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Distribution Law Center Countdown XXIII - Bans on the use of price comparison services

What?

Price comparison services, such as price comparison websites or apps, are used as catalogues in which consumers can search for various goods, find out information about them and, in particular, find the cheapest online store. However, price comparison services do not only benefit consumers. Retailers can use them to increase their visibility and secure better sales.

Price comparison services (as opposed to online marketplaces) usually do not offer sale and purchase functionality. Their role is to re-direct customers to the online stores of specific retailers, where consumers can subsequently order goods. Therefore, price comparison services are more of an advertising tool than an online sales channel.

Since price comparison services contain publicly available offers from many online retailers, their existence leads to increased market transparency and has the potential to intensify both intra-brand and inter?brand price competition.

However, suppliers may wish to restrict or prohibit the use of price comparison services by distributors in distribution agreements. For example, the reason may be to protect the brand image, as price comparison services are most focused on the lowest price rather than on the quality of the goods or services. Another reason may be that suppliers seek to protect specific business models based on specialisation or high quality of the goods or services offered rather than on price. Restricting or banning the use of price comparison services may also make selling counterfeit goods more difficult, as it is the price comparison services that make it easier to get such goods to market.

Rules until 31 May

Neither the Vertical Block Exemption Regulation (the “VBER”) nor the Guidelines on Vertical Restraints (the “Vertical Guidelines”) address the issue of price comparison service restrictions.

Therefore, it have been the competition authorities and courts that ruled on the matter.

The German *ASICS* case concerning branded sports footwear is key in this respect. In its judgment upholding the fine imposed by the competition authority’s decision, the Federal Supreme Court stated that price comparison

services (tools) were an important means for consumers to facilitate their online shopping. They made it easy for consumers to choose the cheapest retailer offering the goods. It might be a small independent online store that would not be able to establish itself on the market and whose offer might not even be noticed by consumers without the existence of price comparison services. Thus, the Federal Supreme Court concluded that the ban on the use of price comparison services excluded a number of retailers from competition and, thus, restricted passive sales. Therefore, it was deemed a hardcore restriction, which was prohibited regardless of the market shares of the parties.

The future as of 1 June 2022?

The European Commission addresses price comparison services extensively in the new Vertical Guidelines. It deals with three basic situations, namely a restriction on the use of price comparison services, a complete ban on the use of price comparison services as an entire online advertising channel and a ban on the use of particular price comparison services.

First, mere restrictions on the use of price comparison services based on the quality requirements imposed on the advertising placed there do not as such constitute a ban on the use of price comparison services. The imposition of such conditions does not have as its object the prevention of the effective use of the internet by the distributor or its customers to sell the contract goods or services to particular territories or customers. It can therefore benefit from the new VBER.

Second, the ban on the use of price comparison services as an entire online advertising channel hinders the distributor from selling to customers who are located outside its area of activity and who wish to make online purchases. It can be imposed both directly and indirectly (e.g., restricting the possibility to provide price information to price comparison services, requiring the supplier's prior approval to use price comparison services or prohibiting the use of the supplier's brand on price comparison services). Such a prohibition has the object of preventing the effective use of the internet by the distributor to sell the contract goods or services. This is now a hardcore restriction within the meaning of Article 4(e) of the VBER and therefore is not within the safe harbour of the new VBER.

Third, the European Commission considers that the ban on the use of particular price comparison services does not generally have the object to prevent retailers from making effective use of the internet to sell the contract goods or services to particular territories or customers. Indeed, a retailer may continue to use other price comparison services to increase customer awareness of its online sales activities. If this is the case, the new VBER will apply to such a prohibition. However, if the ban were directed at the most widely used price comparison services and the other price comparison services were *de facto* not sufficiently effective to attract customers to

the retailer's online store, such a restriction could constitute an anticompetitive agreement. Therefore, it will always be necessary to assess whether a ban on selected price comparison services has as its object the prevention of the effective use of the internet by the distributor or its customers to sell the contract goods or services to particular territories or customers.

Under the VBER, targeting customers through price comparison services will be – under certain conditions – considered a form of active sales (see, DLC countdown no. 21). Therefore, restricting the use of price comparison services targeting customers located in an exclusive territory within an exclusive distribution system is permissible and even necessary to satisfy the condition of parallel imposition (see, DLC countdown no. 13).

In the new Vertical Guidelines, the European Commission also addresses the issue of price comparison services in the context of a purely qualitative selective distribution system to which the prohibition of anticompetitive agreements does not apply (see, DLC countdown no. 19). The European Commission points out that where restrictions on the use of price comparison services are used in a selective distribution agreement, it is first necessary to assess whether the restrictions are an appropriate and proportionate means to preserve quality or to ensure the proper use of the contract goods or services. In this respect, the European Commission notes that via price comparison services, customers merely access the distributor's online store in relation to which the supplier can already set quality requirements. A prohibition to use price comparison services is therefore unlikely to qualify as a purely qualitative selection criterion.

In practice?

As of 1 June 2022, there will be more legal certainty as to the European Commission's approach to the issue of restrictions of price comparison services. Suppliers will be entitled to set the quality standards that price comparison services must meet. Conversely, they will not be allowed to impose a total ban on the use of price comparison services as an entire online advertising channel. Under certain conditions, it will be possible for them to impose a ban on the use of particular price comparison services, provided that this does not prevent the effective use of the internet by the distributor or its customers to sell the contract goods or services to particular territories or customers.

Assessment?

Given the increasing importance of online sales, the European Commission's detailed treatment of price comparison services in the Vertical Guidelines is to be welcomed. This will lead to increased legal certainty for suppliers, who until now have only been able to assume what they can and cannot do.

The classification of the absolute ban on price comparison services as a hardcore restriction is not surprising in view of the judgment of the Federal Supreme Court in *ASICS*. However, the European Commission's explicit recognition of the possibility to restrict the use of price comparison services in some ways is appreciated. This is a desirable element of flexibility, as many suppliers have so far taken a more cautious approach and have preferred to avoid restricting price comparison services.

Want to know more? Stay tuned...

Counting down towards 1 June 2022, we aim to provide you with regular updates and the necessary legal know-how in order to fully prepare your business for the future. Please also check out the Distribution Law Center platform and our LinkedIn page for much more information on the laws governing vertical agreements, covering both competition and commercial law. 27 specialized teams from all over the EEA are working hard to turn the platform into your favourite source of guidance and information.

A translation of this Countdown newsletter is available in the following languages: Czech Republic, Romanian, Portuguese, Slovak, Spanish, Swedish.

Read the available DLC Countdown newsletters on the changes to be expected here.