



Termination of proceedings against Ford, Opel and Peugeot on account of possible restraints of competition in retailers instructions for cooperation with Internet intermediaries

Sector:	Automobile industry
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In spring 2015, the Bundeskartellamt initiated administrative proceedings against the manufacturers Ford Werke GmbH (“Ford”), Adam Opel AG (“Opel”) and Peugeot Citroën Deutschland GmbH (“PSA”) under Section 1 of the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*) and Article 101 of the Treaty on the Functioning of the European Union (TFEU).

This was in response to reports in the relevant trade press concerning the introduction of so-called “Internet standards” by these manufacturers and the objectives associated with them, as assessed by parts of the specialist community. According to these assessments, the manufacturers used these Internet standards to give their respective brand retailers instructions for the sale of their new cars via the Internet. If the brand retailers did not meet these Internet standards, they would have to forego a major part of their bonuses or sales support. Judging by press reports, one reason for introducing the Internet standards was the activity of so-called Internet-based new car portals.

The Bundeskartellamt carried out market surveys of the manufacturers concerned and of the two large new car portals autohaus24 GmbH (“autohaus24”) and MeinAuto GmbH (“meinauto.de”).

These new car portals function according to the following principle: final customers can configure the vehicle on these portals according to their own ideas (brand choice, special features, etc.). Following this configuration, they receive an indication of the price at which it is expected that the purchase of this chosen car can be mediated. The portals calculate

these price indicators on the basis of their own knowledge of the market or on the basis of retailers' indications. Final customers can receive advice on their chosen vehicle by telephone from the portals. If the final customer agrees to the mediation of a new car, he contracts the portal as an intermediary. The portals then look for a suitable retailer who can offer the final customer the car of his choice at the desired price. The sales contract is concluded and the transaction settled directly between the retailer and the final customer. Upon the conclusion of a sales contract, the retailer pays a commission to the portal. The retailer is under no obligation to conclude a sales contract with the customer mediated to him.

The activity of these web-based new car portals leads to significantly greater market transparency in the market for sales of new cars which a final customer would not be able to attain in any other way, or only with undue effort. In addition, the portals' activity leads to greater competition between the different car brands and between the brand retailers of the same manufacturers. This affects not only online, but also offline sales, since final customers regularly negotiate with offline retailers for more favourable prices, making reference to the portals' price indications. For brand retailers that cooperate with online intermediaries, this is often an important sales channel.

The Bundeskartellamt's investigations into the manufacturers indicated that the Internet standards included several conditions, the fulfilment of which was a prerequisite for receiving bonus payments or sales assistance. While the text of these conditions varied, their essence was the same. While they did not contain any explicit prohibition on retailers cooperating with intermediary portals, they were formulated and designed in such a way that such a prohibition could arise in the process of interpretation.

The Bundeskartellamt's investigations also revealed that following the introduction of the standards, a majority of the respective brand retailers were in fact no longer willing to cooperate with the intermediary portals out of a concern that they would lose the manufacturer's bonuses and sales assistance on which they depended. This led to a significant decline in mediation via new car portals of the car brands concerned.

The Bundeskartellamt informed the manufacturers that according to its initial assessment, it regarded the establishment of Internet standards as a contravention of applicable German and European competition law under Section 1 of the GWB and Article 101 of the TFEU insofar as they oppose the cooperation of brand retailers with new car portals acting as intermediaries on behalf of end users

Since the special rules of the motor vehicle block exemption concerning the purchase, sale or resale of new motor vehicles expired at the end of May 2013,¹ corresponding agreements between manufacturers and retailers come under the scope of the cross-sectoral vertical block exemption regulation.²

Following a provisional assessment, exemption of the Internet standards under the vertical block exemption regulation was not possible because these contained a hardcore restriction under Article 4 c) of the regulation insofar as they could be interpreted as prohibiting cooperation with new car portals. Under Article 4 c) of the regulation, limiting the active or passive sale to end users by members of a selective sales system operating at retail level is inadmissible under competition law and renders the agreement null and void. The motor vehicle manufacturers operate quantitative-selective sales systems, sometimes with a number of retailers in certain regions.

In the Commission's Supplementary guidelines for the motor vehicle sector, the concept of the end user used in Article 4 c) of the vertical block exemption regulation is further specified with a view to the sale of motor vehicles.³ The guidelines define the concept of "end user" in Article 4 c) of the vertical block exemption regulation as including consumers who conduct their purchase through an intermediary. The guidelines define intermediaries as persons or undertakings who purchase a new motor vehicle for a certain end user without being a member of the manufacturer's sales network. The use of the Internet to acquire customers for a certain range of motor vehicles and to receive electronically-placed orders from these customers does not affect the intermediary status. Intermediaries are to be distinguished from independent resellers who purchase motor vehicles for resale and do not act on behalf of a specific consumer.

The preliminary assessment of the Bundeskartellamt is that the mediation of new cars via the web portals that work according to the principle referred to above is not prohibited on competition grounds since these portals act as an intermediary for a particular consumer. The limitation of such intermediary activity is a hardcore restriction and thus a serious

¹ Article 3 of Commission Regulation (EU) No. 461/2010 of 27 May 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 in the motor vehicle sector.

² 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.

³ Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles, 2010/C138/05, para. 52.

infringement. An individual exemption from the prohibition on cooperation with end user intermediaries pursuant to Article 101 (3) TFEU was not evident if only on account of the lack of any recognisable improvement in the production and distribution of the goods (e.g. improved efficiency); in the course of proceedings, no claim was made to this effect by those involved. Within the context of the proceedings, the Bundeskartellamt has held talks with the manufacturers Ford, Opel and PSA, with some of them more than once. The manufacturers eventually expressed their willingness to clarify that Internet standards do not apply to web-based intermediary portals that act as customer intermediaries. Proceedings were closed after the motor vehicle manufacturers had communicated this clarification to the retailers and had provided evidence of this to the Bundeskartellamt.