

Access to Online Platforms and Competition Law

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Access to online platforms has become an important topic of debate – raising questions both on how to apply existing antitrust rules and whether new rules are needed. Online distribution creates new opportunities for businesses to expand their scope, overcome geographical limitations, and reach more users. Online platforms are one option for businesses to seize these new opportunities. They offer consumers a one-stop-shop by aggregating products and services from multiple providers that consumers can easily search and compare. They can also help build trust between users and providers by rating and enforcing quality standards and, in some cases, guaranteeing transactions. The European Commission has found that almost half of small businesses in Europe use online marketplaces to sell their products and services.²

It is therefore not surprising that questions of access to online platforms and the competition rules that govern this access have attracted attention. But in the noise that surrounds the sometimes febrile debate, the fundamentals can sometimes be forgotten. In reality, a well-developed body of case law already allows competition rules to be applied consistently and predictably to access restrictions for online platforms.

In this chapter, we explore the EU competition law principles that govern online platform access. We distinguish between three main scenarios of access restrictions:

- vertical access restrictions, where a supplier prevents or restricts the ability of its distributors to access third-party platforms;
- horizontal access restrictions, where a rival prevents or restricts the ability of its competitors from accessing third-party platforms; and
- autogenous access limitations, where a platform limits access to itself.

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² European Commission, 'Fairness in platform-to-business relations, impact assessment', Q4 2017.

Different considerations and principles apply in each of these scenarios. Most importantly, perhaps, there is a clear dividing line between restrictions that hinder access to third-party platforms and limitations that a platform establishes for access to itself.

But there are also commonalities between the different scenarios. In particular, the case law has made clear that not every restriction that affects an undertaking's ability to use the internet or access an online platform necessarily amounts to an anticompetitive restriction of competition. The same basic principles of competition law apply in both the offline and online world: a restriction of an undertaking's commercial freedom is not sufficient to establish an infringement of competition rules. Rather, it is necessary to demonstrate harm to the competitive process.

The following sections discuss in more detail what this means for the different possible scenarios of competitive restrictions.

Vertical restrictions on access to online platforms

Vertical restrictions on access to online platforms involve a supplier preventing or limiting the ability of its distributors to sell via online platforms. These vertical platform restrictions have been the subject of intense debate, particularly in Germany. In 2011, the *Pierre Fabre* judgment of the Court of Justice had condemned a 'general and absolute ban' on online sales in a selective distribution arrangement, which precluded the distributor from making sales via the internet, as a by object restriction under Article 101 TFEU.³

Some German courts and the German Federal Cartel Office took an expansive interpretation of the *Pierre Fabre* principles. They qualified prohibitions that banned distributors from selling via online platforms (platform bans) as by object restrictions, even if distributors were free to engage in online sales via their own websites.⁴ This interpretation was based essentially on the position that any restriction on a distributor's freedom to sell online constituted an anticompetitive restriction by object and could not benefit from the Vertical Restraints Block Exemption Regulation.⁵

In its revised Vertical Restraints Guidelines, the European Commission had taken a considerably more liberal approach. The Guidelines accept that a supplier may prohibit distributors from selling via online platforms that display their own brands, such as Amazon or eBay.⁶ In its recent e-Commerce Report, the Commission confirmed that platform bans 'do not generally amount to a de facto prohibition on selling online or restrict the effective use of the Internet as sales channel.'⁷ Accordingly, they should not be considered as hardcore restrictions within the meaning of the Vertical Restraints Block Exemption Regulation.

3 Case C-439/09 *Pierre Fabre*, judgment of 13 October 2011, EU:C:2011:649.

4 German Federal Cartel Office (*Adidas*, 27 June 2014; *Asics*, 26 August 2015; *Sennheiser*, 24 October 2013); OLG Schleswig (*Digital cameras*, 5 June 2014); KG Berlin (*Scout school bags*, 21 April 2009).

5 Commission Regulation (EU) No 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 (Vertical Restraints Block Exemption Regulation).

6 Commission Notice, Vertical Restraints Guidelines, para.54.

7 European Commission, 'Final report on e-Commerce Sector Inquiry', 10 May 2017, ¶¶41-42; and European Commission, 'e-Commerce Staff Working Document', 10 May 2017, ¶¶499 et. seq.

The German courts that took a more interventionist approach considered that the Vertical Restraints Guidelines were not relevant to them.⁸ But some judgments from German courts took a similar position to the European Commission.⁹

The preliminary ruling of the European Court of Justice in *Coty*, following a reference from the higher state court of Frankfurt, ultimately resolved the tension between these different national judgments.¹⁰ The Court of Justice confirmed the European Commission's position – holding that platform bans are neither restrictions by object nor hardcore restrictions within the meaning of the Vertical Restraints Block Exemption Regulation. Rather, such bans may fall outside the scope of Article 101 TFEU entirely.

In comments following the judgment, the head of the German Federal Cartel Office suggested that the judgment's implications are limited to selective distribution agreements for luxury goods.¹¹ But the considerations that the Court of Justice sets out for its conclusions are of a general nature and apply to different products and different types of distribution.¹² The detailed discussion of the *Coty* judgment is part of a different chapter in this publication. For our analysis of platform access restrictions, however, we note several important conclusions that follow from the judgment.

First, the judgment makes clear that even a blanket ban on accessing online platforms need not necessarily amount to an anticompetitive restriction of competition. A platform ban does not preclude the distributor from selling online via its own website. This is a point the court focused on in *Coty*.¹³ Its conclusions are based on the narrow scope of the constraint that a platform ban creates.

A restriction on access to online platforms is not a resale restriction. It is best understood as a promotion limitation. The restraint prevents the distributor from making use of one specific promotion option. Limiting promotion options is less intrusive than a sales restriction – which is one reason why it cannot be qualified as a hardcore restriction under the Vertical Restraints Block Exemption Regulation.

In fact, in the recent *Ping* case in UK, the Competition Appeal Tribunal held that even a blanket ban on distributors making online sales and thus preventing all selling over the internet could not be treated as automatically restricting competition.¹⁴ Instead, the content, objectives, and legal and economic context of the ban must be considered.¹⁵

8 OLG Schleswig (*Digital cameras*, 5 June 2014).

9 OLG Munich (*Adidas*, 2 July 2009); OLG Frankfurt (*Backpacks*, 22 December 2015); OLG Karlsruhe (*Scout school bags*, 25 November 2009).

10 Case C-230/16 *Coty*, judgment of 6 December 2017, EU:C:2017:941.

11 *Handelsblatt*, 'Luxus muss nicht in die Schmutzedecke', 6 December 2017.

12 Thomas Graf and Tilman Kuhn, 'The *Coty* Judgment', *Competition Law & Policy Debate*, June 2018.

13 Case C-230/16 *Coty*, judgment of 6 December 2017, EU:C:2017:941, ¶¶52-53, 65-67; and Opinion of Advocate General Wahl, ¶¶147-150.

14 *Ping Europe v. CMA* [2018] CAT 13.

15 *Ibid.* ¶143. In that case, the tribunal found that the ban did in fact infringe Article 101 TFEU because it significantly restricted consumers from accessing Ping's golf club retailers outside their local area and from comparing prices, and it reduced the ability of, and incentives for, retailers to compete for business using the Internet (¶148). Ping could have achieved the same aim – promoting its in-store custom-fitting service – in a less restrictive way (and the tribunal identified several alternatives to the blanket ban. See ¶171 et seq.)

Second, competition at the level of the supplier is relevant for the competitive assessment: if the supplier faces competition from other suppliers at the inter-brand level, it is less likely that a restraint will cause anticompetitive harm. It is more likely in those circumstances that the supplier is optimising the promotion strategy for its products to maximise its competitiveness *vis-à-vis* its rivals. If the supplier gets it wrong, inter-brand competition will correct the inefficiency.¹⁶

Third, the possible legitimate interests of the undertaking imposing a platform ban must be given due consideration. In *Coty*, the Court of Justice discussed the supplier's interest in protecting the luxury image of its product.¹⁷ But nothing in the court's reasoning precludes the consideration of other legitimate interests. To the contrary, the court applied general principles for the assessment of selective distribution agreement that were first developed in *Metro*.¹⁸

The *Coty* judgment continues a trend in the case law that emphasises the need to consider legitimate interests and objective justifications. In *Microsoft*, the General Court made clear that once a company advances an objective justification, it falls on the competition authority to explain why that justification cannot be upheld.¹⁹ In *GSK Spain*, both the General Court and the Court of Justice found that the Commission had erred because it had not seriously engaged with the justifications advanced by the defendant.²⁰ And most recently, the Court of Justice in *Intel* reiterated that the Commission must examine whether the benefits of the conduct at issue outweigh its alleged restrictive effects.²¹

Fourth, the *Coty* judgment shows that the same basic principles of competition law apply offline and online. Constraining an undertaking's commercial freedom or denying it a particular commercial opportunity is different from restricting competition.²² Competition authorities must demonstrate harm to the competitive process.²³

This assessment must be done in a holistic manner that considers all aspects of competition. The platform ban cases illustrate the risks of an overly narrow perspective. The authorities challenging platform bans may well have believed that they were protecting small retailers' interests. But they were in fact reinforcing the market power of large online platforms by denying suppliers control over how they promote their products online. That market power is now

16 Vertical Restraints Guidelines, ¶¶102, 153.

17 Case C-230/16 *Coty*, judgment of 6 December 2017, EU:C:2017:941, ¶¶42-46.

18 Case 26/76 *Metro SB-Großmärkte GmbH & Co. KG*, judgment of 25 October 1977, EU:C:1977:167.

19 Case T-201/04 *Microsoft*, judgment of 17 September 2007, EU:T:2007:289, ¶1144.

20 Case T-168/01 *GlaxoSmithKline Services*, judgment of 27 September 2006, EU:T:2006:265, ¶¶275, 301.

21 Case C-413/14 *Intel*, judgment of 6 September 2017, EU:C:2017:632, ¶140.

22 Case T-112/99 *Métropole télévision (M6)*, judgment of 18 September 2001, EU:T:2001:215, ¶¶76-77 ('it is not necessary to hold, wholly abstractly and without drawing any distinction, that any agreement restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition laid down in Article 85(1) of the Treaty'). See also Case T-99/04 *AC Treuhand*, judgment of 8 July 2008, EU:T:2008:256, ¶126 with further references.

23 Case C-8/08 *T-Mobile Netherlands BV*, Opinion of Advocate General Kokott of 19 February 2009, EU:C:2009:110, ¶71; Case C-209/10 *Post Danmark I*, judgment of 27 March 2012, EU:C:2012:172, ¶¶21-22; and Case C-413/14 *Intel*, judgment of 6 September 2017, EU:C:2017:632, ¶133. See too Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (the Article 102 Guidance), ¶6 ('the Commission is mindful that what really matters is protecting an effective competitive process and not simply protecting competitors').

triggering calls for new competition law intervention²⁴ and possibly legislative changes.²⁵ One may well ask whether a better approach would not be to let market forces play out.

Horizontal restrictions on access to online platforms

Horizontal restrictions on access to online platforms involve a competitor preventing or restricting the ability of its rivals to access one or more platforms. For example, a provider may enter into an exclusivity arrangement or non-compete agreement with a platform, prohibiting the platform from hosting rival products or services; or the provider may engage in a tying arrangement that precludes the platform from giving access to competitors.

A recent example of a horizontal platform restriction in the offline world arose in *Maxima Latvija*.²⁶ In that case, the platforms at issue were shopping centres. Maxima Latvija, a major retailer, had included non-compete clause in its rental agreements with several shopping centres that allowed it to veto rival retailers' access to the centres. The Court of Justice held that even if the clauses at issue prevented 'access of Maxima Latvija's competitors to some shopping centres,' this did not support a conclusion that the clauses by their nature restricted 'competition on the relevant market, namely the local market for the retail food trade.'²⁷

The judgment therefore draws an important distinction between access to the platform and access to the relevant market.²⁸ The two are not the same. Restricting access to a platform does not necessarily mean that access to the market is restricted and competition is foreclosed. This is the same kind of reasoning that can also be seen (albeit in different terms) in the assessment of vertical restraints in *Coty*. To establish whether there is an anticompetitive restriction, it is necessary to conduct a 'thorough analysis of the economic and legal context' in which the constraint takes place.²⁹

Relevant elements for that analysis include the market coverage of the constraint at issue and the alternatives available to rivals. In *Maxima Latvija*, the Court of Justice noted that it was necessary to consider whether rivals had real alternatives to establish themselves, such as renting space in other shopping centres or other commercial premises. Ultimately, what was needed was a thorough assessment of the 'availability and accessibility of commercial land'.³⁰

A good example of a thorough review of the economic and legal context of platform restrictions in the online space is provided by the *OnTheMarket* case in the UK. OnTheMarket is a

24 The European Commission recently announced that it is investigating concerns that Amazon may be misusing merchant data. *Financial Times*, 'EU opens probe into Amazon use of data about merchants', 19 September 2018.

25 In April 2018, the European Commission proposed an EU Regulation on fairness and transparency in online platform trading, COM(2018) 238. The German government, in turn, is considering changes to national competition law directed at online platforms and also proposals for changes to the framework of European competition law, see Thorsten Käseberg, 'Wettbewerbspolitik in dieser Legislaturperiode: 10. GWB-Novelle und Kommission Wettbewerbsrecht 4.0', *Neue Zeitschrift für Kartellrecht*, 10 October 2018.

26 Case C-345/14 *Maxima Latvija*, judgment of 26 November 2015, EU:C:2015:784.

27 Ibid. ¶22.

28 Advocate General Wahl had already pointed this out in his Opinion in *Cartes Bancaires*, see Case C-67/13 *Cartes Bancaires*, judgment of 11 September 2014, EU:C:2014:2204.

29 Case C-345/14 *Maxima Latvija*, judgment of 26 November 2015, EU:C:2015:784, ¶29.

30 Ibid. ¶27.

property search service launched by estate agents in the UK to challenge the effective duopoly of Rightmove (the market leader) and Zoopla.³¹ Prior to the launch of OnTheMarket, estate agents tended to list on both Rightmove and Zoopla, and they had been facing increasing listing fees for both services. When it launched, OnTheMarket included a rule by which estate agents listing on its platform could list only on one other property search service. The clause therefore imposed a restriction on estate agents from accessing rival property search services.

The Competition Appeal Tribunal, however, held that the rule did not restrict competition. Rather, it had a procompetitive object because it enabled OnTheMarket's entry, with the overriding purpose to provide cost reductions for estate agents. The *OnTheMarket* case confirms the importance of not abstracting restrictions on competition from restrictions on platform access, even when rivals are involved. Instead, the full context (here, a two-sided market subject to network efforts with powerful incumbents) and legitimate objectives (enabling market entry) must always be carefully considered.³²

Maxima Latvija and *OnTheMarket* concerned restrictions of competitors under Article 101 TFEU. The same principles, however, govern the application of Article 102 TFEU because the concept of a restriction of competition is the same.³³ This is illustrated by the approach the Commission and the General Court took in the case of Microsoft's tying of Windows Media Player (WMP) with its dominant Windows operating system. At issue in that case was the ability of rival media player applications to access PC OEMs.³⁴

The Commission recognised that there were 'good reasons not to assume without further analysis that tying WMP constitutes conduct which by its very nature is liable to foreclose competition.'³⁵ The Commission therefore undertook 'a closer examination of the effects that tying has on competition'.³⁶ The General Court, for its part, reviewed the Commission's analysis of 'the actual foreclosure effects of Microsoft's abusive conduct'.³⁷

The Commission established that the tie between Windows and WMP rendered it unlikely that OEMs would preinstall rival media players, notably because of space constraints, while the tie gave WMP ubiquitous presence on PCs. The Commission also demonstrated that rival media

31 *Agents Mutual Limited v. Gascoigne Halman* [2017] CAT 15.

32 The case has also been cited as an example of a market-oriented solution to how businesses might respond to their reliance on powerful incumbent platforms through collective action, rather than seeking greater regulation, see H Mullan, N Timan, 'Strengthening Buyer Power as Solution to Platform Market Power', *CPI Antitrust Chronicle*, September 2018.

33 'It goes without saying that it is of the utmost importance that legal tests applied to one category of conduct are coherent with those applied to comparable practices,' see Case C-413/14 *Intel*, Opinion of Advocate General Wahl of 20 October 2016, EU:C:2016:788, ¶103.

34 Original Equipment Manufacturers.

35 Case COMP/C-3/37.792 *Microsoft*, Commission decision of 24 March 2004, ¶¶841, 905-926.

36 Ibid ¶841.

37 Case T-201/04 *Microsoft*, judgment of 17 September 2007, EU:T:2007:289, ¶¶971, 1010, 1057. See also ¶¶868-869, 977, 1035, which note that the Commission had examined 'more closely the actual effects which the bundling had on the market'.

players had no real alternatives to OEM preinstallation for reaching users.³⁸ In particular, downloading was not an alternative at the time because it was slow, difficult and prone to failure.³⁹

The Commission, moreover, showed that rival media players were qualitatively superior to WMP, but nevertheless experienced declining shares following Microsoft's tie.⁴⁰ Similarly, in the *Microsoft (Internet Explorer)* follow-on case, the Commission found that tying Windows with the Internet Explorer browser had enabled Microsoft to maintain a leading position in browsers 'despite the fact that it did not improve Internet Explorer 6.0 for many years'.⁴¹

In short, Microsoft's tying conduct created barriers for rival media players to reach users via PC OEMs.⁴² But the fact that Microsoft's tying practices closed off access to OEMs was not sufficient, in itself, to establish anticompetitive foreclosure. Competition was foreclosed because objective factors, such as download speed, precluded downloading as an alternative to OEM preinstallation and the tie therefore prevented qualitatively superior applications from competing for users.

Access to OEMs is also the subject matter of the Commission's recent *Google Android* decision.⁴³ In that case, the Commission maintains that Google engaged in abusive tying of the Android Play store with the Google Search app and the Chrome browser. Similar to *Microsoft WMP*, the Commission alleges that Google prevents preinstallation of rival search apps and browsers on Android device OEMs and that this forecloses competition. Yet the factual and technical circumstances since the time of the *Microsoft (WMP)* decision have changed.

Mobile OEMs preinstall multiple apps without space constraints. And rival apps have real alternatives for reaching users, notably through downloading. As the General Court found in *Cisco*, 'there are no technical or economic constraints which prevent users from downloading'.⁴⁴ Google, moreover, does not achieve ubiquity through the alleged tie. Most searches take place on PCs on which Microsoft's Bing search service and Internet Explorer browsers are preinstalled.

38 Case COMP/C-3/37.792 *Microsoft*, Commission decision of 24 March 2004, ¶¶858-876. This involved a detail factual assessment of the alternative channels ostensibly open to rivals – at the time, none of these channels constituted a viable means for rivals to reach users.

39 For, example, only 7.5 per cent of European households had broadband access at the time, and over 50 per cent of downloads failed. Microsoft also added a hurdle to downloading because Windows 'generates an error message if a user tries to access content that WMP does not support' (¶869). Microsoft itself recognised that 'requiring users to download more than ten megabytes of software code before they can access multimedia content is extremely inconvenient' (¶867), see Case COMP/C-3/37.792, *Microsoft*, Commission decision of 24 March 2004.

40 The Commission found that the affected competitors were leaders in quality and innovation (they had a 'competitive edge' over Microsoft's software) and had attracted large shares of users independently from Microsoft prior to the conduct at issue. Ibid. ¶¶ 819, 947-951.

41 Case COMP/AT.39530 *Microsoft (Internet Explorer)*, Commission decision of 16 December 2012, ¶¶34-54 ('as a result of the tying, Internet Explorer's market share remains much higher than that of its competitors, although it could not be considered as a superior product compared to its main competitors'; the Commission noted that it had 'examined such effects closely', for example, by considering empirical surveys).

42 Case T-201/04 *Microsoft*, judgment of 17 September 2007, EU:T:2007:289, ¶¶1043-1046, 1088 (Microsoft's tie foreclosed rival media players from access to third-party PC OEMs as a distribution channel; the Court held that Microsoft's tie facilitated the 'erection of such barriers for Windows Media Player').

43 European Commission, 'Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine', 18 July 2018.

44 Case T-79/12, *Cisco Systems*, judgment of 11 December 2013, EU:T:2013:635, ¶79.

Nor does the Commission show that allegedly foreclosed search apps and browsers are qualitatively superior. The question whether these different circumstances should matter for the competitive analysis is now before the General Court.

Autogenous access limitations

Autogenous access limitations involve a platform limiting or excluding access to itself. Such access limitations are different from the vertical and horizontal restraints discussed above. The potential concern with vertical and horizontal restraints is that they may create barriers for companies to compete independently. They may prevent companies from reaching customers or users through means that are independent of the company that creates the restriction. For example, in *Microsoft (WMP)*, Microsoft (as seen) created barriers that prevented rivals from reaching users via third-party PC OEMs.

The obligation that follows from Articles 101 and 102 TFEU in these cases is therefore a negative obligation: the addressee of an infringement decision must abstain from creating the barrier at issue. For example, it must not conclude an exclusivity arrangement or must not engage in a tying practice. To remedy the infringement, the addressee needs simply to remove the exclusivity clause or end the tie.

The situation is different in cases where a platform limits access to itself. In those cases, the platform is asked to supply access to others – typically its downstream rivals. The platform is expected not just to abstain from creating barriers that prevent rivals from competing independently, but to positively assist rivals by giving them access. In other words, the platform must subsidise competition against itself.

Such obligations to supply access are subject to a higher legal threshold. The Court of Justice made this clear in its landmark *Bronner* judgment.⁴⁵ In that case, the platform was Mediaprint's newspaper distribution network. Mediaprint reserved this network solely for its own downstream newspaper business. The Court of Justice held that Mediaprint was not required to provide rival newspapers with access to the network.

The fact that alternative means of reaching customers – such as kiosks or post – were competitively 'less advantageous' than Mediaprint's distribution network was not sufficient for finding an infringement of Article 102 TFEU.⁴⁶ For a duty to supply access to arise under EU competition rules, three conditions must be met: access must be indispensable for rivals to compete; failing to supply access must risk eliminating all competition on the downstream market; and there must be no objective justification for a decision not to supply.⁴⁷

The Court of Justice had already identified the same principles in *Telemarketing*.⁴⁸ That case concerned a television station that accepted advertisements with a telephone number only if the advertisement included the station's own telemarketing service's number.⁴⁹ The television

45 Case C-7/97 *Bronner*, judgment of 12 June 1997, EU:C:1998:569.

46 Ibid. ¶43.

47 Case C-7/73 *Commercial Solvents*, Judgment of 6 March 1974, EU:C:1974:18; Case C-311/84 *CBEM*, judgment of 3 October 1985, EU:C:1985:394; Case C-7/97 *Bronner*, judgment of 26 November 1998, EU:C:1998:569; Joined Cases T-374/94 et al. *European Night Services*, judgment of 15 September 1998, EU:T:1998:198; and Case T-201/04 *Microsoft*, judgment of 17 September 2007, EU:T:2007:289.

48 Case C-311/84 *CBEM*, judgment of 3 October 1985, EU:C:1985:394.

49 Ibid. ¶¶2-5, 26.

station thus excluded access to its platform for rival telemarketing services. The court found that this conduct amounted ‘in practice to a refusal to supply the services of that station to any other telemarketing undertaking’.⁵⁰ This represented an abuse only if the service was ‘indispensable’; the refusal was ‘not justified by technical or commercial requirements’; and the refusal risked ‘eliminating all competition’.⁵¹

An example of the application of the *Bronner* principles in the online space arose in the *Getmapping* case decided by the English High Court.⁵² Ordnance Survey, a dominant mapping provider with a dominant website, gave preference to its own digital photos, rather than photos from rivals, when showing maps on its website.⁵³ The court held that absent a ‘bottleneck monopoly’ or indispensability, it is not abusive for a dominant platform to limit access to its facilities and enjoy ‘a commercial advantage over others’ in a downstream market by virtue of its ownership of the platform.⁵⁴ Otherwise, *Bronner* would have been decided ‘the other way’.⁵⁵

The Commission’s recent decision in *Google Shopping* takes a different position.⁵⁶ The case concerns groups of specialised product ads for product offers that Google shows in the ad space of its general result pages, and groups of specialised product results that it showed in the past. The Commission maintains that by showing these groups of product results and ads, Google committed an abuse because Google did not show product results from rival comparison shopping services (CSSs) in the same way.

The Commission describes the abuse as ‘the more favourable positioning and display, in Google’s general search results pages, of Google’s own comparison shopping service compared to competing comparison shopping services’.⁵⁷ Its remedy stipulates that if Google shows grouped product results or ads, it must show product results or ads from third-party CSSs in the same manner.⁵⁸

The Commission does not claim that access to product results and ads on Google is indispensable for CSSs to compete. Yet the Commission’s favouring claim in substance makes a case that Google has a duty to supply access to CSSs. The Commission does not suggest that Google hinders CSSs from attracting users independently of Google. The Commission’s case is only about CSSs’ access to Google. But the Commission does not satisfy – or attempt to satisfy – the legal conditions to impose a duty to supply access.

50 Ibid. ¶¶26.

51 Ibid. ¶¶26.

52 *Getmapping Plc v. Ordnance Survey* [2002] EWHC 1089. Mr Justice Laddie’s judgment relates to an interim injunction by Getmapping requiring Ordnance Survey to show Getmapping’s photos on Ordnance Survey’s website. Laddie J dismissed the application on the substance, holding it was ‘very weak’, and therefore unlikely to succeed at trial.

53 The claimant’s position, at ¶29, was as follows: ‘OS [the dominant mapping provider] is leveraging its market power and privileges in its mapping market to gain a competitive advantage in the imagery market. By displaying its imagery in the one stop shop [i.e., the system for showing a map together with an image] OS is not competing on the merits. ... Consequently, if OS’s imagery is in the one stop shop it is essential for Getmapping to be there as well.’

54 Ibid. ¶¶47, 49.

55 Ibid. ¶47.

56 Case COMP/AT.39.740 *Google Search (Shopping)*, Commission decision of 27 June 2017.

57 Ibid. ¶2.

58 Ibid. ¶700.

Any demand for access to a platform can be reframed as a claim that the platform favours itself in the same way that the Commission does in *Google Shopping*. In the *Bronner* case, Mediaprint could have been said to engage in favourable positioning by including only its newspapers in its distribution network. In *Telemarketing*, a claim could have been made that the television station engaged in favourable positioning of its own telemarketing service by admitting only ads with its own telemarketing service's telephone number. In *Orange Polska*, the Commission itself described the fact that the incumbent telecom network provider was granting its subsidiary 'more favourable conditions' for accessing its indispensable broadband network as 'an element of the refusal to supply wholesale broadband access' to rivals.⁵⁹

Because a claim of favouring or self-preferencing is in substance a case for supply of access, such a claim does not provide a self-standing legal basis for finding an abuse, outside the conditions for a duty to supply. Otherwise, as the English High Court pointed out in *Getmapping*, *Bronner* would have been decided 'the other way'. Likewise, the German Federal Court of Justice has consistently excluded self-preferencing as an abuse, absent indispensability, because competition law does not require companies to subsidise competition against themselves.⁶⁰

There are several reasons why requiring a platform to provide access to rivals is subject to a higher legal threshold under competition law. First, there is a fundamental tension between the general competition rules and obligations to supply competitors. Competition law is about preserving independent rivalry between competitors, not competitors cooperating with each other.⁶¹ Second, a duty to supply interferes with property rights and the right to choose one's trading partners.⁶² Third, obligations to supply may diminish the incentives of both the company subject to the obligation and companies benefiting from it from competing and innovating.⁶³ Fourth, in industries with fast innovation cycles, such as the technology sector, a duty to integrate rivals into constantly evolving technologies and products may delay – or preclude entirely – new developments.

Yet under the reasoning of the *Google Shopping* decision, the legal conditions that the Court of Justice has consistently identified for a duty to supply could be sidestepped and conduct that the court has consistently confirmed as lawful could be treated as an illegal abuse. The pending

59 Case COMP/39.525 *Telekomunikacja Polska*, Commission decision of 22 June 2011, ¶¶748, 762.

60 'Niemand ist verpflichtet, zu seinen Lasten fremden Wettbewerb zu fördern', BGH, KVR 17/08 *Bau und Hobby*, 11 November 2008, NJW 2009, 1753, ¶24; see also BGH, KZT 2/90 *Aktionsbeträge*, 12 November 1991, NJW 1992, 1827 (1828), ¶22; BGH, KZR 65/10 *Telefon- und Branchenverzeichnisse*, 31 January 2012, NJW 2012, 2110, ¶14; BGH, KZR 7-10 *Grossistenkündigung*, 24 October 2011, NJW 2012, 773, ¶¶31, 53; BGH, KZR 4/01 *Kommunaler Schilderprägebetrieb*, 24 September 2002, GRUR 2003, 167 (168); BGH, KZR 6/86 *Freundschaftswerbung*, 10 February 1987, NJW 1987, 3197 (3198-9); BGH, KVR 5/81 *Stuttgarter Wochenblatt*, 29 June 1982, NJW 1982, 2775 (2776); BGH, KZR 54/71 *Registrierkassen*, 26 October 1972, NJW 1973, 280 (281).

61 As Advocate General Jacobs noted in *Bronner*, 'it is generally procompetitive and in the interests of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business,' Case C-7/97 *Bronner*, Opinion of Advocate General Jacobs of 28 May 1998, ECLI:EU:C:1998:264, ¶57.

62 Ibid. ¶56. See too Article 102 Guidance: 'the Commission starts from the position that, generally speaking, any undertaking, whether dominant or not, should have the right to choose its trading partners and to dispose freely of its property.'

63 Case COMP/39.525 *Telekomunikacja Polska*, Commission decision of 22 June 2011, ¶700. Advocate General Jacobs in *Bronner*, ¶57.

court proceedings in the *Google Shopping* case may provide more guidance on where the limits for access to platforms are to be drawn.

Conclusion

While access to online platforms may on their face raise novel issues, the same principles of competition law apply as in the physical world. Preventing distributors or rivals from accessing a platform is not anticompetitive by its object or by nature. Rather, the restraint must be assessed in its full economic and legal context. If a platform limits access to itself, this raises an issue under competition rules only if the conditions for a duty to supply access are met. Attempts to sidestep these legal conditions would undermine established case law and create legal uncertainty that is harmful to competition and innovation.

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Henry Mostyn

Cleary Gottlieb Steen & Hamilton LLP

Henry Mostyn's practice focuses on EU and UK competition law, including merger control, anti-competitive agreements and abuse of dominance rules. He is a barrister of England and Wales, and Ireland.

Henry has represented clients before the European Commission and the UK Competition and Markets Authority, and conducted litigation before the European Courts in Luxembourg and the UK High Court. His particular focus is on the application of the abuse of dominance rules to the technology sector.

Henry joined the Brussels office of the firm in 2012. He moved to the London office in 2014. He previously completed a pupillage at 4 New Square Chambers, Lincoln's Inn. He has a background in mathematics.

During 2017 and 2018, Henry worked at the UK Competition and Markets Authority in the mergers team.

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