the Guidelines give substantial guidance on the extent to which restrictions may be implemented in relation to selective distribution networks. For example, every distributor must be allowed to use the Internet to sell products, but a supplier may require that the distributor have a brick and mortar business before allowing it to join the supplier's distribution network. Overall, the criteria imposed on online sales must be equivalent to those for sales from physical premises, although differentiation between the two can be justified where this reflects objective differences between the two distribution channels. For example, in order to combat free riding, the Guidelines state that undertakings may impose quality and service conditions on online sellers, so long as equivalent conditions are applied to offline sales. These Guidelines should go some way to promoting consistency in the decisions of NCAs concerning vertical restraints on Internet sales. As the Internet continues to evolve as a distribution channel, it will be important for the Commission to update the Guidelines to ensure that the rules keep pace with market developments, and to verify whether free rider concerns are as serious as they are sometimes said to be.

## IV. Provision of Internet Access

Since the liberalization of the telecommunications industry in 1998, NCAs across Europe (often acting in conjunction with sector-specific regulators and the Commission and the BEREC [26]) have made great strides to ensure the maintenance and creation of competition in the sector. While privatization and legislative reforms mean that telecommunications in EU countries are no longer the exclusive preserve of the public sector, many of the former State monopolies continue to hold market power at both the retail and wholesale levels. In particular, at the wholesale level, the incumbents are often one of a small number of regional network providers [27]. Since access to wholesale Internet connectivity at a competitive rate is essential for competition at the retail level (where the incumbent network operator may also be active), incumbents continue to play a significant “gatekeeper” role for competition in retail Internet access.

A series of decisions by NCAs reported in this volume illustrates the application of competition law to telecommunications. The most common allegation is that incumbent providers take advantage of a dominant position by refusing to allow a competitor access to their upstream networks [28], or by engaging in margin squeezing, *i.e.* artificially lowering prices at the retail level or raising prices at the wholesale level in order to eliminate equally efficient downstream competitors [29]. NCAs have also investigated other alleged abusive conduct by dominant telecommunications companies, such as inviting sales representatives to denigrate competitors [30], exploiting their privileged access to customer information [31], and reducing the quality of data transmission for competitors making use of other regional networks [32]. In addition, increased competition in the telecommunications sector has led operators to adopt aggressive pricing strategies to gain and maintain

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customers. Some of these aggressive tactics may fall foul of Article 102 TFEU: While sales promotions such as the provision of Internet and telephone services at “bundled” rates are permissible for non-dominant providers (even if they result in below-cost selling) [33], dominant providers have been found to infringe Article 102 TFEU for engaging in alleged predatory pricing by offering Internet access below cost [34]. NCAs can impose serious fines [35], especially for repeat infringements [36], although in other instances show a readiness to consider commitments [37]. Even new NCAs, such as the Cypriot Commission for the Protection of Competition have made their mark [38].

Finally, despite the liberalization of the telecommunications industry, it is worth noting that state intervention continues to play a substantial role in the development of broadband infrastructure. In particular, the European Commission and national authorities recognize the public need for broadband Internet access across all regions of Europe. While broadband Internet access is a growing and economically attractive sector, state intervention may be justified where there are too few incentives for private operators to invest in infrastructure, particularly in marginal geographical areas. The Commission therefore adopted a set of Guidelines in 2009 governing the state aid rules for the public funding of broadband networks [39]. These Guidelines recognize the justification for state aid in certain circumstances, subject to certain safeguards. In particular, any publicly funded network must provide open access to third-party networks who wish to make use of it. These rules have been used by the Commission to ensure the preservation of competition in the sector, while at the same time recognizing the general public interest in the creation of broadband services in all areas of the EU [40].

## V. Conclusion

The articles in this special e-Competitions issue throw light on the European Commission’s and NCAs’ ongoing efforts to apply antitrust principles to the novel situations created by the advent of the Internet. The provision of universally available broadband Internet access is of paramount economic importance, and, to that end, NCAs are making efforts to ensure that the telecommunications sector remains competitive. In parallel, national courts and NCAs continue to grapple with the challenges posed by the evolution of online services, and the refinement of antitrust principles for application to this highly dynamic sector. Concerning online distribution, the law continues to develop as we see NCAs and courts adopt differing stances towards the limitations imposed by certain companies on online sales. In some decisions, NCAs and courts have taken a hard-line stance against such limitations, while in others they have tended to favor traditional retailers over online players. It remains to be seen how these differences will evolve in the future, particularly in light of the 2010 VRBER and its accompanying Guidelines, which hopefully will lead to greater consistency between NCAs.

[1] These include complaints by *Foundem* against *Google* (See [Nicolas Petit, \*The European Commission is called on to assess whether a company in the online search market has abused of its dominant position under Art. 102 TFEU \(Microsoft, Google\)\*, 30 March 2011, e-Competitions, n 36317](#) ); the *Federation of German Newspaper Publishers* and the *Association of German Magazine Publishers* against *Google*, *NavX* against *Google* (See [Charles Saumon, \*The French NCA accepts commitments relating to online advertising service \(Google AdWords\)\*, 28 October 2010, e-Competitions, n 33290](#)), and the Italian Federation of Newspaper and Periodical Publishers against *Google News Italia*. (See [Cedric Manara, \*The Italian Competition Authority examines commitments regarding the functioning of Google News \(FIEG v. Google\)\*, 13 May 2010, e-Competitions, n 32135](#) ) .

[2] As discussed in European Commission, 7 October 2011, [Case COMP/M.6281, \*Microsoft/Skype, multi-homing refers to consumers using more than one communications services provider or platform or OS for communicating\*](#) .

[3] European Commission, 18 February 2010, [Case COMP/M.5727, \*Microsoft/Yahoo! Search Business\*](#), at 86. See [Andrea Amelio, Dimitrios Magos, \*The European Commission clears merger in the internet search and search advertising services markets \(Microsoft, Yahoo\)\*, 18 February 2010, e-Competitions, n 34853](#) and [Frederic Depoortere, \*The European\*](#)

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*Commission clears in phase I a merger in the internet search market addressing the concept of concentration and conducting a detailed two-sided market analysis (Microsoft, Yahoo!Search Business)*, 18 February 2010, e-Competitions, n 35647 .

[4] As the Commission noted in *Microsoft/Skype*, charged for this service, the large majority of consumers would switch to alternative providers Facebook, Viber, ooVoo or Fring. See European Commission, 7 October 2011, *Case COMP/M.6281, Microsoft/Skype*.

[5] European Commission, 18 February 2010, *Case COMP/M.5727*, Microsoft/Yahoo! Search Business, at 84.

[6] European Commission, 11 March 2008, *Case COMP/M.4731*, Google/DoubleClick, at 45. And the approach followed in FIEG v Google, *Cedric Manara, The Italian Competition Authority examines commitments regarding the functioning of Google News (FIEG v. Google)*, 13 May 2010, e-Competitions, n 32135 .

[7] European Commission, 18 February 2010, *Case COMP/M.5727*, Microsoft/Yahoo! Search Business, at 75.

[8] See *Cedric Manara, The Italian Competition Authority examines commitments regarding the functioning of Google News (FIEG v. Google)*, 13 May 2010, e-Competitions, n 32135 .

[9] Paris Commercial Court (*Tribunal de commerce de Paris*), 31 January 2012, *Bottin Cartographes v Google*. The Court held that Google did not cover its variable costs and thus, was engaging in Google was providing its Google Maps API services for free, without looking any further into Google

[10] See *Cedric Manara, The Italian Competition Authority examines commitments regarding the functioning of Google News (FIEG v. Google)*, 13 May 2010, e-Competitions, n 32135 .

[11] Following a complaint concerning devices used to evade road traffic speed cameras, Google accepted commitments to clarify which road navigation services advertisements are authorized or prohibited, and to introduce an information and notification procedure. See *Charles Saumon, The French NCA accepts commitments relating to online advertising service (Google AdWords)*, 28 October 2010, e-Competitions, n 33290 .

[12] Commission *Regulation n 2790/1999* , of 22 December 1999, on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (*OJ L 336, 29 december 1999, p. 21-25*).

[13] Commission Notice - *Guidelines on Vertical Restraints [(2000/C 291/01) ; OJEC C 291, 13 October 2000, p. 1-44*.

[14] See *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 L 102, 23.4.2010, p. 1-7*.

[15] In CIBA, this argument was not accepted because less restrictive options could have been adopted to achieve the same aim, for example by requiring proof of a recent contact lens fitting. German Federal Cartel Office (Bundeskartellamt), 25 September 2009, Case n B 3 - 123/08, *CIBA, Tobias Caspary, The German Federal Cartel Office issues third fine for resale price maintenance (CIBA)*, 25 September 2009, e-Competitions, n 29823 .

[16] The ECJ in *Pierre Fabre* held that this was not a legitimate aim for restricting competition: Justice rules that absolute bans on Internet sales are prohibited *Joseph Vogel, The European Court of Justice rules*

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*that absolute bans on Internet sales are prohibited (Pierre Fabre Dermo-Cosmetique)*, 13 October 2011, e-Competitions, n 39725 .

[17] Court of Justice of the European Union, 13 October 2011, *Pierre Fabre Dermo-Cosmétique* . See [Lila Ferchiche, A French Court of Appeal makes a reference for a preliminary ruling to the ECJ on whether a general and absolute ban on Internet sales by approved distributors does constitute a «hardcore restriction» on competition by object within the meaning of Art. 81.1 EC \(Pierre Fabre Dermo-Cosmétique\)](#) , 29 October 2009, e-Competitions, n 29700 and [Joseph Vogel, The European Court of Justice rules that absolute bans on Internet sales are prohibited \(Pierre Fabre Dermo-Cosmetique\)](#), 13 October 2011, e-Competitions, n 39725 .

[18] French Competition Council (*Conseil de la concurrence*), 24 July 2006, [Decision No 06-D-24, pertaining the distribution of watches marketed by Festina France](#). See [Laura Cerny, François Doridou , The French Competition Council accepts commitments to modify selective distribution agreements as regards access to the network and advertising on the Internet \(Festina\)](#), 24 July 2006, e-Competitions, n 12128 .

[19] French Competition Council (*Conseil de la concurrence*), 29 October 2008, [Decision No 08-D-25, regarding practices in the sector of distribution or personal care and cosmetic products sold upon pharmaceutical advice, Pierre Fabre Dermo-Cosmétique](#) . See [Juliette Goyer, The French NCA sanctions the prohibition of Internet sales imposed on the members of a selective distribution network, under Art. 81.1 EC \(Pierre Fabre Dermo-cosmetique\)](#), 29 October 2008, e-Competitions, n 22891 and [Omblin Ancelin, Charles Saumon, The French NCA fines a cosmetics manufacturer for prohibiting its selective distributors from selling its products on the Internet \(Pierre Fabre Dermo-Cosmetique\)](#), 29 October 2008, e-Competitions, n 22998 .

[20] German Federal Cartel Office (Bundeskartellamt), 25 September 2009, Case n B 3 - 123/08, *CIBA, Tobias Caspary, The German Federal Cartel Office issues third fine for resale price maintenance (CIBA)*, 25 September 2009, e-Competitions, n 29823 .

[21] District Court of Zutphen (Rechtbank Zutphen), 30 December 2005, Case 74100, KG ZA 05-309, *Groen Trend B.V. and Schouten Keukens B.V. / Atag Etna Pelgrim Home Products B.V.*. See [Ariela Stoffer, The Dutch District Court of Zutphen holds in an interim judgment that the Vertical Restraints Block Exemption Reg. n° 2790/99 covers the application of dissimilar terms and conditions of supply to internet retailers \(Groen Trend & Schouten Keukens/AEP Home Products\)](#), 30 December 2005, e-Competitions, n 427 .

[22] See above.

[23] Paris Commercial Court (*Tribunal de commerce de Paris*), 30 June 2008, *Christian Dior, Kenzo Parfums, Parfums Givenchy and Guerlain v. eBay*. See [Frederic Manin, A French Court condemns a leading auction website to pay damages to perfume makers for a violation of its selective distribution networks and rejects the defendant based on Art. 81 EC \(Parfums Christian Dior, Kenzo Parfums, Parfums Givenchy and Guerlain v. eBay\)](#), 30 June 2008, e-Competitions, n 20065 .

[24] Council [Regulation \(EC\) n 1/2003](#) , of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ([OJEU L 1, 4 January 2003, p. 1-25](#)).

[25] See [Commission Notice Guidelines on Vertical Restraints ; \(OJ C 130, 19.05.2010, p. 1\)](#).

[26] The Body of European Regulators for Electronic Communications ( [Regulation \(EC\) n 1211/2009](#), of the European Parliament and of the Council of 25 November 2009 establishing the Body of European

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Regulators for Electronic Communications (BEREC) and the Office ( *OJ L 337, 18.12.2009, p. 1* ). Its role is to ensure the consistency of the EU regulatory framework by, for example, delivering opinions on the NRAs concerning market definition, designation of undertakings with significant market power and the imposition of remedies, and, upon request, providing assistance to NRAs.

[27] See [Sara Lembo, \*The Italian Competition Authority accepted the commitments offered by Telecom Italia following its investigation into the latter internet access services markets\*, 11 December 2008, e-Competitions, n 24285](#) and [Anna Pisarkiewicz, \*A Polish Court of Appeal quashes the first instance ruling reversing the NRA telecommunications incumbent for tying of Internet services contrary to cost-oriented prices principle \(Telekomunikacja Polska\)\*, 10 April 2008, e-Competitions, n 24305](#) ; [Jacques Derenne, Lucas Niedolisteck, \*The French Competition Authority imposes an unprecedented EUR 80 M fine to the telecommunications incumbent for abuse of a dominant position on the broadband internet market \(France Telecom\)\*, 7 November 2005, e-Competitions, n 315](#) . For a more detailed description of the interaction between local and regional networks in the Internet access sector, see: [Aldona Kwapisz, \*The Polish Competition Authority fines the largest telecom operator a record fine of Eur. 20 M for abusing its dominant position on the Internet access market \(TP S.A.\)\*, 20 December 2007, e-Competitions, n 15528](#) .

[28] See [Jacques Derenne, Lucas Niedolisteck, \*The French Competition Authority imposes an unprecedented EUR 80 M fine to the telecommunications incumbent for abuse of a dominant position on the broadband internet market \(France Telecom\)\*, 7 November 2005, e-Competitions, n 315](#) .

[29] See, for example [Luís D. S. Morais, \*The Portuguese Competition Authority adopts landmark decision concerning an abuse of dominant position case in the Internet broadband access markets \(PT and ZON\)\*, 2 September 2009, e-Competitions, n 29131](#) .

[30] See [Fanny Mejane, \*The French Competition Council inflicts a EUR 45 M fine on the telecommunications incumbent for abusive discrimination and denigration on the ADSL high-speed Internet access market and specifies the notion of repeated infringements \(France Telecom-Wanadoo\)\*, 15 October 2007, e-Competitions, n 20347](#) .

[31] See [Sara Lembo, \*The Italian Competition Authority accepted the commitments offered by Telecom Italia following its investigation into the latter internet access services markets\*, 11 December 2008, e-Competitions, n 24285](#) .

[32] See [Aldona Kwapisz, \*The Polish Competition Authority fines the largest telecom operator a record fine of Eur. 20 M for abusing its dominant position on the Internet access market \(TP S.A.\)\*, 20 December 2007, e-Competitions, n 15528](#) .

[33] See [Fredrik Lindblom, \*The Swedish Market Court rejects a complaint against the incumbent for abusive mixed bundling and predatory pricing in the broadband internet access sector \(B2 Bredband/TeliaSonera\)\*, 1 November 2005, e-Competitions, n 1135](#) .

[34] See [Fanny Mejane, \*The French Competition Council inflicts a EUR 45 M fine on the telecommunications incumbent for abusive discrimination and denigration on the ADSL high-speed Internet access market and specifies the notion of repeated infringements \(France Telecom-Wanadoo\)\*, 15 October 2007, e-Competitions, n 20347](#) .

[35] For example [Aldona Kwapisz, \*The Polish Competition Authority fines the largest telecom operator a record fine of Eur. 20 M for abusing its dominant position on the Internet access market \(TP S.A.\)\*, 20 December 2007, e-Competitions, n 15528](#) .

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[36] See Fanny Mejane, *The French Competition Council inflicts a EUR 45 M fine on the telecommunications incumbent for abusive discrimination and denigration on the ADSL high-speed Internet access market and specifies the notion of repeated infringements (France Telecom-Wanadoo)*, 15 October 2007, e-Competitions, n 20347 .

[37] See Sara Lembo, *The Italian Competition Authority accepted the commitments offered by Telecom Italia following its investigation into the latter internet access services markets*, 11 December 2008, e-Competitions, n 24285 .

[38] See Antigoni Lykotrafiti, *The Cypriot Competition Authority imposes a fine for price squeezing and excessive pricing on the Internet services market (CYTA)*, 30 May 2005, e-Competitions, n 12125 .

[39] See Koen Van de Castele, *The European Commission adopts guidelines on application of State aid rules to the public funding of broadband networks*, 30 September 2009, e-Competitions, n 37522 .

[40] For example, European Commission, 30 September 2009, *Case N331/2008, Réseau à très haut débit en Hauts-de-Seine*, discussed at: Koen Van de Castele, *The European Commission approves public co-financing of broadband network covering the entire French department of Hauts-de-Seine, including the non-profitable areas*, 30 September 2009, e-Competitions, n 37529 .

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