

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Implications of E-commerce for Competition Policy - Note by France**

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## France

### Introduction

1. As stated in the OECD Secretariat background note, the booming e-commerce sector is a powerful factor driving competition, offering consumers a greater range of products and services, and fostering innovation in goods and services distribution.
2. At a very early stage, the French *Autorité de la concurrence* sought to understand the specific competition issues raised by e-commerce.
3. It was one of the first competition authorities in Europe to issue decisions concerning practices that hinder the development of e-commerce. It has actively used the procedural tools at its disposal in order to even out the competitive playing field, for instance by accepting commitments in the online watch sales sector<sup>1</sup> or the selective distribution of stereo and home cinema equipment<sup>2</sup>.
4. The *Autorité de la concurrence* has also sought to improve its expertise in e-commerce matters by issuing an opinion at its own initiative on 1 July 2011 in order to analyse how competition works in the e-commerce sector<sup>3</sup>.
5. The continuous growth of e-commerce, combined with changing consumer behaviour from the widespread use of mobile devices have raised increasingly pressing problems for competition regulators. This report presents how the *Autorité de la concurrence* seeks to take these problems into account in all aspects of its work.

### 1. Understanding competitive pressure in e-commerce: convergence between online and brick-and-mortar retail?

#### 1.1. Introduction

6. The convergence of online and brick-and-mortar retail is an important topic for competition authorities when studying mergers in the retail sector, and is more regularly taken into account in the definition of these markets.
7. Several recent mergers between retailers and pure play companies have shown that the lines between the brick-and-mortar and digital worlds are increasingly being blurred. Either digital players want to take advantage of the physical presence of retail stores, or traditional players want to enjoy the digital know-how, audiences and logistics networks of these platforms.
8. In France, Carrefour, one of the world's leading retailers acquired around 17% of Showroomprivé.com, Europe's second largest player in online private sales, owned by

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<sup>1</sup> Decision 06-D-24 of 24 July 2006, confirmed by the Court of Appeal of Paris, Decision of 16 October 2007.

<sup>2</sup> Decision 06-D-28 of 5 October 2006.

<sup>3</sup> Opinion 12-A-20 of 18 September 2012 on e-commerce competition.

Conforama. Similarly, on 10 January 2018, the *Autorité de la concurrence* authorised the Galeries Lafayette Group, which operates department stores (Galeries Lafayette and BHV/Marais), jewellery/watch stores, and websites, to acquire La Redoute, which sells clothing and housewares, mainly on its website, which incorporates a marketplace.

9. In China, French players in the mass retail sector recently signed deals with online giants, such as the technological cooperation agreement between Carrefour, Europe's leading food retailer, and Tencent, a highly popular messaging and online payment app, or the partnership between Auchan and Alibaba.

10. We are witnessing the development of a hybrid model, sometimes called the "phygital" model, which is when a player active on one distribution channel acquires a competitor operating on another channel, or when players are present on both the brick-and-mortar retail market and the online sales market. These mergers provide a comprehensive range of goods and services, and new ways of interacting with consumers based on complementarity between the advantages of a brick-and-mortar network and e-commerce.

11. A threefold dynamic is at play, involving a trend that is breaking down the barriers between online and brick-and-mortar shopping, transitioning from a multichannel to an omnichannel strategy and the seeing traditional retailers adapt to the development of pure play retailers.

## 1.2. Definition of a market which, in some cases, can include online sales

### *1.2.1. Fnac / Darty (2016), first consideration of e-commerce with brick-and-mortar retail*

12. In addressing these new consumption and distribution methods, when appropriate, the *Autorité de la concurrence* adopts a dynamic approach to merger control in line with market changes. The way it handled the Fnac/Darty<sup>4</sup> case is an example of this.

13. On 17 February 2016, the Fnac Group notified the *Autorité de la concurrence* of its intention to acquire Darty. Fnac mainly sells publishing products (books, music, video, etc.) and electronics (photography, TV/video, sound systems, microcomputers, consoles and video games), and operates ticket sales. Darty sells so-called white goods (small and major home appliances), grey goods – communication and multimedia products such as computers, tablets, smartphones, etc.), and brown goods (televisions, cameras, MP3 players, DVD players, etc.). On 23 March 2016 the *Autorité de la concurrence* opened a phase 2, in-depth examination in order to examine the competitive pressure exercised by the online retailers on electronics retail markets and its effects on the delineation of the markets affected by the transaction.

14. For the first time in Europe, in order to define the relevant markets and assess the brown and grey goods retail distribution market, the *Autorité de la concurrence* took into account competition from online sales, from the websites of the retailers in question, as well as competition from pure players (including Amazon and Cdiscount) on brick-and-mortar retailers. It considered that both sales channels were now part of the same market.

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<sup>4</sup> Decision 16-DCC-111 of 27 July 2016.

15. To back up this assessment, it used two surveys conducted during the investigation of the merger request, one of which was carried out specifically for the *Autorité de la concurrence*, involving a representative sample of over 20,000 people. The results of the survey amply confirm the economic studies provided by Fnac, the analyses of the Investigation Services, and information submitted by the market players consulted during the investigation. Market testing was also carried out. The majority of respondents felt that online and in-store retail is the same market, while a market test from 2011, as part of the investigation of a transaction in the brown goods sector<sup>5</sup>, had found that “*only part of the clientele actually chooses between e-commerce and in-store shopping, due to the differences in services provided by each of these distribution channels*”. The *Autorité de la concurrence* therefore noted a significant and relatively rapid change to consumer practices concerning these types of products.

16. In this case, the *Autorité de la concurrence* used a series of precise and consistent evidence (penetration of online sales for electronics, similarity of product and service ranges, price uniformity, etc.) to conclude that although imperfect, the substitutability of the sales channels was enough for them to be considered as part of the same market.

17. When analysing the effects of the transaction, geographically defining the market was a considerable challenge. Because of local specificities, due to the presence of brick-and-mortar stores, and national characteristics due to competition from e-commerce, the *Autorité de la concurrence* adopted a national market analysis that also measured local effects.

18. The *Autorité de la concurrence* considered that the brown and grey goods markets required a local analysis of the players’ competitive positions, given most consumers’ expressed preference of making their purchases in stores. It was estimated that the penetration rate of e-commerce on these markets was between 15 and 30%. The survey conducted for Fnac showed that nine out of ten consumers (89%) preferred making their purchases in stores and almost two-thirds (64%) did not plan to purchase online in the future.

19. In the end, taking into account competition from e-commerce on brick-and-mortar stores does not mean focusing solely on the national market. By nature, e-commerce cannot be attached to a specific geographical area, but it can be understood by examining the differences in situations available to consumers depending on the catchment area where they live. Since the large majority of purchases are still made in stores, it implies that consumers will make their decision based on the geographically accessible alternatives. The positions of the different players therefore need to be assessed on a national and local level.

20. In order to take into account the real impact of the transaction in the different areas affected, the *Autorité de la concurrence* used the scoring method, which provides a qualitative assessment of the real competitive pressure on each catchment area from the competing companies (Fnac and Darty) while considering their competitive proximity to the parties and their geographical distance from the target store.

21. Finally, the *Autorité de la concurrence* took into account the non-pricing effects of the transaction, concerning its impact on service quality, particularly important in consumers’ purchases of brown and grey goods, which was a determining factor in competition between retailers. This was confirmed by the surveys produced during the

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<sup>5</sup> Decision 11-DCC-87 of 10 June 2011.

investigation, which identified the risk that the transaction could deteriorate the qualitative services of the parties.

22. This in-depth analysis revealed concerns about competition in Paris and the Paris region, where the new entity would have significant market power in several catchment areas as it would face little competition from other players. As a result, the transaction was authorised, subject to the divestiture of six stores.

### ***1.2.2. The cases of Monoprix / Sarenza and Spartoo / André (2018): emergence of the phygital model***

23. A dual example of the emergence of the phygital model was given in recent *Autorité de la concurrence* decisions, furthering the analysis initiated in the Fnac/Darty case in terms of analysing the competitive pressure from e-commerce.

24. In two decisions on 20 April 2018, the *Autorité de la concurrence* authorised two separate transactions that raised similar questions concerning a merger between online and brick-and-mortar retailers in the same activity sector.

25. First, Monoprix, which is owned by the Casino Group, a mass food retailer that also owns the pure player company Cdiscount, notified the *Autorité de la concurrence* of its plan to take over Sarenza, an online shoes and leather goods retailer.

26. Secondly, Spartoo, another shoes and leather goods retailer that sells mainly through its website, but that also operates a dozen stores in medium-sized cities and towns, notified the *Autorité de la concurrence* of its plan to acquire André, a shoes and leather goods retailer with 149 stores across France.

27. The *Autorité de la concurrence* unconditionally authorised the two transactions as they were not likely to harm competition.

28. In both decisions, the *Autorité de la concurrence* took into account competition from online retailers with brick-and-mortar retailers, but without concluding that they formed a single market. It found that a large majority of shoe sales take place in stores (85%) as consumers choose to make purchases based on the products available close to their homes. The competitive analysis was conducted at a national and local level in order to take into account these types of local competition factors.

## **1.3. In-depth competitive analysis of the effects of a merger between online players**

### ***1.3.1. Introduction***

29. The characteristics of online platforms raise specific problems for competition authorities when analysing mergers between them.

30. When defining the product market, the fact that the platforms connect two groups of agents who have potential gains to make, raises questions about the cross-effects on two-sided markets, and the existence of a single market or a two-sided one. As recalled in the merger control guidelines of the *Autorité de la concurrence*, “[i]n the case of two-sided markets, the economic balance on a market cannot be assessed independently of the prevailing conditions on another market. Though separate, both markets operate interdependently, which is a specific feature that can be taken into account either at the market delineation stage or during the analysis of the effects of the transaction on competition and of efficiency gains”. The examination of a two-sided market can thus be

conducted by defining a single market with its two inseparable sides or by analysing the two sides separately as if they were two connected markets.

31. At this stage, the question of the substitutability of online shopping on these platforms with in-store shopping must also be raised, and the competitive pressure they place on substitutability.

32. As already stated, when defining the geographical market, the fact that by nature, online platforms only operate on the internet, does not necessarily mean that they operate on a national market. Depending on the characteristics of the market, local aspects may need to be taken into account in the analysis.

33. At the competitive analysis stage, one of the main issues is the barriers that prevent players from entering the market and expanding. Is there really any room to penetrate online platform markets since the Big Four tech companies (GAFA) have a large financial base, a global reputation and audience, and huge possibilities for technological development? Some markets have just as many, if not more specificities, particularly in terms of their regulatory framework, that can impede the Big Four from penetrating the market. Therefore, to take into account potential competitive pressure from these global players, it is important to determine whether they operate or are likely to quickly and massively enter the market.

34. The flexibility of the competitive analysis allows the regulator to address the specific challenges raised by digital platforms and provide tools to analyse this type of transaction through its decision-making practices. When investigating the merger between SeLoger and Logic-immo, the *Autorité de la concurrence* adopted a landmark decision on the competitive assessment of a merger between platforms in the online real estate advertising sector<sup>6</sup>.

### ***1.3.2. The case of SeLoger / Logic-immo (2017), first merger between platforms examined by the Autorité de la concurrence***

35. In July 2017, the German group Axel Springer, which owns the online real estate portal Seloger.com, notified the *Autorité de la concurrence* of its plan to acquire the French company Concept Multimédia, which publishes Logic-immo.com and real estate ad magazines.

36. An in-depth investigation was conducted to identify the specific characteristics of the online real estate advertising market in France. The transaction was then unconditionally approved, following a phase 2 examination. The *Autorité de la concurrence* based its decision on the analysis of several of the parties' internal documents, economic studies, interviews with customers and competitors, and on a particularly extensive market test conducted by publishing an online questionnaire managed by the Investigation Services, to which 2000 agencies responded.

37. In a context where the competitive position of platforms, often owned by global players, had rarely been analysed by national competition authorities, the *Autorité de la concurrence* decided to take into consideration the work of its counterparts in other countries, making references in its own decision to those of the Bundeskartellamt (German competition regulator) in the Axel Springer / Immowelt case of 2015, and the

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<sup>6</sup> Decision 18-DCC-18 of 1 February 2018.

British authorities (the OFT, later replaced by the CMA) concerning The Digital Property Group Ltd / Zoopla Ltd (2012) and Just Eat.co.uk Ltd / Hungryhouse Holdings Ltd (2017) transactions.

38. When defining the market, the *Autorité de la concurrence* considered the existence of a single online real estate classifieds market for professionals, including the typically two-sided market's upstream side, which connects advertisers and the portals, and a downstream side, which connects the portals and internet users.

39. The geographical market was defined at a national level while taking into account the fact that the effects of the transaction also needed to be analysed at a local level, particularly due to local specificities in terms of price, performance and the existence of local portals. However, the question of geographical delineation was left open since the conclusions of the competitive analysis remained the same regardless of the scenario.

40. Essentially, opening an in-depth examination phase mainly involved verifying whether the transaction, which would give the new entity control of over 50% of the market share (in value), could have horizontal effects on the online property classifieds market for professionals.

41. Analysis of the transaction led the *Autorité de la concurrence* to take into account the competition from specialised players (including the player Bien'Ici) and non-specialised players such as Le Bon Coin. However, based on data collected during its investigation, it did not take into account competitive pressure from players likely to enter the market, in particular the Big Four tech companies. However, it did indicate that if these players were to enter the market, they could quickly become major leaders due to their renown and large audiences.

42. After the competitive analysis was completed, risks of price increases resulting from the transaction were excluded at national and local level. Since the large majority of real estate agents would turn to other websites, such as Le Bon Coin, if SeLoger or Logic-immo were to increase their prices, the transaction would not give the new entity fresh incentives to raise its prices.

43. Data is strategically important to how platforms are run and is essential for the development of new services. When it came to risks of exclusion from the market that could be caused by the acquisition of data, considering the huge volume of data in the two parties' possession, it was determined that competing websites could continue to access the same data as the new entity, and that the risk of capture was not sufficiently proven.

44. The risks of coordinated effects between the new entity and Le Bon Coin were also excluded as the two players have very different positioning strategies and business models and operate in a market where there is little price transparency.

45. The *Autorité de la concurrence* also studied the potential conglomerate effects of the transaction. Since the online real estate classifieds market is related to the market for real estate classifieds in the print media, it examined whether the new entity could consolidate the online and "paper" publications. Its analysis found that these effects did not exist, mainly due to the decline of the market for real estate classifieds in print media.

46. Finally, the *Autorité de la concurrence* closely examined the potential impact of the Big Four tech companies entering the online real estate classifieds market for professionals. It was prudent in this case, given the strict criteria involved in the decisions of competition authorities, detecting nothing at this point that would indicate that the Big

Four are planning to enter the market in the short term in France, even though time is a key factor in assessing potential competition.

## 2. Growth of e-commerce sparking restrictive competitive practices

### 2.1. Introduction

47. The rapid growth of e-commerce has caused some players to adopt restrictive competitive practices. As a result, competition regulators have had to assess their specific characteristics, within an unchanged yet still relevant legal framework.

48. Besides past national and European decisions and case law concerning restrictive practices in e-commerce, the *Autorité de la concurrence*'s advisory role has generated an analysis framework which does not consider the individual behaviour of players, but provides guidelines for developing their strategies and relationships with their partners.

### 2.2. Online sales restrictions in selective distribution

#### *Hardcore restriction prohibiting online sales: past decisions and case law regarding selective distribution*

##### *2.2.1. European case law*

49. As a preliminary reminder, a selective distribution network may need to be organised for selling certain types of products, mainly luxury goods, in order to protect their image, or experience goods, i.e. those requiring personalised advice when making the purchase, in order to ensure a consistent level of investment from selected distributors, and thus prevent parasitism. Therefore, as clearly dictated by European case law and doctrine to date, under these circumstances, selective distribution can be legitimate when it improves competition, “*in relation to factors other than price*”<sup>7</sup>.

50. More specifically, dating back to the “Metro” decision<sup>8</sup> of 1977, European case law has long held that selective distribution is not prohibited by Article 101(1) of the TFEU, which states the criteria that constitute an anticompetitive agreement, where the following criteria are met: resellers are chosen on the basis of criteria laid down uniformly for all potential resellers and are not applied in a discriminatory fashion, the properties of the product require this type of network to preserve its quality and proper usage, and the criteria do not exceed what is necessary.

51. In this context, the *Autorité de la concurrence* and its predecessor, the *Conseil de la concurrence*, have striven to protect the legitimate objectives of selective distribution networks while ending unreasonable competitive restrictions. Two recent cases demonstrate the *Autorité de la concurrence*'s approach in this regard.

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<sup>7</sup> CJEC, 25 October 1983, AEG-Telefunken v Commission, 107/82 Rec. p. 3151, point 33.

<sup>8</sup> CJEC, 25 October 1977, Metro SB-Großmärkte v Commission, 26/76, Rec. p. 1875, point 20.

### 2.2.2. The cases of Bang & Olufsen and Pierre Fabre Dermo-cosmétique

52. In its decision of 12 December 2012, the *Autorité de la concurrence* condemned Bang & Olufsen for prohibiting its authorised distributors from selling its products on the internet<sup>9</sup>. In the case, the supplier's selective distribution agreement had prohibited mail order selling since 1990, without any reference to online selling. The distributors were allowed to have a website that had to comply with use conditions established by the supplier. However, the *Autorité de la concurrence* considered that the supplier had established a *de facto* ban on online selling under the distribution agreement and the use conditions for the distributor websites.

53. Similar reasoning was used in a 2008 decision concerning Pierre Fabre Dermo-cosmétique<sup>10</sup>. The *Conseil de la Concurrence* found that Pierre Fabre was in violation of competition law by prohibiting its authorised distributors from selling the cosmetic and personal care products of several brands online. In the case, the selective distribution agreement did not prohibit online selling, but imposed the sale of contractual products in the presence of a pharmacist. Complying with this condition therefore required that selling take place in physical space and again prohibited online selling in a *de facto* manner.

54. In both cases, it was considered that the restriction in question could not be justified by a legitimate objective and constituted a restriction by object. The *Autorité de la concurrence* and the Court of Appeal of Paris, acting as a review court, therefore considered that a large portion of the Bang & Olufsen product range did not require personalised advice needing purchases to be made in a store (unlike in a previous case from 2006 concerning high-end stereo and home cinema products of other suppliers)<sup>11</sup>, so that the products could be sold online without restraint<sup>12</sup>.

55. In the Pierre Fabre case, the Court of Appeal of Paris submitted a prejudicial question to the CJEU to determine whether the litigious clause constituted a competition restriction "by object" under Article 101(1) of the TFEU, and whether the agreement could benefit from a block exemption, as provided for by the applicable European regulation<sup>13</sup> or, an individual exemption from Article 101(3) of the TFEU, which gives the possibility of justifying an agreement, which initially appears to be anticompetitive. In its decision, the CJEU stated that "*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*" It is not eligible for a block exemption and can only be examined based on the conditions required to obtain an individual exemption.

<sup>9</sup> Decision 12-D-23 of 12 December 2012.

<sup>10</sup> Decision 08-D-25 of 29 October 2008.

<sup>11</sup> Decision 06-D-28 of 5 October 2006.

<sup>12</sup> CA Paris, 13 March 2014, no.13/00714.

<sup>13</sup> Article 4, (c) of Regulation 330/2010 of 20 April 2010.

56. In its subsequent decision, the Court of Appeal of Paris conducted this examination and ruled that fighting counterfeit cosmetics and protecting the health of consumers could not, in the case in point, constitute grounds for prohibiting all online selling. This clause was not proportionate, since the consumer could be informed on the internet about the products for purchase and the risk of parasitism was not proven and could not be limited in any event, as all the distributors selected were bound by the same service obligations<sup>14</sup>.

57. The *Autorité de la concurrence* and the Court of Appeal of Paris therefore use this approach to protect the organisation of selective distribution networks, except when unjustified or disproportionate clauses are used, such as those which prohibit online selling in a de facto manner.

### ***Restriction involving platform bans: past decisions and case law***

58. The *Autorité de la concurrence* has yet to issue any decisions on bans against reselling products on third-party platforms.

59. However, it considered this scenario in a 2014 case initiated by a brown and grey goods distributor against Samsung<sup>15</sup>. In this case, the *Autorité de la concurrence* rejected requests for urgent interim measures and decided to pursue the investigation into the merits of the case concerning practices of which the complainant accused Samsung, involving the allegation that it used vertical agreements with its distributors in order to restrict active and passive sales. The *Autorité de la concurrence's* intention was to determine whether this type of ban, combined with other vertical restrictions could be considered anticompetitive.

60. The *Autorité de la concurrence* noted that all the supplier's distribution agreements contained a general ban on selling its products on non-authorised websites and/or all third party websites, and marketplaces in particular. On this point, the *Autorité de la concurrence* made reference to the European Commission guidelines (2010), which state that "a supplier may require that its distributors use third party platforms to distribute the contract products only in accordance with the standards and conditions agreed between the supplier and its distributors for the distributors' use of the internet". It went on to say that in its past decisions, it had already determined that marketplaces were capable of meeting products' qualitative criteria.

61. In light of the evidence of the case, the *Autorité de la concurrence* held that the risk of competition could not be excluded, and decided to pursue the investigation of the case concerning the platform bans.

62. In another case involving Adidas, the *Autorité de la concurrence* investigated its de facto ban preventing its authorised distributors from selling contractual products on third-party platforms. The manufacturer then decided to change its sales conditions at its own initiative, and authorise these sales, provided the third-party platforms fulfilled the same qualitative conditions required of the authorised Adidas resellers, and that the platform entered a license agreement with the manufacturer. Following this commitment,

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<sup>14</sup> CA Paris, 31 January 2013, no. 08/23812.

<sup>15</sup> *Autorité de la concurrence*, Decision 14-D-07 of 23 July 2014.

the Investigation Services decided to close the investigation while publishing a press release to inform distributors of the new option<sup>16</sup>.

63. In the absence of other practices, the decision handed down by the Court of Justice of the European Union on 6 December 2017 in the Coty Germany case<sup>17</sup> seems to have settled the issue, by clearly distinguishing between platform ban clauses and those involved in the Pierre Fabre and Bang & Olufsen cases.

64. In its decision, as requested by France in its *amicus curiae*, the CJEU clearly outlined that the terms of its aforementioned Pierre Fabre decision, whereupon “*the aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU*”, were limited to clauses aimed at completely prohibiting the online sale of cosmetic products, and could not be applied to other clauses and other products, such as platform ban clauses for luxury goods.

65. Therefore, as underlined by the French authorities, a platform ban clause that does not prohibit all online selling is legal if it meets the conditions of the CJEC’s aforementioned Metro decision, including the proportionality criteria with respect to the characteristics of the products in question.

66. For luxury goods, the Court of Appeal of Paris recently followed CJEU case law to the letter by ruling that “*the sale of luxury goods alongside other types of products is detrimental to the image held by consumers of the luxury goods and therefore the ability to maintain one of the primary characteristics of these consumer goods. This [platform ban] clause is therefore appropriate for protecting the luxury image of said products and does not exceed what is necessary to achieve the pursued objective since it does not completely prohibit authorised distributors from selling the contractual products on the internet. It is therefore legal under Article 101(1) of the TFEU*”<sup>18</sup>.

67. The Court of Appeal also underlined that “*while the distributors have an undeniable interest in using platforms for some non-luxury goods [...], the Autorité de la concurrence has always held that the manufacturer leading a selective distribution network may scrutinise this use in order to ensure that the conditions under which the products are presented on the platforms comply with the network’s quality requirements and may impose platform bans if there are no guarantees concerning the identity of the sellers*”<sup>19</sup>.

68. However, if the proportionality condition was not fulfilled (e.g. for non-luxury goods), the clause would not necessarily be illegal. It can be exempted on the grounds of exemption 330/2010 since, according to the CJEU, it does not constitute a hardcore restriction under this regulation. It is therefore only in the event that the conditions for the exemption regulation are not met, particularly the market share threshold condition, that the clause in question must be examined, while taking into account its content and objectives, as well as the economic and legal context in which it is used.

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<sup>16</sup> Press release of 18 November 2015.

<sup>17</sup> CJEU, 6 December 2017, Coty Germany GmbH v Parfümerie Akzente GmbH, C-230/16.

<sup>18</sup> CA Paris, 28 February 2018, no.16/02263.

<sup>19</sup> Ibid.

69. In any event, the clause in question may qualify for an individual exemption on the basis of Article 101(3) of the TFEU.

70. In conclusion, by supporting the development of necessary and proportionate selective distribution networks, the past decisions of the *Autorité de la concurrence* and review court case law have developed increased competition for a number of factors, including price, to the benefit of consumers.

### 2.3. Restrictive practices used by online platforms

#### 2.3.1. Across platform parity agreements: the case of *Booking.com* (2015)

71. Following a complaint from the main hotel syndicates in France and the Accord Group, who accused online hotel reservation platforms of forcing hotels to comply with “parity” clauses, the *Autorité de la concurrence* examined whether these clauses complied with competition law. Under these clauses, the online platforms required that hotels give them rates, room availability and supply conditions (reservation conditions, breakfast, etc.) at least as favourable as those offered on competing platforms and all other online and offline distribution channels, including the hotel’s own channels (website, telephone, onsite, etc.). It was claimed that hotels were therefore being prevented from seeking out the competition on other reservation platforms.

72. The commitment procedure seemed particularly appropriate in this case, and enabled quicker intervention on the market.

73. In its decision of 21 April 2015<sup>20</sup>, the *Autorité de la concurrence*, in coordination with the European Commission and the Italian and Swedish authorities, made broader agreements from Booking.com mandatory in order to stimulate competition between online reservation platforms and give hotels more sales and pricing freedom.

74. It identified two primary anticompetition effects generated by parity clauses which were reinforced by the implementation of similar clauses by all operators in the sector.

75. Firstly, these clauses curbed competition between platforms by preventing hotels from rewarding those that were the most competitive, through better prices and availability, etc. In the case at hand, no matter what the commission rate practiced by Booking.com, hotels were obligated to give it prices, room availability and sales conditions that were as least as favourable as competing platforms.

76. Furthermore, if a platform increased its commission rate, the hotels wanting to offset part of this increase on their prices had to do so for all of their distribution channels. The decrease in demand generated by the price increase therefore affected all the distribution channels and not just the platform that increased its prices, causing a “diluting” effect. Price parity clauses can therefore lead to higher commission rates and hotel rates.

77. These clauses also entail risks of excluding small platforms and new platforms wanting to penetrate the market, as they are unable to compete with better prices or availability and are forced to invest heavily in advertising or quality to attract consumers.

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<sup>20</sup> Decision 15-D-06 of 21 April 2015.

78. The commitments proposed by Booking.com include the following measures for all hotel establishments in France, for five years starting from 1 July 2015.

79. Price or conditions parity obligations with regard to other platforms, direct offline hotel reservation channels, and hotel loyalty schemes were removed. Price or conditions parity clauses with regard to direct online reservation channels (restrictive parity clauses) were permitted by this decision on commitments, until they became prohibited by law under article 133 of the Law n°2015-990 of 6 August 2015 *on growth, activity and equal economic opportunities*. This law, besides imposing a mandate contract, requires that hotels be at liberty to offer their clients any rebate or other preferable rate whatsoever, any contractual clause to the contrary being null and void (cf. article L.311-5-1 of the Tourism code on the nullity of any price parity clause). As for availability parity clauses, they were completely removed under the commitments decision. Finally, hotels now have the right to re-contact their former clients.

80. Furthermore, Booking.com committed to implement a communication policy compliant with the commitments, and to submit a report on the effectiveness of the commitments between 1 July 2016 and 1 October 2016.

81. The *Autorité de la concurrence* considered that “*the combined commitments [appeared] proportionate and relevant to address the competition concerns expressed. They create a good balance as they improve competition between Booking.com and online travel agents (OTAs) and the commercial freedom of hotels, while protecting the efficiency gains made possible by the economic model of OTAs*”. They were therefore “*substantial, credible and verifiable*”.

82. Furthermore, as the inquiry conducted by the DGCCRF services between 2011 and 2013 revealed unfair practices in the sector, the Minister of the Economy launched civil proceedings against the two leading players of online hotel reservation, namely Expedia and Booking. Thus, on 2 October 2013 and on 6 May 2014, the two companies were summoned before the Paris Commercial Court on the basis of articles L. 442-6.-I.2° (significant imbalance in the parties' rights and obligations) and L. 442-6.-II-d (automatic obtaining of the most favorable terms granted to competitors) of the Commercial Code. It was especially asked from the judge that the parity and availability clauses concluded with hoteliers be declared null and void and that practices referring to such clauses in their contracts be ordered to cease.

83. In its decision of 29 November 2016 (not yet final), the Commercial Court held that the parity clause imposed by Booking constituted a significant imbalance as it was demonstrated that “*the price parity clause impedes the hotelier from directly offering to its clients a lower price without being compelled to immediately offer this same price to Booking*”, that “*the hotelier is deprived of its liberty to determine the pricing policy of its rooms according to the different marketing channels*” and “*to grant specific advantages to some customers*”. The Commercial Court consequently found that price parity clauses broke the aforementioned provisions of the Commercial Code.

84. Likewise, on appeal of the Commercial Court's decision rendered on 7 May 2015, the Paris Court of Appeal sentenced Expedia on 21 June 2017 to a civil penalty amounting to 1 million euros for significant imbalance of the contracts. It held that the agreements included clauses aiming at restraining the commercial and pricing freedom of French hoteliers. The Court of Appeal thus declared the disputed clauses null and void and ordered Expedia to refrain from including such provisions in agreements concluded

with hoteliers. This litigation is nevertheless still ongoing as Expedia filed an appeal before the Supreme Court.

85. It seems that the main online hotel reservation platforms operating in France have now modified their commercial policy regarding price parity clauses. This evolution is likely driven by the conjunction of different measures: the commitments undertaken by Booking before the *Autorité de la concurrence*, the nullity of price parity clauses introduced by the aforementioned Law n° 2015-990, the deterrent nature of criminal penalties provided by Article L.311-5-3 of the Tourism Code and civil actions brought by the Ministry of the Economy (through the DGCCRF). These measures increased the hotels' room for maneuver and stroke the right balance for consumers, restoring competition while preserving free and easy-to-use search and comparison services, and encouraging the emergence of the digital economy.

86. In addition to these measures, other solutions were adopted in some EU member states. Through a working group under the aegis of the Commission, the *Autorité de la concurrence* and nine other national competition authorities assessed the various solutions in place in EU countries concerning online hotel reservations.

87. These results are consistent with the *Autorité de la concurrence*'s report of 9 February 2017 on the effectiveness of the Booking.com commitments. The comparative analysis of the situation before and after the remedies suggests that the change from “wide” to “narrow” parity clauses, or the removal of parity clauses altogether, increased the price differentiation between online reservation platforms in most countries. However, nearly half the hotels surveyed indicated that they were not aware of the various changes to the sector, although much less so in France (30%). Most said that they had not changed their sales strategies with respect to platforms following the implementation of the various remedies.

88. Based on this research, the European Commission and the national competition authorities decided to continue monitoring the sector.

### *2.3.2. The behaviours of dominant online advertising players: an analysis framework for practices in the sector, designed as part of the advisory role of the Autorité de la concurrence*

89. Online advertising is a business sector whose growth is directly correlated with e-commerce growth. Under its advisory role, the *Autorité de la concurrence* has worked to decipher the specific competition mechanisms at play in this sector, and, given the considerable changes in recent years, decided to conduct two sector-specific enquiries to further its knowledge. These inquiries enabled it to identify the dominant position of certain major players in the digital economy, whose practices require continuing vigilance.

#### *Opinion on search advertising (2010)*

90. In December 2010, the *Autorité de la concurrence* issued an initial opinion<sup>21</sup> following a sector-specific inquiry on the online advertising market. In the inquiry, it focused specifically on search advertising, a market on which it considered that Google held a dominant position.

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<sup>21</sup> Opinion 10-A-29 of 14 December 2010 on e-commerce competition.

91. Online search advertising is a specific market that cannot be substituted by other forms of communication, as it uses precise targeting and there are no equivalent alternative services for advertisers. Following the market analysis, the *Autorité de la concurrence* found that online and offline advertising do not share the same relevant market and that the needs met by search advertising are not the same as those met by display advertising.

92. Various evidence pointed to Google's dominant position on this market, including market share, strong profitability, prices consistently higher than the competition, and contractual relationships with advertisers allowing it to exercise its market power. Furthermore, it appeared that there were major barriers for entering the market in terms of the investment required to develop algorithms and web indexing, and scalability.

93. Acting in an advisory role, the *Autorité de la concurrence* examined how competition works on this market and, without specifying any behaviour, designed an analysis framework for better assessing a set of practices that could be implemented given the specific characteristics of the sector, and their compatibility with competition law.

94. First, it identified potential exclusion abuses that would discourage, delay or eliminate the competition from markets where a dominant player is present. It also identified abusive operating practices that affect the customers, suppliers or partners of the dominant player, whether or not they are competitors.

95. For instance, in the case of exclusion practices, it identified exclusivity clauses that were excessive in their field, term and scope, particularly in contracts between Google and AdSense partner websites, and technical barriers. The potential operating abuses included exorbitant conditions imposed on partners or clients, discriminatory treatment or a lack of transparency, particularly concerning how the AdWords service operates.

96. The opinion also underlined the case of the print media sector, which is particularly affected by changes to advertising media and methods, as it is a client, partner, competitor, and potential supplier of Google, all at the same time. The *Autorité de la concurrence* insisted on the need for print media publishers to be able to be excluded from the "Google News" service without being removed from the Google search engine. Google was criticised for engaging in a form of economic parasitism as the aggregator positioned itself as the leading website for access to information, without providing the media outlets in question with financial compensation. Google had made commitments to the Italian competition authority to separate indexing in Google News and its all-purpose search engine. The *Autorité de la concurrence* requested that these commitments also be respected in France.

#### *The case of NavX (2010)*

97. This 2010 opinion should be associated with the *Autorité de la concurrence*'s concurrent past decisions. In 2010, Navx brought a complaint before the *Autorité de la concurrence*, saying that it had been targeted by discriminatory practices due to the sudden termination of its AdWords contract and the way in which its AdWords account was managed. In its decision of 30 June 2010 for urgent interim measures<sup>22</sup>, the *Autorité de la concurrence* recognised that in principle, Google remains free to define its own

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<sup>22</sup> Decision 10-MC-01 of 30 June 2010.

policy regarding content accepted on AdWords, provided it is implemented under objective and transparent conditions and does not lead to discriminatory practices.

98. The *Autorité de la concurrence* had ordered Google to make its AdWords content policy more transparent and predictable for advertisers and to reinstate the company's AdWords account.

99. As part of the investigation into the merits of the case<sup>23</sup>, Google made three-year commitments, which the *Autorité de la concurrence* accepted after conducting a market test. Google committed to make information on its AdWords service more transparent, detailed and predictable for advertisers. It also indicated that in practice, it would voluntarily apply all the improvements made by these commitments to all advertisers using AdWords in all applicable countries.

#### *Opinion on display advertising (2018)*

100. Following the 2010 opinion and the joint study on big data carried out with the Bundeskartellamt (German competition authority), the *Autorité de la concurrence* launched another sector-specific inquiry on the online advertising sector.

101. The purpose of the study was to analyse the sector while focusing on display advertising, i.e. tiles, banners, and wallpaper advertising integrated into website content. It examined the position of the numerous different players and the important role of data and algorithms.

102. In its opinion<sup>24</sup>, the *Autorité de la concurrence* found that in a context where online advertising has become the leading advertising market in France, display advertising has experienced significant growth driven by social media and programmatic advertising. This type of advertising has multiplied and diversified the number of sources of data production and intermediaries. New technologies and activities have emerged, for example, for publishers, letting them develop coherent services by type of medium or audience; and for advertisers, optimising the delivery of their ads to internet users who may be interested in their products and make a purchase.

103. This market is marked by the fact that some media agencies and players such as Google and Facebook are increasingly integrating all activities into their services. Both globally and for France, most of the revenue in this sector is generated by these two operators, resulting from the accumulation of several competitive advantages.

104. Google and Facebook services have the highest audience numbers and generate huge volumes of data. These services have the benefit of strong network effects, which result from the type of services and the dominant positions of these companies on their respective markets. They are able to draw on the extremely high number of users of their proprietary services, and as intermediaries, on selling the advertising inventories of numerous third-party publishers, which gives them a significant competitive advantage. Over the last few years, no companies have succeeded in significantly increasing their market share in Europe in the display advertising sector up against Google and Facebook. Only the e-commerce giant Amazon, which is still a small player in this sector, would be capable of one day becoming a rival.

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<sup>23</sup> Decision 10-D-30 of 28 October 2010.

<sup>24</sup> Opinion 18-D-03 of 6 March 2018 regarding data usage in the online advertising sector.

105. In addition to clarifying the display advertising ecosystem, the *Autorité de la concurrence* also found that the equilibrium of the sector is weakened by the competitive pressure from these global players.

106. The investigation for this opinion and consultation with players in the sector identified practices and situations that could have negative effects on competition.

107. These practices included tied selling, low prices, and exclusivity strategies, associating several intermediation services with the supply of targeting data, and intermediation services with exclusive access to a website's inventory.

108. Some stakeholders also said that the leaders in the sector use their dominant positions on certain service markets to develop on other markets.

109. Furthermore, certain publishers and intermediaries were of the opinion that they are subjected to different treatment by dominant players in the advertising intermediation sector. This involved the possibility of monetising certain types of content and the access conditions of demand-side platforms<sup>25</sup> for marketplaces and certain inventories.

110. Other companies noted potential impediments to interoperability in the advertising intermediation sector.

111. Finally, several players alleged data processing restrictions, making it harder to monitor advertising campaigns.

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<sup>25</sup> A technology platform used mainly by advertisers to optimise and automate the purchase of ad space offered by various ad exchanges and supply-side platforms.