

The clock is ticking – have you made your distribution contracts competition-proof?

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Time is running out for companies to check their distribution contracts for potential e-commerce competition concerns. Three investigations into online sales restrictions, launched earlier this year, have already shown that the Commission means business. However, a recently published Commission report and the launch of formal investigations into potential online sales restrictions by clothing company Guess seem to signal even more intense enforcement action. The Commission is encouraging national competition authorities to follow its lead. Some companies have made a head start by reviewing their commercial practices; others are well-advised to do the same, before the Commission or a national competition authority does it for them.

The Commission's [final report](#) on the E-commerce sector inquiry – accompanied by a [staff working document](#) – was published in May 2017 and mainly confirms the findings of the Commission's [preliminary report](#) of September 2016. According to the Commission, the report's conclusions confirm that the [Vertical Block Exemption Regulation](#) (VBER) does not need to be reviewed before its scheduled May 2022 expiration date. However, the report does provide the Commission with sufficient ammunition to focus enforcement on the most widespread e-commerce business practices identified in the report. The recent launch of formal investigations into the online distribution practices of clothing company [Guess](#) seems only the first of many more to come.

The business practices flagged in the report as raising potential competition concerns for consumer goods include:

- Certain contractual territorial restrictions may raise competition concerns, such as:
 - restricting active sales by retailers outside a designated territory, when these other territories have not been exclusively allocated to other retailers or reserved for the supplier
 - restricting passive sales
 - restricting authorised retailers within a selective distribution network from actively selling to certain customers within the EU by, for instance, limiting the retailers in their ability to launch websites targeting other member states than their own.
- Brick and mortar requirements in selective distribution agreements may raise competition concerns if these are aimed at excluding purely online players from the selective distribution network without any apparent link to distribution quality and/or other potential efficiencies.
- Pricing software to monitor online retail prices may raise competition concerns, if used by manufacturers to

retaliate to retailers deviating from the desired price level or to facilitate collusion between retailers.

- Dual pricing for one and the same hybrid retailer is considered a hard-core restriction under the VBER. However, the final report notes that dual pricing could be justified if necessary to address free-riding between offline and online sales channels.
- Absolute price comparison tools which are not linked to quality criteria may amount to a hard-core restriction of passive sales under the VBER. Restrictions on the use of price comparison tools based on objective qualitative criteria are, however, generally covered by the VBER.
- Absolute internet bans are considered hard-core restrictions. Restrictions on the use of brand names for online advertisement purposes (search engine optimisation and search advertising) may raise similar concerns by restricting the effective use of the internet as a sales channel. In contrast, absolute marketplace bans are generally not considered a hard-core restriction within the meaning of the VBER.
- Parity clauses are covered by the VBER if the parties' market shares do not exceed 30%. In the event of higher market shares, it should be determined whether the efficiencies gained using parity clauses, such as recouping investments and avoiding free-riding, outweigh their restrictive effects, which may include reducing intra-brand competition or competition between online retailers and marketplaces.
- Data collection and usage in e-commerce may raise competition concerns. The exchange of competitive sensitive data, such as on prices and sold quantities, between marketplaces and third party sellers or manufacturers with their own shops and retailers may, for example, lead to competition concerns where the same players are in direct competition for the sale of certain products or services.