



July 2020

Online Distribution, Platforms and Retail

Next Normal: Combining online and offline sales in and after the crisis

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INTRODUCTION AND SUMMARY

Radical events often trigger transformation processes - a new kind of **forced disruption**.

Almost everyone has made more online purchases in recent months than before. Online sales benefit - stationary sales suffer, although both have their advantages for customers. The **combination of both worlds** makes sense. However, **webshops** have to comply with a tangle of legal requirements; effective shops with connected logistics are expensive and cannot be created overnight. Stationary **shops**, on the other hand, lack customers, but they have **warehouses** and could **advise customers quickly and closely, deliver and take back products**, and provide **after sales services**. Thus, a combination of both platforms might be a good idea.

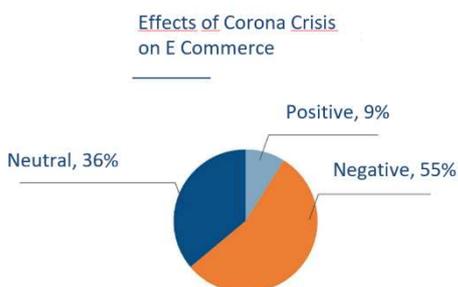
#ForcedDisruption, #BestOfBothWorlds, #Cash-free, #MobilePayment, #SmartphoneInBusiness, #RegionalisationInOnlineCommerce, #CrossChannel, #OmniChannel, #MultiChannel, #ROPO, #PORO, #O2O, #Halo, #PlaymakerPrinciple, #Dropshipping, #AreaManagement, #ShopInShop, #PopUpShops, #ClickAndCollect, #PickUpInStore, #Platforms

Legal issues relate to: **E-commerce requirements, data protection, geo-blocking, P2B platform requirements, restrictions of online distribution** relevant to antitrust law and other restrictions of competition, as well as general questions **of distribution law (commercial agents, distributors, franchise, etc.)**.

#E-CommerceRequirements, #TechnicalRequirements, #Imprint, #CommercialCommunication, #DistanceSellingInformationRequirements, #RightOfWithdrawal, #CancellationPolicy, #DataProtection, #GeoBlocking, #P2B, #TermsAndConditions, #RestrictionsOnWebsites, #RestrictionsOnCustomers, #RestrictedAreas, #RestrictionsOnPlatforms, #RestrictionsOnPriceSearch, #BestPriceClause, #PriceFixing, #PriceRecommendation, #DoublePriceSystems, #SelectiveDistributionSystems, #CotyDecision, #AsicsDecision, #IntersportDecision

PANDEMIC AND ONLINE DISTRIBUTION

The pandemic has of course had an impact on online sales, and there was a sharp drop in the beginning¹:



Besides negative effects, especially at the beginning of the crisis, there are nevertheless positive effects. Stationary retail chains, for example, increased their **online sales**², but were not able to compensate for the **stationary losses**; the winners were likely the **Internet Pure Players**³. Retail stores are closing everywhere – even stores of large chains with online offers.

Nevertheless, the future most likely lies in the **combination of online and offline sales** because the changed consumer behaviour developed during the Corona crisis will definitely continue.

Recently, a Bitcom study has shown that there is a **regionalisation in online commerce**⁴:



In addition, the Corona situation has led to an even stronger desire for

cashless or even contactless payment. A targeted use of smartphones in shops (as it is now common in restaurants) is also a logical step. There are thus enough drivers for the **sympiosis**.

ONLINE SALES - (LEGAL) QUESTIONS

The **legal issues** relate to: **E-commerce requirements, data protection, geo-blocking** (the 2018 EU Regulation), **P2B** (the new **platform requirements** since 12 July 2020), **permissible restrictions on online distribution**, and general questions of **distribution law (commercial agents, distributors, franchise, etc.)**.

Of course, there are also significant questions regarding the combination of online and offline sales. Furthermore, a primary concern is how to maintain channel excellence.

E-Commerce requirements

First, there is the obligation to **identify the provider ("Imprint")** in accordance with § 5 of the German Telemedia Act (**General Information Obligations**). Service providers must keep the following information for telemedia business easily recognisable, directly accessible, and constantly available:

- Name, address, legal form, authorised representatives, and share capital,
- contact details for quick electronic contact and direct communication, including e-mail,
- where appropriate, details of the responsible supervisory authority,
- commercial/association/partnership/cooperative register and registration number,
- where applicable, information on the professional chamber, legal professional title, awarding state, professional regulations,
- where applicable, sales tax identification number or business identification number,
- for AG, KGaA, and GmbH in liquidation or winding up, the information that the company is in the process of liquidation or being wound up.

In addition, there are **special information obligations for commercial communication** according to § 6 Telemedia Act:

- Commercial communications must be recognisable.
- The communicating physical or legal person must be clearly identifiable.
- Offers of sales promotions, such as discounts, premiums, and gifts, must be clearly identifiable as such, and the conditions for their use must be easily accessible and indicated clearly and unambiguously.
- Prize competitions or promotional contests must be clearly identifiable as such, and the conditions of participation must be easily accessible and indicated clearly and unambiguously.
- Where commercial communications are sent by e-mail, the header and subject line may not conceal or disguise the sender or the commercial nature of the message. [...]

There are also **general distance selling information duties** (§ 312d BGB), i.e. the **trader must provide the consumer with the following information**, according to Art. 246a (1) Introduction to German Civil Code (EGBGB):

- (No 1) the essential characteristics of the goods or services, to the extent appropriate to the means of communication and to the goods and services
- (No 2) his identity, such as his trade name and the address of the place where he is established, his telephone number, and, where appropriate, his fax number and e-mail address, and, where appropriate, the address and identity of the trader on whose behalf he is acting,
- (No 3) in addition to the information provided for in No 2, the business address of the trader and, where appropriate, the address of the trader on whose behalf he is acting, to which the consumer may address any complaint if this address differs from the address provided for in No 2,
- (No 4) the total price of the goods or services, including all taxes and duties, or, where the nature of the goods or services means that the price cannot be reasonably calculated in advance, the method of calculating the price, and, where appropriate, any additional freight, delivery, or shipping charges and any other charges, or, where

¹ According to a study by the E Commerce Association of merchants from March 2020 <https://www.haendlerbund.de/de/downloads/infografik-corona-studie-2020.pdf>

² Federal Statistical Office (https://www.destatis.de/DE/Presse/Pressemitteilungen/2020/07/PD20_245_45212.html): The Internet and mail-order business achieved the greatest increase in turnover compared to the same month last year, with 28.7% in real terms and 28.8% in nominal terms. Rates of change of this magnitude are unusual even in this very dynamic sector and are thus largely attributable to a special effect of the corona pandemic.

³ See <https://www.channelpartner.de/a/multichannel-haendler-verlieren-in-der-corona-krise.3338015> with reference to figures published by the bevh (<https://www.bevh.org/corona.html>): Internet pure players grew by 13.3 per cent in the first half of the year and 20.8 per cent in the second quarter of 2020 alone; sales on online marketplaces grew by 19.1 per cent (quarter) and 12.1 per cent (half-year) in the same period; online sales by stationary retailers, on the other hand, only participated below average in growth in the second quarter at 4.7 per cent; in terms of the half-year, they even lost 1.8 per cent compared with the same period a year ago.

⁴ From 14 July 2020, https://www.bitkom.org/sites/default/files/2020-07/200714_studienbericht-handel_2020.pdf. This is how Germans shop digitally.

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such charges cannot reasonably be calculated in advance, the fact that such additional charges may be incurred

- (No 5) in case of a contract for an indefinite period or a subscription contract, the total price; this includes the total costs incurred per billing period and, if fixed amounts are charged for such a contract, also the monthly total costs; if the total costs cannot be reasonably calculated in advance, the method of calculating the price must be specified,
- (No 6) the cost of the means of distance communication used for the conclusion of the contract if the consumer is charged costs which exceed the costs of the mere use of the means of distance communication,
- (No 7) the terms of payment, delivery, and performance, the deadline by which the trader must deliver the goods or provide the service and, where appropriate, the trader's procedure for dealing with complaints,
- (No 8) The existence of a statutory liability for defective goods,
- (No 9) the existence and conditions of after-sales services and guarantees, where applicable,
- (No 10) where appropriate, existing relevant codes of conduct and how to obtain copies thereof,
- (No 11) where appropriate, the duration of the contract or the conditions for terminating open-ended contracts or automatically renewable contracts,
- (No 12) where appropriate, the minimum duration of the consumer's obligations under the contract,
- (No 13) where appropriate, the fact that the trader may require the consumer to lodge a deposit or provide other financial guarantees, and the conditions thereof,
- (No 14) where appropriate, the functioning of digital content, including applicable technological protection measures for such content,
- (No 15) where appropriate, significant restrictions on the interoperability and compatibility of digital content with hardware and software, to the extent that these restrictions are or must be known by the business operator, and
- (No 16) where appropriate, that the consumer may use an out-of-court complaint and redress procedure to which the trader is subject, and its conditions of access.

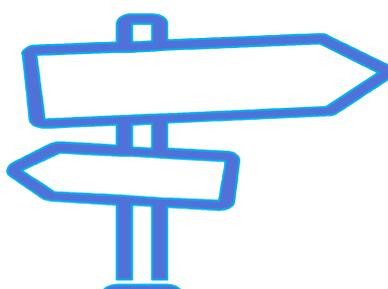
In addition, there are **special distance selling information duties** (§ 312j BGB). For instance, on websites for electronic commerce with consumers, it must be **clearly indicated at the latest at the beginning of the order process** whether there are any **delivery restrictions** and which **means of payment** will be accepted. Furthermore, in case of a consumer contract

in electronic commerce involving a service provided by the trader for consideration, the trader must provide the consumer with the information referred to in Article 246a No 1, 4, 5, 11 and 12 EGBGB in a clear and comprehensible manner and in a prominent place immediately before the consumer places his order. The trader must also organise the ordering process in such a way that the consumer expressly confirms with his order that he **makes a binding promise to pay**. If the order is placed by clicking on a button, this duty can only be fulfilled if the button is labelled with nothing other than the clearly legible words "order with obligation to pay" or with a comparable clear wording - otherwise no contract will be concluded.

Regarding the known **right of withdrawal** (§§ 312g, 355 ff. BGB), the trader is **obliged to inform** the consumer (according to Art. 246a (2) and (3) EGBGB):

- about the conditions, time-limits and procedure for exercising the right of withdrawal [] as well as the model withdrawal form in Annex 2 to the Act,
- where appropriate, that the consumer must bear the cost of returning the goods in the event of withdrawal and, in the case of distance contracts, in addition the cost of returning the goods if they cannot be returned by normal post because of their nature; and [] and
- if the consumer does not have a right of withdrawal under § 312g (2) Nos. 1, 2, 5 and 7 to 13 of the German Civil Code, that the consumer cannot revoke his declaration of intent, or
- if the consumer's right of withdrawal under § 312g (2), (3), (4) and (6) and § 356 (4) and (5) of the German Civil Code (BGB) may expire prematurely, on the circumstances in which the consumer loses an initially existing right of withdrawal.

The website can fulfil these information obligations by sending the **model for the withdrawal instruction** provided in Annex 1 of the Act, duly completed and in text form.



Withdrawal - sample texts

Statutory Law has provided model texts for the complex instructions in connection with the consumer's right of withdrawal, which are contained in Annexes 1 and 2 to the Act on Information Duties in Consumer Contracts (Art. 246, 246a EGBGB). The legislator has been tinkering with these model texts from time to time for many years because the courts described the models repeatedly as incorrect. Nevertheless, it makes sense to use the samples. You can easily find them on the internet.

There are also **technical obligations and duties to inform in e-commerce** (§ 312i BGB) i.e. technical means to correct input errors must be provided and information duties (according to Art. 246c EGBGB) must be fulfilled, i.e. the customer must be informed

- on the individual technical steps leading to the conclusion of a contract,
- whether the text of the contract will be stored by the website after the conclusion of the contract and whether it will be accessible to the customer,
- on how he can detect and correct input errors before submitting the contractual declaration using the technical means provided pursuant to § 312i (1) sentence 1 number 1 of the German Civil Code,
- on the languages available for the conclusion of the contract, and
- on all relevant codes of conduct to which the trader is subject and on the possibility of electronic access to these codes.

> The compliance with all formal requirements for online trade is of course burdensome and easily prone to errors (expensive warnings and injunctions threaten).

However, there is more to it than that:

DATA PROTECTION

The processing of personal data (i.e. all data that allow the allocation to a specific person, including basic technical data such as the IP address of the online shop users) are subject to data protection. Since May 26th, 2018, the General Data Protection Regulation (GDPR) has been in force without restriction and uniformly in all EU countries. According to the GDPR, there is a duty to inform online shop users about the processing of their personal data in connection with the online

shop.

Therefore, a so-called **data protection declaration** is used. It should be accessible via a link on the homepage and on every website of the online shop, so that the online shop user can immediately access the information at any time.

The detailed information obligations are set out in Art. 13 GDPR.

> In addition to the data protection declaration, it is of course necessary to handle the data in accordance with the regulations.

GEOBLOCKING

The recent Geo-blocking - Regulation (2018/302) of February 28, 2018, in force as of December 3, 2018, forced at least one third of the providers on the internet to rethink strategies⁵.

Already in the **EU Commission's** much-noticed **sector enquiry on e-commerce**⁶ in 2016, the EU Commission had conducted a survey with more than 1450 responses from market participants. The result: 36% of retailers surveyed do not sell cross-border in at least one of the product categories in which they are active. 38% of retailers (43% of marketplaces and 34% of price search engines) collected geo-information to apply geo-blocking measures. 11% of the retailers were even subject to contractual obligations towards their suppliers to conduct geo-blocking (mainly based on costs, competitive pressure, and different taxes) and 25% of the retailers who also geo-blocked charged different prices.

Such differences based on the origin of the interested parties should be avoided. The Geo-blocking Regulation plays an important role in the European Union's strategy for a "*one digital market*" to fully exploit the potential of the domestic market. Thereby it is one of many steps⁷ which the European

Union is taking on the way to fulfilling its *strategy for a digital internal market*⁸.

The following applies:

- **Geo-blocking on websites or apps according to the nationality, residence, or domicile of the customer to deny access or redirect the customer to local websites is prohibited.** The customer must be left the choice to decide which local website he wishes to visit. They should also be free to change this choice at any time without significant effort.
- The **discriminatory use of different general terms and conditions (including prices)** for access to goods or services based on geo-data is not allowed. If the company does not supply a country, customers must have the possibility to collect the products in a supplied Member State, as companies are still not obliged to supply all Member States.
- **Payment terms may not vary due to the nationality, residence, or place of establishment of a customer.** For example, anyone who allows purchase on account once must allow all customers to do so.

In Germany, the legal consequences of incorrect geo-blocking are laid down in the Telecommunications Act (TKG)⁹: It threatens a fine of up to € 300,000 (§ 149 (1c) TKG) and in addition, an injunctive relief for qualified institutions (§ 2 UKlaG, Law on Cease and Desist Orders) and competitors (§§ 3, 3a UWG, Law against Unfair Competition). The Federal Network Agency is responsible for the enforcement and provision of practical assistance under

Article 8 of the Geo-blocking Regulation (§ 116 TKG), while the Federal Cartel Office is responsible for monitoring competition law aspects (§ 116 TKG).

> There are no reports of cases of fines so far.

NEW: P2B - PLATFORM REGULATION

The EU Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediary services, "**Platform-to-Business Regulation**" (**P2B Regulation**) will apply directly in the EU Member States from July 12, 2020.

Online brokerage services and online search engines, through which commercial platform users offer products to their **consumer customers**, must therefore

- formulate **General Terms and Conditions of Business (GTC) clearly and comprehensibly** and make them easily accessible to commercial users, in particular even before conclusion of the contract,
- state specific reasons which may lead to the **services** offered being **suspended**, terminated, or restricted in any other way, **in whole or in part**,
- provide information on **additional distribution channels or any partner programmes**,
- provide information on ownership and control of **intellectual property rights**.

In addition, Platforms must

- explain **rankings** and how to influence them clearly and understandably,
- **disclose** reductions of a user in his ranking,
- **explain** any differentiated treatment,
- explain the technical and contractual access to **personal data**, and
- maintain an internal **complaints management system**.

There is an extensive right of action

⁵ See Rothermel/Schulz, K&R 2018, 449, "Die neue Geoblocking Verordnung" and K&R 2019, 367, "Die Geoblocking Verordnung ein Jahr danach...".

⁶ See the Final Report on the Sector Inquiry on Electronic Commerce {SWD (2017) 154 final}, presented on 10.05.2017, consisting of the 16-page report to the Council and Parliament (COM (2017) 229 final) and a 300-page accompanying document containing the details of the enquiry: Commission Staff Working Document.

⁷ See for example the chronological list of European activities on the European Council's homepage: <http://www.consilium.europa.eu/de/policies/digital-single-market/>.

⁸Namely in: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *Strategy for a Digital Single Market for Europe*, COM(2015) 192 final

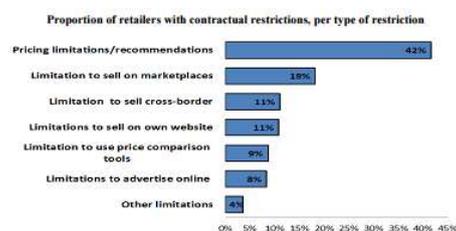
⁹"BT Drucksache". 19/4722 of 04.10.2018.

granted to associations and a requirement for Member States to adopt appropriate measures against infringements; such measures are not yet apparent, but there may be sanctions through competition law.

> This is the latest specification.

RESTRICTIONS ON ONLINE DISTRIBUTION

Restrictions on online distribution have been viewed critically, and not just since the EU Commission's much-noticed **sector enquiry** on e-commerce.¹⁰ The Commission had found:



The Commission had subsequently taken a number of measures against companies for violations of the ban on cartels (Art. 101 TFEU); others will follow, as the yield of information from the sector enquiry was enormous. In addition, several landmark decisions have been taken on this and other cases.

> This leads to the following:

Restricted online sales

It is **not legal to prohibit a distributor from operating its own website**. It would be a restriction of the customer group "internet buyers" and is as such (like territorial restrictions) only allowed for active sales to customer groups which are exclusively allocated to someone else or reserved by the supplier and up to market shares of 30% (Vertical Block Exemption Regulation). However, the website is generally considered a passive sale (like a shop window) and therefore cannot be prohibited.

Nevertheless, it is permitted to impose quality requirements on the merchant's

website, like the positioning as an authorised dealer (platform, product range, and communication), the design of the website (quality, look & feel, images, descriptions, etc.), the content and the product range of the website, the handling of online purchases, advice and customer service, advertising, etc.

Territorial restriction

A territorial restriction for active sales, like a restriction of a customer group, is only allowed if the territories are exclusively allocated to someone else or reserved by the supplier and up to market shares of 30% (Vertical Block Exemption Regulation).

Prohibition of third party platforms

According to the sector enquiry, there is a very widespread usage of market-

places (third party platforms) by traders. Over 90% of the retailers surveyed use their own online shop, 31% sell through both their online shops and marketplaces, and only 4% sell exclusively through marketplaces. The importance of marketplaces differs between the member states, with a more important role in Germany (62% of retailers surveyed), the UK (43%), and Poland (36%) compared to states such as Italy (13%) and Belgium (4%), and between retailers. They are more important for medium and small retailers than for larger retailers. The conversion rate for own webshops is around 4% and for marketplaces around 5%. 18% of dealers (but 32% in Germany) are subject to contractual restrictions relating to marketplaces (general prohibition, prohibition of auctions, prohibition of second-hand exchanges, qualitative requirements).

Since the ECJ's *Coty decision*¹¹ and its continuation before the Frankfurt

Antitrust Law

Antitrust law protects the market from restrictions, so-called **restraints of competition**. In the EU, there is a general prohibition (so-called **cartel prohibition**) in Art. 101 TFEU (Treaty on the Functioning of the European Union): "*[...] prohibited are all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development or investment; (c) share markets or sources of supply [...]*".

However, there are exceptions. Restrictions of competition can be exempted from the prohibition - in practice mainly due to lack of **market shares** and thus lack of **appreciability** according to the **de minimis notice** and **block exemption** if: (i) the market shares are ≤ 30% and (ii) the agreement is free of **hardcore restrictions** (i.e. no price fixing, territorial or customer restrictions, restrictions on the sale of spare parts) and (iii) other conditions are fulfilled. There are a number of **block exemption regulations and guidelines**, such as for typical **distribution agreements**, i.e. vertical agreements (so-called **Vertical Block Exemption Regulation**, No. 330/2020), which provide further conditions for an exemption, i.e. exceptions to the cartel prohibition.

Violations of the ban on cartels are punishable by severe fines of up to a maximum of 10% of total turnover (group of companies/economic unit) in the previous business year; this can be reduced by 50% in the case of cooperative companies and by 100% in the case of **whistleblowers** (cf. EU Regulation 1/2003; Guidelines on the method of setting fines).

¹⁰ See the final report on the sector enquiry on electronic commerce {SWD (2017) 154 final} of 10.05.2017.

¹¹ Judgment of 06.12.2017 (C-230/16); see Rohrßen, "Vertriebsvorgaben im E-Commerce 2018: Praxisüberblick und Folgen des "Coty"-Urteil des EuGH", GRUR-Prax 2018, 39 ff. and "Internetvertrieb von Markenartikeln: Admissibility of platform bans following the ECJ's Coty ruling", in: DB 2018, 300 et seq. with details on internet sales of branded goods and "Nicht Ideal(O)" - combination of price search engine ban and logo clause", in: ZVertriebsR 2018, 118 et seq.

Higher Regional Court¹² and the decision of the Hamburg Higher Regional Court¹³, the following has now been reasonably clarified:

Qualitative-selective distribution systems are allowed not only for luxury goods and technically high-value, but also for (other) high-quality goods. Provided that *"the goods distributed are of high quality and the distribution is geared to accompanying advisory and support services for the customer, with the aim, among other things, of making the customer aware of an end product which is, on the whole, sophisticated, of high quality and of a higher price and of building up or maintaining a special product image"*. Within such a selective distribution system, it could then be permissible *"to prohibit the distribution partners by appropriate company guidelines from distributing these goods via a certain online sales platform in order to protect the product image and the practice of customer-loyalty advice which contributes to this, as well as to prevent product and image-damaging business practices of individual distribution partners which have been identified and consistently pursued in the past."*

Prohibitions to use third party platforms could therefore be allowed.

Restrictions on price search engines

The sector enquiry found that 36% of retailers enter their offers into price search engines, while suppliers contractually prohibit 9% of retailers from doing so. Price search engines link back to the supplier's website for purchase (which is a difference to marketplaces).

With regard to price search engines, the FCJ found in the *Asics case*¹⁴ that the restriction on price search engines "at least" is a restriction of passive sales to consumers and even the purpose of the restriction on price search engines. The admissibility of restrictions on platforms in accordance

with the *Coty judgment* (see above) does not mean that general price search engine restrictions are admissible. In particular, the "combination of restrictions" - i.e. price search engine and advertising restrictions - makes the difference here, because it does not ensure that interested parties have "practically substantial access" to the dealers' internet offerings.

Such price search engine restrictions are therefore inadmissible.

Best price clauses

According to the sector enquiry, best price clauses in agreements between marketplaces and retailers are rather rare; 43% of marketplaces do not even have them; only 2% of retailers report such parity clauses. However, they are common, for example, on hotel booking platforms.

The Düsseldorf Higher Regional Court¹⁵ recently challenged the previous court practice and the Federal Cartel Office's view that a *"narrow best price clause"*, according to which booking portals such as *Booking.com* prohibit hotels from offering rooms at lower prices on their own website than via the portal, was permissible and not restrictive for competition, but necessary to prevent *"disloyal diversion of customer bookings"*. The situation is different for the *"wide best price clauses"* and a market share of over 30% according to the Düsseldorf Higher Regional Court and the Federal Cartel Office¹⁶.

Wide best price clauses are therefore most likely prohibited where market shares are high, narrow best price clauses may not be prohibited.

Recommended retail prices

The sector enquiry found that 38% of retailers receive price recommendations from the supplier (manufacturers report 80%); 10% receive discount targets for online sales; 5% receive minimum price targets for sales, and 3%

receive price targets for marketing. 18% of retailers also report that suppliers monitor prices (manufacturers report 30% monitoring). Some retailers even report that suppliers/manufacturers provide incentives or exert pressure to ensure that recommended prices are respected.

Non-binding price recommendations and maximum prices are allowed under the Verticals Block Exemption Regulation. Minimum price recommendations are prohibited hardcore restrictions; dual pricing systems (online and offline) are also prohibited.

Selective distribution system

The sector enquiry has shown that almost 20% of manufacturers have introduced selective distribution systems. 2% have extended existing systems to new product types and almost 40% have included new criteria relating to online sales or online advertising for their products in their distribution agreements. More than 50% of all manufacturers use *"brick and mortar"* clauses in selective distribution, thus excluding pure online dealers from distribution. 64% of manufacturers said they had opened their own online shops. 3% said they had decided to fully integrate their distribution activities.

Selective distribution systems are those where the supplier undertakes to sell the contractual goods only to distributors selected based on specified characteristics and where these distributors undertake not to sell the goods to distributors not authorised to distribute within the territory defined by the supplier to operate that system.

Such conditions do not constitute a restriction of competition at all if the resellers are selected based on objective criteria of a qualitative nature relating to the professional competence of the reseller, his staff and his equipment, and if those conditions are laid down uniformly for all the resellers con-

¹² Judgment of 12.07.2018, ref. 11 U 96/14 (Kart).

¹³ Judgment of 22.03.2018, file no. 3 U 250/16.

¹⁴ Decision of 12.12.2017, Ref. CPC 41/17.

¹⁵ Decision on 04.06.2019, Ref.: VI - Kart 2/16 (V).

¹⁶ Bundeskartellamt (Federal Cartel Office) 2013 against *HRS* (decision of 20.12.2013 - B 9 - 66/10), confirmed by the Düsseldorf Higher Regional Court (decision of 09.01.2015 - VI Kart 1/14 (V)).

cerned and applied without discrimination.¹⁷

The Vertical Block Exemption Regulation also allows selective distribution systems under certain conditions where no hardcore restrictions are contained. However, obligations to operate at least one physical point of sale that are unrelated to the quality of distribution and/or other potential efficiencies may be critical.

Non-compete clauses

The prohibition to distribute, produce or purchase competing goods is called a non-compete clause. This is allowed under the Vertical Block Exemption Regulation if the market share thresholds are not exceeded and the duration of the prohibition does not exceed five years.

Antitrust law-free contracts

Antitrust law does not apply to agency agreements if the agent does not have to bear an atypical risk. It neither applies to commissions and commission agencies by the same standards.

GENERAL DISTRIBUTION LAW ISSUES

All general distribution law questions are of course relevant.

This means, in particular, **compliance with the strict mandatory rules for the protection of commercial agents**. Under certain circumstances, these can be applied **analogously to distributors** if (i) they are integrated into the sales organisation and (ii) there is an obligation to transfer customer data during the cooperation or when it ends. In addition, there are a number of judgments on **distribution law, which is** not codified by statutory law. The situation is similar in **franchise law**. It is possible that commercial agency law could also apply to platforms (see box).

There are also special forms such as **commissions** and **consignment stock contracts** as well as - even

more specifically - **multi-level marketing systems** and others¹⁸.

CONNECTION ONLINE AND OFFLINE...

In terms of marketing and sales policy, the connection between online and offline sales, or "**O2O**" or "**connected commerce**", is often referred to as the "**halo effect**", which explains an increase in online sales based on the depiction of a halo in the physical presence of sales outlets. The increased visibility of retail shops and their shop windows probably has a lasting effect on the frequency of online sales from the same area. A **marketing mix** may therefore be interesting.

Retailers in turn benefit from the so-called **ROPO effect** (Research Online, Purchase Offline). Customers can obtain information online and then test the product offline in the stores. Of course, there is also **PORO** (advice in the store with product testing and purchase online - perhaps in a different size or design). This leads to offers such as **Click and Collect, Pick-up-in-Store, Drive-In**, etc.

The approach taken is a **cross-channel** approach, or **multichannel** approach, or **omni-channel** approach. This leads to synergy effects and increased conversion rates.

The **strengths of stationary trade** (e.g. proximity, trust, advice, shopping experience, rapid availability, etc.) are thus combined with the **strengths of online trade** (e.g. wide range of products, 24/7 accessibility, convenience, etc.). This also results in decentralisation and optimisation of logistics processes.

Connectivity and consistency of the **customer journey** is of course of great importance.

This requires agreements that take a holistic approach and do not favour commission-based interests or channelled profit-seeking. The **incentive system** must fit.

Online purchases could be processed decentrally, either by handing over the sale directly to the stationary trade

(**ROPO**) - in which case the freedom of pricing is problematic - or by having the latter at least take over the logistics in return for a corresponding internal remuneration; in both variants, a regulation must then be found to ensure that customers return goods after exercising their right of withdrawal. If necessary, it may then be possible to consider returning or picking up the goods again.

If the customer has received **advice** and tested the product **on site** and then possibly decided online on a different design, colour, or size (**PORO**), the challenge is to let the stationary trade participate.

Various stationary merchants could also merge through a **platform**, such as the platform of a shopping mall operator. Then, the logistical issues of the "**dropshipping model**" and questions of processing and profit must be contractually clarified.

On June 25, 2020, the Federal Cartel Office last examined the *Intersport platform* (currently 350 out of 1500 shops) as a "**drop shipment business model**" according to the "**play-maker principle**" and did not raise any objections, although this restricts competition between retailers.

Obstacles are certainly traditional **exclusivity, exclusive agencies, and expectations of territorial protection**. In general, the idea that someone "owns" customers or that someone is paid for simply finding a prospective customer without being involved in the transaction is rather unsuitable to meet current and future challenges.

Certainly useful are systems that decouple stock flow from cash flow, such as **consignment and commission systems**¹⁹. The idea that a retailer must buy the goods and then bear the **sales risk** is more likely to hinder **cross- or multi-channel strategies**. Retailers, wholesalers, and manufacturers tend to have a common interest in selling goods.

Area management (shops rent space) or **shop-in-shop systems** or **pop-up shops** may also be an option.

¹⁷ Metro judgment, ECJ of 25.11.1977, Case 26/76.

¹⁸ See our more specific guide Purchasing-Sales-Distribution Systems.

¹⁹ See our guide to NEXT NORMAL Supply Chains.

It remains to be seen how **voucher systems** will help the retail trade; in any case, time demands creative solutions.

Problem area: The platform as a commercial agent !?

European and thus also **German commercial agency law** (§§ 84 ff. HGB) provides a number of **legally binding regulations in favour of the commercial agent**; the so-called **commercial agent compensation claim** (§ 89b HGB) is almost "notorious". **For years, German courts have applied** these provisions **analogously to distributors** if (i) they are integrated into the sales organisation and (ii) there is an obligation to transfer customer data during the cooperation or when it ends. It should make no difference whether a commercial agent or a distributor is acting in the traditional analogue way or online, i.e. digitally.

It is not yet clear whether the **platform** is to be considered **as a commercial agent**. The core issue with platforms is when the performance of a machine (platform) is equal to that of a classic commercial agent. It is important that **sales promotions** (showing the range of goods on offer, providing advice, etc.) are also figuratively taken over by the machine used (by algorithms or associated services).

> This is probably the case if the machine does not merely act as a messenger, translator, or writing aid, but rather promotes the mediation process independently or even brings about the conclusion. **Such support is** likely to be present if

- the online shop operator also provides concrete purchasing advice (individual advice by call centre agents or by e-mail) to customers as part of its service (Dieselhorst/Grages in MMR 2011, 368; Forgó/Helfrich/Schneider, Betriebl. Data protection, Part IX, Chapter 2, Data transfer to trading partners and disclosure obligations, shop hosting nr. 6);
- offers (advertising) are technically and digitally displayed and applications are made available to the supplier (Dreyer/Haskamp in ZVertriebsR 2017, 359);
- the platform operator advertises independently and refers in general terms to its advantages as a comparison portal and in particular to certain offers of the companies registered in its booking system (Emde/Valdini in BB 2016, 899);
- the search results generated after the customer's input contain availability, service description and price, so that concrete offers are made that are tailored to the individual customer's wishes (Emde/Valdini in BB 2016, 899).

> **Such support is unlikely to exist** if

- the platform operator does not appear at all to the end customer (Söbbing BKR 2016, 360; Emde/Valdini in BB 2016, 899);
- a pure advertising activity, such as the transfer of customer data to the trader (Dreyer/Haskamp in ZVertriebsR 2017, 359);
- the platform operator is merely maintaining contacts or providing customer care (Emde/Valdini in BB 2016, 899);
- the customer concluding the contract is not identical to the person on whom the platform has acted (Emde/Valdini in BB 2016, 899).

Of course, the drafting of the contract also plays a role in individual cases (Rohrßen ZVertriebsR 2019, 153; Dreyer/Haskamp in ZVertriebsR 2017, 359). If there is a subsidy but no obligation to promote sales, these are referred to as **occasional agency contracts**.

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