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## German Court Joins Increased Trend to Police Internet Sales

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**The luxury bathroom fittings manufacturer Dornbracht has lost its appeal to the German Supreme Court against an order from a lower court awarding damages of €820,000 to a retailer because of losses suffered due to an anticompetitive clause in Dornbracht's distribution agreements.**

The case is one of several recent examples of private enforcement in Germany against competition law infringements concerning internet sales of branded consumer goods.<sup>1</sup> It should also be seen in the context of the growing number of investigations initiated by EU national competition authorities (NCAs), who are showing ever-growing willingness to pursue cases against online sales restrictions and thereby paving the way for 'follow on' damages actions such as that brought by Dornbracht.

### The Case

The clause in question offered wholesalers a substantial additional discount if they sold Dornbracht fittings to retailers with bricks and mortar shops and who offered a certain level of service quality (e.g. installation and after-sales care). In 2011, the German Federal Cartel Office (FCO) found that the clause amounted to a 'hardcore' restriction of competition because it disincentivised wholesalers from supplying internet only retailers who were unable to satisfy the clause's requirements, thereby restricting passive (online) sales to customers. Dornbracht agreed to remove the clause from its distribution agreements, and the FCO did not impose a fine.

In 2012, Reuter, a German retailer with two physical outlets as well as an online store, brought an action for damages against Dornbracht on the basis that the effect

<sup>1</sup> See, e.g., Regional Court of Kiel, Decision of 8 November 2013, Case No. 14 O 44/13 (concerning internet sales restrictions on digital cameras by Casio) and Higher Regional Court of Berlin (Kammergericht), Decision of 19 September 2013, Case No. 2 U 8/09 Kart (concerning internet sales restrictions for school bags).

of the clause was to lessen the amount of rebate it received for its bathroom fitting purchases from wholesalers for the period 2008 to 2011. This claim was dismissed at first instance, but the Düsseldorf Court of Appeal awarded damages to Reuters for lost profits due to higher purchase prices. The Court's ruling was also notable because it found Dornbracht's CEO to be jointly and severally liable to Reuter, on the basis that the CEO caused/instigated the infringement.

The German Supreme Court dismissed Dornbracht's appeal in its entirety.

### The Context: Online Sales Restrictions in the EU

The rapid growth of the internet and e-commerce in recent years has contributed to the realisation of what Bill Gates described in his 1996 book, *The Road Ahead*, as "friction-free capitalism". The expansion of borderless markets presents a tremendous opportunity for manufacturers, distributors and consumers, particularly in the EU where the achievement of an internal market and the dismantling of barriers to trade between Member States is one of the fundamental policy objectives contained in the EU Treaty.<sup>2</sup> This has been the driver of major changes to traditional business models and consumer expectations. Whilst the internet undoubtedly improves access to markets and customers, a concern of bricks and mortar businesses may be that online distribution poses a threat to their brand reputation and market position, in particular by enabling online rivals to succeed mainly by free-riding on others' investments and by offering reduced levels of customer service.

This dynamic can cause companies to seek greater control over their distribution networks in an attempt to defend their traditional market positions. A common method of doing so is to place restrictions on online sales made by distributors. Whilst it is certainly possible to exert a greater degree of control over distribution (including with regard to sales made via the internet), a blanket prohibition of online sales is almost certain to be problematic under EU law.

In this area, the European Commission has developed specific rules and guidance for businesses; this is a developing area of law and as such it is not always obvious when certain restrictions can fall foul of the EU competition rules. This is borne out by some of the recent investigations both in the EU and at the Member State level where proceedings have been brought despite there being seemingly little evidence of anticompetitive intent on the part of the companies involved, and where several cases have been settled without fines being imposed.

### Recent Investigations in the EU

Numerous public statements made at the Commission level – including by members of the incoming Commission<sup>3</sup> – make clear that 'online' remains very much part of the Commission's current enforcement agenda; and there have been signs in the past year of the Commission taking the lead in investigations relating to restrictions on internet sales. For example, in December 2013, just weeks after a speech by the Commissioner for Competition, Joaquín Almunia, on 'Competition in the Online World', the Commission conducted unannounced inspections in various

<sup>2</sup> The Treaty of the Functioning of the European Union (TFEU), Article 26, provides that "[t]he Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market" and that "[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured."

<sup>3</sup> For example, in his recent European Parliament hearing, Andrus Ansip, the incoming Vice-President for the Digital Single Market, said he wanted "to see an operational digital single market where consumers are protected and free to choose goods and services cross-border" ([http://ec.europa.eu/about/juncker-commission/docs/2014-ep-hearings-reply-ansip\\_en.pdf](http://ec.europa.eu/about/juncker-commission/docs/2014-ep-hearings-reply-ansip_en.pdf)); and in his Mission Letter to Margrethe Vestager, the incoming Commissioner for Competition, the President-elect of the European Commission, Jean-Claude Juncker, stated that Vestager's role included "Mobilising competition policy tools and market expertise so that they contribute, as appropriate, to our jobs and growth agenda, including in areas such as the digital single market" ([http://ec.europa.eu/about/juncker-commission/docs/vestager\\_en.pdf](http://ec.europa.eu/about/juncker-commission/docs/vestager_en.pdf)).

Member States in relation to potential restrictions on online sales of consumer electronics products and small electronic appliances, including at the premises of Philips, Media Saturn and Samsung.<sup>4</sup>

Nonetheless, the majority of such investigations continue to be initiated by NCAs, who (along with national courts) are able to apply EU competition laws on anticompetitive agreements/conduct as well as the equivalent domestic legislation. In a recent speech, the outgoing Director-General for Competition, Alexander Italianer, noted the NCAs' "pioneering role" in pursuing online distribution investigations.<sup>5</sup>

The table below provides a snapshot of some of the more high profile NCA investigations concerning online sales restrictions:

Sector	Parties	Jurisdiction	Issues(s)	Status
White / brown goods	Electrolux, Samsung, LG and Darty (household appliances)	France	Resale price maintenance Discrimination between distribution channels	Dawn raids were carried out at premises in October 2013
Apparel	Asics (footwear)	Germany	Discrimination between distribution channels (particularly third party platforms such as eBay and Amazon Marketplace).	On 28 April 2014, a statement of objections was issued to Asics Settlement reportedly being negotiated
	Adidas (footwear)	Germany	Discrimination between distribution channels (particularly third party platforms such as eBay and Amazon Marketplace)	Adidas has agreed to a change of distribution practices – no fine has been imposed On 2 July 2014, the company stated: "...we have decided to extend our eCommerce guidelines to also include open market practices; if our partners adhere to our criteria, there will be no restrictions for online sales in any channel"
Healthcare	Carl Zeiss and Essilor (optical glass)	France	Prohibiting online sales	On 10 July 2014, Carl Zeiss stated: "We are cooperating with the French authorities, because as a maker of optical lenses we are also interested in having swift and legally valid clarification of the relevant standards for internet sale"
	Pride Mobility Products and Roma Medical Aids (mobility scooters)	UK	Prohibiting online sales Prohibiting online advertising of prices below the supplier's own recommended retail prices	On 5 August 2013, the Office of Fair Trading issued an infringement decision No fine was imposed, but the parties were required to end the current arrangements and not enter into similar restrictive arrangements in the future
Electronic goods	Sennheiser (headphones)	Germany	Selective distribution preventing authorised traders from selling products on Amazon Marketplace	On 24 October 2013, Sennheiser agreed to a change to its online sales terms to no longer prohibit dealers from selling their products on Amazon Marketplace, thus preventing the initiation of formal proceedings

<sup>4</sup> Commission confirms inspections relating to potential restrictions on online sales, MEMO/13/1106, 5 December 2013 ([http://europa.eu/rapid/press-release\\_MEMO-13-1106\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-1106_en.htm)).

<sup>5</sup> 'Competition Policy in the Digital Age', 47th Innsbruck Symposium- "Real sector economy and the internet – digital interconnection as an issue for competition policy", 7 March 2014 ([http://ec.europa.eu/competition/speeches/text/sp2014\\_01\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2014_01_en.pdf)).

Sector	Parties	Jurisdiction	Issues(s)	Status
Electronic goods	Pioneer and Media Saturn (audio-visual receivers)	Austria	Pricing agreements with the potential to block online sales	On 13 June 2014, Pioneer was fined €350,000 and Media Saturn was fined €1,230,000
	Bang & Olufsen (electronic goods)	France	<i>De facto</i> ban on online sales	On 12 December 2012, Bang & Olufsen was fined €900,000 (reduced to €10,000 on appeal)

## Key Issues to Consider Following the *Dornbracht* Ruling

- Blanket restrictions on online sales by distributors are not advisable. Clauses that fall short of an outright ban but nonetheless disincentivise or hinder online sales are also likely to raise issues. They run counter to the underlying principle that every distributor in the EU should be able to do business via the internet, are viewed as restrictions of competition “by object” (i.e. as serious restrictions) and are highly unlikely to benefit from an exemption from the prohibition against anticompetitive agreements.<sup>6</sup>
- Selective or exclusive distribution agreements can be considered as a possible means to exert a greater degree of control over distributors. Selective distribution in particular offers greater scope to enter into legitimate restrictions, including with regard to how internet sales are conducted by distributors. This said, not all products are suitable for selective distribution (it is typically used for luxury goods or technically complex products), and of course both exclusive and selective distribution may be unattractive for commercial reasons.
- Distribution arrangements that ‘pass muster’ in one Member State may usefully serve as a benchmark for competition compliance in other Member States – although it cannot be ruled out that an NCA may come to a different conclusion than another NCA with regard to issues arising from the same distribution arrangements.
- Investigations in this area are often resolved by a change of business practice by the companies concerned, and without the imposition of (significant) fines, suggesting that these issues may be driven not by anticompetitive intent but rather by the fact that online distribution is an evolving area for businesses and competition authorities alike. This said, the burden on management time and the adverse publicity that is associated with competition investigations (particularly if the authorities decide to carry out a “dawn raid” at company premises) should not be underestimated.

<sup>6</sup> In a 2011 judgment involving cosmetics and personal care products, the European Court of Justice ruled that, in the context of selective distribution, a clause which prevented internet sales by requiring that the products be sold in a physical space in the presence of a qualified pharmacist was a restriction “by object” that fell outside the automatic “block exemption” for vertical agreements, although it may be possible to demonstrate that the criteria for individual exemption are met (*Pierre Fabre Dermo-Cosmetique*, 13 October 2011, C-439/09).