

E.CA Economics

Economics of vertical restraints for price comparison websites

ACE conference, Madrid, 17 November 2017

FCO Asics decision (case B2-98-11)

Agenda

1	The FCO decision	1
2	Price Comparison Functionality and websites	7
3	Economic effects of price comparison websites	14
4	On possible anticompetitive effects and efficiencies	17
5	Conclusion	25

FCO decision (case B2-98-11) – short recap

- On 26 August 2015 the FCO decided that provisions in the past “distribution system 1.0” by ASICS Germany for its authorized distributors violated Article 101(1) TFEU/section 1 of the German Act against Restraints of Competition
- According to the FCO in particular the following provisions constituted restrictions of **competition by object**:
 1. **General prohibition on the use of brand names for online advertising**: authorized distributors were prohibited using paid search engine advertising and placements of advertising on third-party websites;
 2. **General prohibition on supporting price comparison engines**: authorized distributors were prohibited to support any price comparison engines through setting up application-specific interfaces.
- According to the FCO these provisions did neither qualify for exemption under the Vertical Agreements Block Exemption (VBER), nor for individual exemption under Article 101 (3) TFEU.
- The FCO decision left open whether or not a third provision, a **general prohibition on sales via online marketplaces (3)**, also constituted a restriction of competition by object that cannot be exempted

FCO assessment – prohibition to use price comparison engines

Restriction of competition by object:

- The FCO accepts the use of selective distribution systems by branded goods manufacturers and restrictions imposed on selected distributors in order to safeguard quality standards in distribution
- However, according to the FCO such restrictions may not be used to restrict dealers to in their ability to also sell products over the internet
 - The FCO stresses that this in particular holds for **small- and medium-sized dealers**
- Moreover, according to the FCO the price comparison websites ban serves primarily to **control price competition** in both offline and online sales.
- FCO's theory of harm:
 - Less price transparency leads to reduction of (intra-brand price) competition
- FCO criticizes the **general nature** of the prohibition to cooperate with any price comparison engines

FCO assessment – prohibition to use price comparison engines

Block exemption not applicable

- Hardcore restriction under VBER, Article 4(c):
 - *“the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, ...”*

Conditions for individual exemption **not met**

- **“Principle of equivalence”** between online sales and brick and mortar shops not applicable according to the FCO: price comparison engines have no equivalent in offline sales
- The *per se* prohibition not justified as a measure
 - to protect brand image (*“The searchability of a branded product on a price comparison website cannot be regarded as damaging to the brand per se.”* - FCO case summary, 25 January 2016)
 - to resolve a free-rider problem (*“... it is already questionable whether there is a free-rider problem at all in connection with the products under discussion. Many end customers have started to use both online and offline distribution channels in parallel in a wide range of product areas.”* – FCO case summary, 25 January 2016)

Düsseldorf Higher Regional Court decision on appeal (12 April 2017)

- Düsseldorf Court confirms FCO's decision on the prohibition of use of price comparison engines:
 - Restriction by object
 - Deprived retailers of advertising and sales possibility
 - Hardcore restriction which does not meet the requirements for exemption
 - No justification on grounds of image protection of pre-sales services – consumers of running shoes do not necessarily need or want such services or could inform themselves via the Internet

Key results E.CA analysis

Focus of E.CA analysis on vertical restraint to use **price comparison websites**

- Restraint is no by-object competition restriction:
 - Price comparison websites do **not** necessarily lead to lower prices
 - Reduced intra-brand price competition does not lead to higher prices if **inter-brand competition** is effective
- Restraint is no hardcore restriction and exemption should not be ruled out:
 - Encourages provision of **pre-** and **post-sales services**
 - Protects **brand image**
- No consistent theory of harm of FCO:
 - There is more to competition than intra-brand price competition
 - No careful balancing of pros and cons

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Price Comparison Functionality and websites

Price Comparison Functionality

Compare prices of a product across online retailers

Identify price components: product, shipment, packaging, tax

Information collected directly from retailers or via crawling

Recognize location of the buyer

High processing speed required

Price comparison website

Business model

Offers PCF to its visitors

Revenue from advertising or retailers (pay per click, sale or lead)

Additional services in upper range: interface, privacy and consumer protection, support transaction

Current characteristics of price comparison websites

Characteristics	Lower range	Upper range
Comparison functionalities	PCF centred	Additional functionalities: product search, rankings, customer reviews, product tests
Design	Plain, few figures	Modern interface, numerous figures
Privacy protection	Low standards	High standards
Consumer protection	Low standards (e.g. transparency of delivery costs)	High standards
Transaction	Forwarding to online shop	Information on shops (delivery times, stock, reliability), orders, e.g. buy direct by idealo.de

Price Comparison Functionality and websites

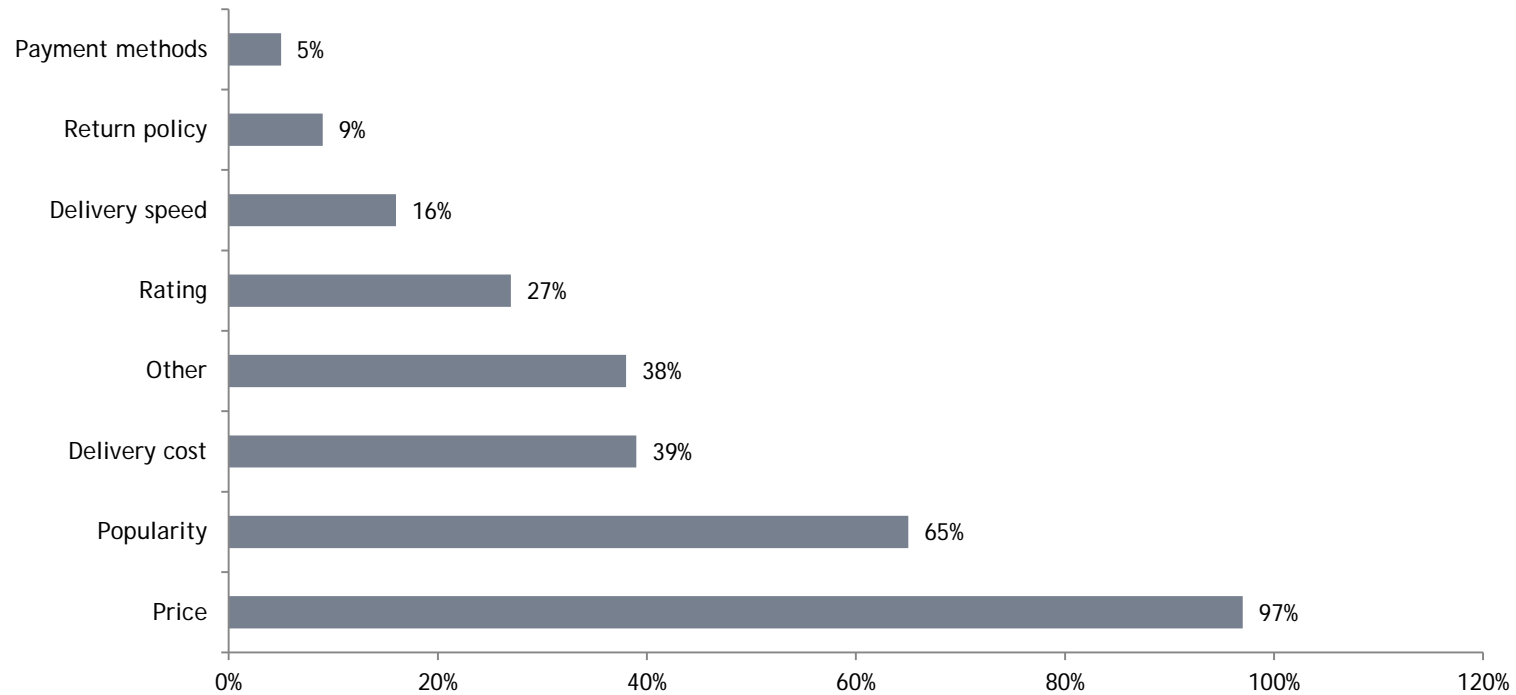
- **Development** in price comparison websites:
 - Early price comparison websites focused on PCF
 - Some have added functionalities and moved towards open market places
- **Evidence** from German price comparison websites:
 - "Ciao" was and still is PCF-centered
 - "Idealo" was PCF-centered but added functionalities and moved towards online market platform
 - At present "Idealo" much more visitors than "Ciao"
- FCO did **not** take historic perspective into account in its assessment

Most popular price comparison websites in Germany

Price comparison website	Price comparison websites 2010	Price comparison websites 2017*	All websites 2010	All websites 2017*
Idealo.de	1	1	69	62
Ciao.de	2	7	85	1,533
Preisroboter.de	3	14	145	18,828
Dooyoo.de	4	11	207	2,707
Geizhals.de	5	2	212	311
..				

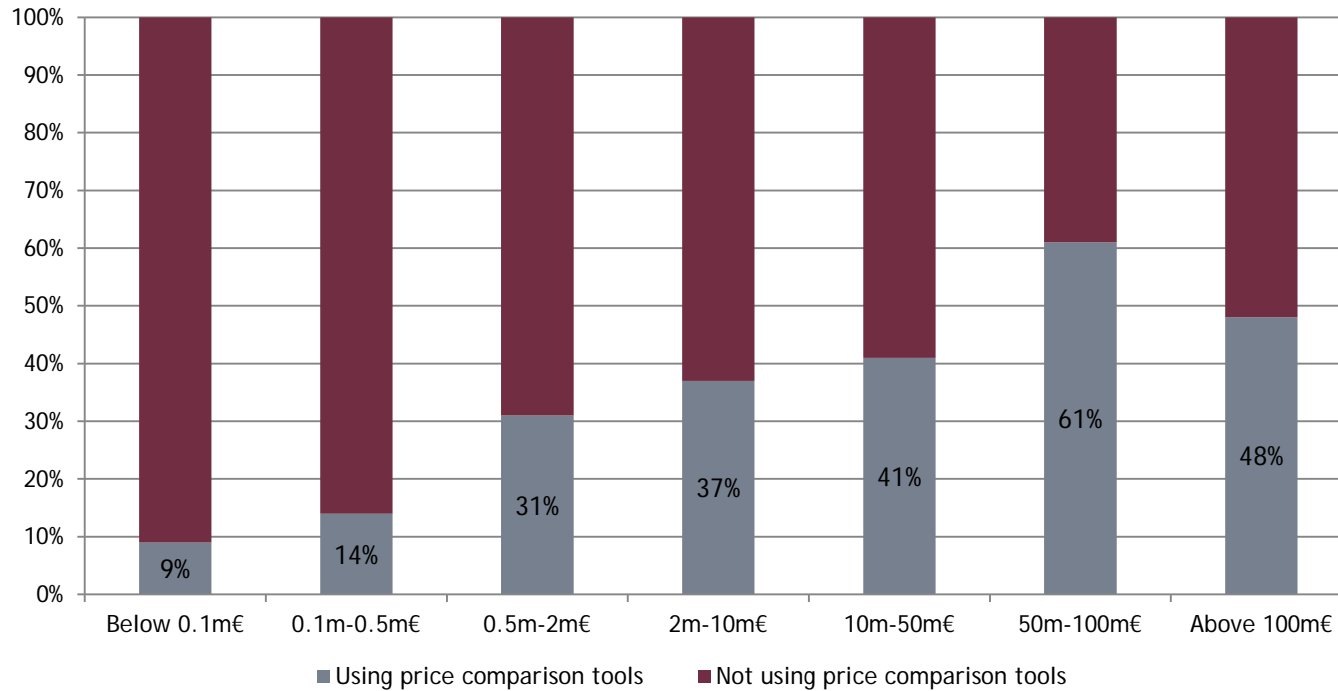
Source: Alexa.com, traffic statistics and Arbeitsgemeinschaft Online Forschung e.V. Note: Viewed on 26/01/2017

Ranking criteria on price comparison websites



Source: European Commission, Preliminary report on the e-commerce sector inquiry (15/09/2016), p.44.

Retailer size and use of price comparison websites



Source: European Commission, Preliminary report on the e-commerce sector inquiry (15/09/2016), p.158

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Economic effects of price comparison websites

- Price comparison websites increase price transparency, which may strengthen price competition
- Other possible effects of price comparison websites:
 - Price transparency may facilitate **coordination** between competitors
 - Retailers often have **similar prices** online and offline
 - Cavallo (2017), "Are Online and Offline Prices Similar? Evidence from Large Multi-Channel Retailers", *American Economic Review* 107(1): 283-303;
 - Duch-Brown, Grzybowski, Romahn and Verboven (2017), "The Impact of Online Sales on Consumers and Firms: Evidence from Consumer Electronics", *International Journal of Industrial Organization* 52: 30-62.
 - Create (significant) **costs** for retailers of being placed on price comparison websites
 - Lack of **transparency** and **impartiality** of information presented on price comparison websites (cfr. sector inquiry by FCO into price comparison sites)
 - Create problems of **retail channel coordination**

General principles for vertical restraints assessment

- An interest of manufacturers to **restrict sales** cannot be assumed *per se*
- Motives for vertical and horizontal restraints are principally **different**
- A reduction of intra-brand competition can only lead to higher retail prices when **inter-brand competition** is not effective

Necessary steps in economically sound assessment :

1. Assess degree of inter-brand competition
2. Spell out consistent theory of harm, identify positive and negative effects of vertical restraint
3. Carry out balancing of efficiencies and anticompetitive effects

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On possible anticompetitive effects

- Economic **incentive** of manufacturer for imposing vertical restraint needs to be examined
 - Analysis of possible motives of manufacturer for restricting sales channels
 - Higher retail price **≠** higher wholesale price
- Restraint imposed on manufacturer by large retailer to **foreclose** smaller retailers? Unlikely:
 - Larger retailers use price comparison websites **more frequently** than smaller retailers (source: E-commerce sector inquiry)
 - Use of price comparison websites **no entry strategy** for smaller retailers (source: E-commerce sector inquiry)

On possible anticompetitive effects

Presumption that restraint leads to higher prices is economically not justified

- Restraint may affect intra-brand price competition – however, actual effects depend on:
 - degree of **inter-brand competition**
 - importance of **price** versus **other** parameters of competition
- Retailers' prices online and offline **similar**, so price competition may not be strengthened without the ban
- **Differentiation** and **search costs** (also) important in online retail
 - intensive price competition online unlikely
 - typical search patterns and online/offline behavior of consumers not investigated by the FCO
- **Costs** of using price comparison websites for retailers (in particular significant for SME retailers)
 - under plausible assumptions up to 11% of retail price in the case of sport shoes
- **Lack of transparency** and **impartiality** of information/rankings on price comparison websites
- More price transparency **facilitates coordination** between competitors

On possible efficiencies

- Sports footwear as **experience** or **credence goods**
- Selective distribution system needed for these goods to provide “comfort” to consumers:
 - by ensuring **pre-** and **post-sales services**
 - by building **brand value** and **reputation**
- Same economic logic of selective distribution for offline applies to **online distribution**. Restraints necessary:
 - to protect brand image (to prevent almost exclusive focus on price by low-quality price comparison websites)
 - to solve free-riding problems and preserve provision of services
 - to solve retail channel coordination problems
- Difference between selected retailers’ **own online stores** and **third-party online platforms**
 - **no price focus** of own online stores; control over presentation, positioning and product selection and range
 - offline/online **coordination** possible for brick-and-mortar retailers with online stores

Asics brand Serious runner's shoes



High-tech, innovative shoes



UNDERPRONATORS

Cushioned Running Shoes

As underpronators (also called supinators) tend to be susceptible to shock-related injuries where you should choose a neutral running shoe with plenty of cushioning, for example, the GEL-Cumulus®.

- Focused on midsole cushioning for extra shock absorption
- Cushioning along outside of running shoe to counter outward roll of foot
- Cushioning in the heel
- Flexible shoes help evenly distribute impact

[SHOP UNDERPRONATOR](#)



NEUTRAL

Neutral running shoes

When you have a normal pronation pattern you can run in a wide variety of shoes, but specialized neutral running shoes offering cushioning and support are most suitable. The GEL-Nimbus® is the leading cushioning model for neutral runners.

- Neutral cushioned shoes promote natural foot motion
- Beginners may want to start with a cushioning shoe for support
- Some runners may like natural running shoes that provide a feeling of more ground contact

[SHOP NEUTRAL PRONATOR](#)



OVERPRONATORS

Stability Running Shoes

Overpronators need extra support, structured cushioning, and stability. The GEL-Kayano® is a leading structured cushioning shoe.

- Stability running shoes help distribute the impact of running more effectively to minimize pronation
- Medial post support, sometimes extended through to the heel
- Firm midsoles provide arch support * For severe overpronators, you may want to consider a motion control shoe with extra cushioning

[SHOP OVERPRONATOR](#)

Individual fit for different pronations

Asics brand Biomechanical 3D foot analysis in retail stores



Personal Data

FOOT ID	110-170615-JUB
Name	WEENA PRADHAN
Gender	Female
Measurement Day	5/15/2017
Store	ASICS EXPRESS AVENUE CHENNAI
Type	L 9.5 US_D R 9.5 US_D

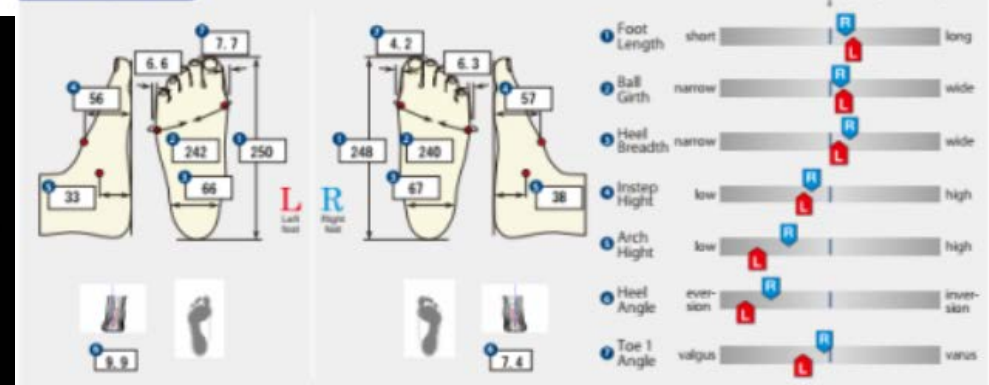
Static Data

	Standing Data Left	Right
Foot Length	250 mm (9.8")	248 mm (9.8")
Ball Girth	242 mm (9.5")	240 mm (9.4")
Arch Height	33 mm (1.3")	38 mm (1.5")

Dynamic Data

Treadmill Speed	6.0 km/h
Step Frequency	124 steps/min
Step Length	80.4 cm (31.6")
Step Length / Height	52.7 %

Static Analysis Result



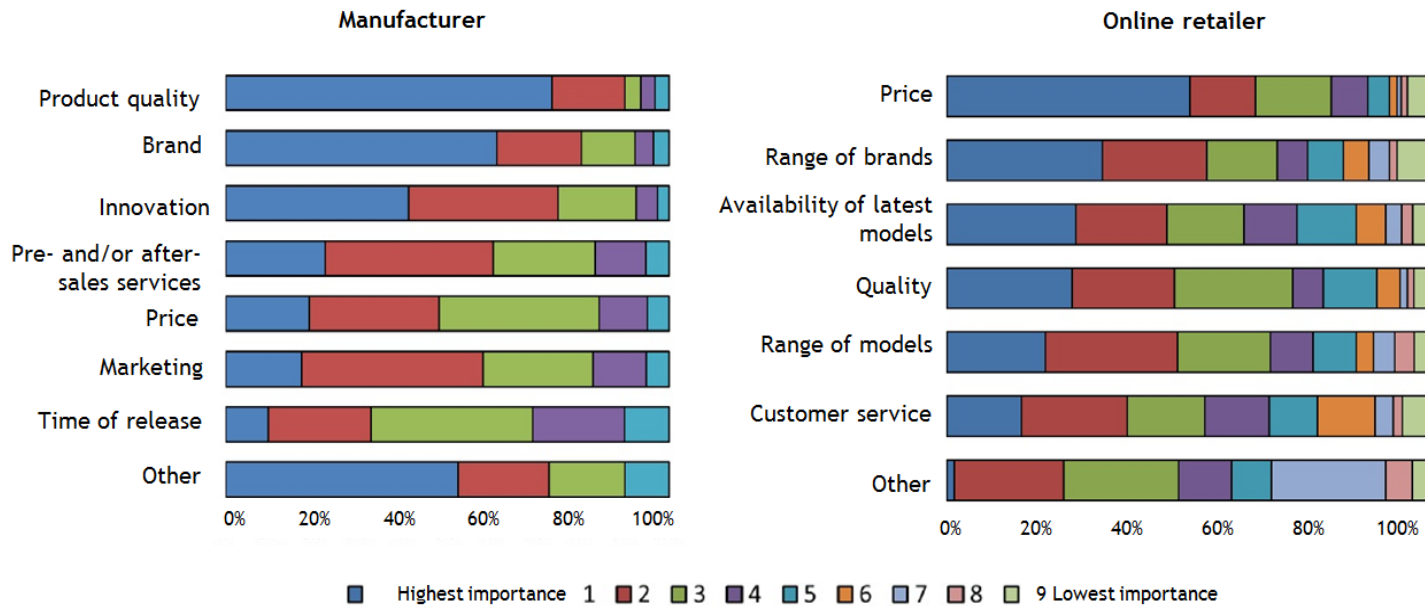
Dynamic Analysis Result



Asics brand Ergospirometry in flagship stores



Parameters of competition: manufacturers and online retailers



Source: European Commission, Preliminary report on the e-commerce sector inquiry (15/09/2016), p.47-49

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Conclusion

- Impact of restraint on **intra-brand price competition** too limited scope for assessment
- Analysis of **inter-brand competition** prerequisite of any assessment of vertical restraints
- Manufacturers face fundamental **coordination problems** between offline and online retail channels
- Solving free-rider problems and brand image protection **plausible economic efficiencies**
- Price comparison websites at the time of Asics' restraint (early 2010's) generally of **low-quality**
 - Limited functionality, low standards for privacy and consumer protection, reports of misled consumers
- **No economic support** for treatment of price comparison websites ban as:
 - by-object restriction
 - hardcore restriction

Price comparison websites and (other) online sales channels

Functionality	General price comparison websites	Specialised price comparison websites	Technical comparison sites	Online market places	Online shop	Search engines
Price Comparison Functionality (PCF)	Yes	Yes	Partially	Yes	No	No
Search for products	Within product portfolios of participating retailers	Within product portfolios of participating retailers	Partially / within portfolio of tested products	Within product portfolios of registered retailers	Within single retailer's product portfolio	Yes
Product comparison	No	Yes	Yes	No	Partially	No
Customer feedback	Yes	Partially	Partially	Yes	No	No
Product availability, payment option and delivery times	Partially	Partially	Partially	Yes	Yes	No
Personalised advice	No	Partially	No	No	Yes	No
Direction to seller	Yes	Yes	Partially	Yes	-	Yes
Transaction and after-sales services	Partially	Partially	No	Yes	Yes	No

Postscript I

Opinion AG Wahl in **Coty**, delivered on 26 July 2017 (Case C-230/16):

- Background: Coty Germany is a leading supplier of luxury cosmetics in Germany and Parfümerie Akzente is an authorised distributor of those products. The latter is not allowed to use non-authorised third undertakings for internet sales.
 - *“Selective distribution systems relating to the distribution of luxury and prestige products and mainly intended to preserve the ‘luxury image’ of those products are an aspect of competition which is compatible with Article 101(1) TFEU provided that ...”* (par 157 (1))
 - *“The prohibition imposed on the members of a selective distribution system, who operate as retailers on the market, from making use in a discernible manner of third undertakings for internet sales does not constitute a restriction of passive sales to end users within the meaning of Article 4(c) of Regulation No 330/2010.”* (Par 157 (4))

Postscript II

Amsterdam Court judgment in **Nike / Action Sport** (C/13/615474 / HA ZA 16-959)

- Background: Nike has selective distribution system and Action Sport is a selected distributor located in Italy. Action Sport sold Nike products via Amazon, which is not a Nike selected distributor.
- Amsterdam Court refers to AG Wahl's opinion and applies it to the case at hand:
 - *"In the court's view, the Nike products should be regarded as luxury products and the Policy serves to maintain brand image"* (par 4.9.3, translation from Dutch)
 - *"Given the presence of own webshops of authorized retailers, the prohibition to use third-party platforms is not the same as a general prohibition or a substantial reduction of internet sales. Moreover a general ban can be proportionate relative to the objective of safeguarding image."* (par 4.9.4, translation from Dutch)
- The Amsterdam Court decided that Nike did not act unlawfully under Article 101(1) TFEU when it imposed the requirement on its authorized retailers not to sell via unauthorized online platforms