

Autorité  
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# Competition & **e-commerce**

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# **A study on the impact of e-commerce on competition policy**

The growth of e-commerce is profoundly changing distribution. The physical distribution model is facing strong competition from the growth of online sales, which may be the result of “pure play” online retailers and strategies using alternative distribution channels. Sales conditions in physical stores are also evolving, increasingly incorporating digital technologies (use of smartphones, tablets, augmented technologies, etc.), to the point that there is now a “phygital” (physical and digital) model. Finally, these developments raise many questions for the Autorité de la concurrence, sometimes leading it to redefine market boundaries, focus on restrictions on Internet sales, and increase the new power held by online platforms, especially structuring platforms that hold strategic or preeminent positions.

In view of the prominent place that the distribution sector occupies in the French economy, the Autorité has sought to provide an overview of these various issues and explain its vision so businesses have a clear understanding of them.



## Contents

Introduction.....	4
I. ASSESSMENT OF THE COMPETITIVE PRESSURE EXERTED BY ONLINE ACTIVITIES ON OFFLINE ACTIVITIES .....	8
A. Taking e-commerce into account in analysing the competitive situation of offline activities.....	8
1. Analysis of inter-channel demand shifts.....	9
2. Indirect indicators of competitive pressure from online sales on offline sales .....	10
B. Adapting the competition law analysis framework to take on board online sales .....	20
1. Taking online sales and local competition into account .....	20
2. Assessing market share in the presence of online sales .....	24
3. Taking the specificities of digital markets into account in assessing market shares and market power .....	26
C. Conclusion .....	33
II. THE CONDUCTS OF OPERATORS FACED WITH THE DEVELOPMENT OF E- COMMERCE .....	34
A. The conducts likely to reduce the competitive pressure exerted by e- commerce.....	34
1. Pricing conducts: imposed resale prices and discrimination .....	34
2. Non-pricing conducts: conditions for inclusion of online sales websites into the distribution network.....	39
B. Regulatory frameworks that are sometimes dissuasive for online selling .....	47
1. The example of individual passenger transport.....	47
2. The example of retail sales of medicinal products.....	49
C. Conducts likely to distort competition between online sales operators .....	52
1. The case of parity clauses in the hotel booking platform sector .....	52
2. Exclusionary practices employed by dominant operators to develop online .....	55
3. The diversity of the practices that can be implemented by operators who are active online .....	57
D. Conclusion .....	59
General conclusion .....	60



## Introduction

1. Increasing numbers of French people are shopping online: in 2018, nearly 60% of people in France aged twelve and over had made at least one online purchase over the preceding 12 months, against 40% in 2008<sup>1</sup>, whether it be for tangible or intangible goods. Such online purchases, made on online sales websites or “webshops” (or on smartphone or tablet applications), currently account for a turnover of nearly 100 billion euros, i.e. a little less than 10% of all retail sales<sup>2</sup> in France, with rapid growth of about 14% per year from 2014 to 2018<sup>3</sup>. The explanations for this growth in e-commerce<sup>4</sup> are well known: access to the Internet has become increasingly generalised, there has been an expansion in the offerings of goods and services proposed online, it is increasingly easy to purchase online through various features and services (search engines, price comparison tools or “price comparators”, online marketplaces, etc.), delivery times have shortened and modes of delivery have become more diverse, online payments have been made more secure, etc.
2. On the supply side, most in-store or in-branch retail players, i.e. “offline” or “brick-and-mortar” retailers, have taken steps to satisfy the growing desire of consumers to shop online. They have developed and/or acquired websites and/or applications for selling their goods and services online, thereby becoming operators in selling both at physical points of sale and also online and being dubbed “click-and-mortar”, “bricks-and-clicks” or “phygital” retailers<sup>5</sup>. In its E-commerce Sector Inquiry of 2016, the European Commission observed that in Europe, the share of manufacturers’ sales made through “hybrid” distributors who sell both offline and online grew from 20% in 2005 to 35% in 2015. Over the same period, the share of manufacturers’ sales made through distributors selling exclusively offline fell from 60% to 35%<sup>6</sup>. At the same time, new “pure online players”, who sell almost exclusively over the Internet, developed their presence significantly. While their significance in terms of the percentage of sales they represent is still modest on average, it is nevertheless growing and several of them, like Amazon or Cdiscount, are among the most visited e-commerce websites in France<sup>7</sup>. It should also be noted that the

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<sup>1</sup> ARCEP (French Telecommunications and Posts Regulator), *Baromètre du numérique 2018, 18<sup>ème</sup> édition* (Digital Market Barometer 2018, 18<sup>th</sup> Edition).

<sup>2</sup> FEVAD (*Fédération du e-commerce et de la vente à distance*, French Federation of e-commerce and Distance Selling), *Les Chiffres Clés 2019* (2019 Key Figures).

<sup>3</sup> FEVAD, 2019, 2018, 2017 and 2016 Key Figures.

<sup>4</sup> The study uses the terms “e-commerce” or “electronic commerce” to mean online sales of goods and services through websites or through telephone or tablet applications.

<sup>5</sup> cf. contribution from France to the OECD roundtable on the Implications of E-commerce for Competition Policy, §10 (available here: [https://one.oecd.org/document/DAF/COMP/WD\(2018\)58/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)58/en/pdf)).

<sup>6</sup> European Commission, 2016, Preliminary Report on the E-commerce Sector Inquiry, Commission Staff Working Document, SWD (2016)312 final, Figure B.23 §158.

<sup>7</sup> In the third quarter of 2019, of the 15 e-commerce sites that were most visited according to data from FEVAD and Médiamétrie (a French audience measurement company), 9 were pure online sales players. Source: Fevad/Médiamétrie, *Baromètre trimestriel de l’audience du e-commerce en France* (Quarterly barometer of e-commerce audience in France), 21 November 2019.

online share of sales has distinctive national traits, with major differences from one country to another<sup>8</sup>.

3. The impact of the Internet on the conducts of businesses and of consumers is not limited to making it possible to sell the same products via a different sales channel. In some cases, the Internet has also made it possible to sell goods or services that could not be proposed through the traditional channels, either for technical reasons or for reasons of profitability. The Internet has thus made it possible to develop online advertising, services proposing diversified audio-visual content (catch-up TV, video on demand (VOD) or subscription VOD), large-scale music or VOD streaming platforms, etc. By making it possible to reduce the sales costs (be it for storing the goods, for transporting them, or for putting them on the shelves), and by offering the possibility of reaching a vast number of consumers, the Internet has also made it possible to propose products that are in little demand because they meet very specific needs or tastes. The development of online sales through transfer from brick-and-mortar distribution to online distribution has also been accompanied by the emergence of new types of commercial activities, such as price comparison tools, aggregators of online sales websites, or, above all, online marketplaces, which not only put private individuals and businesses who supply goods and provide services into contact with one another ("Platform-to-Business" or "P2B") but also put private individuals into contact with one another ("Peer-to-Peer" or "P2P") or businesses into contact with one another ("Business-to-Business" or "B2B"). Such marketplaces or platforms currently account for more than half the turnover from e-commerce globally<sup>9</sup> and they play a particularly significant part in certain sectors such as property (real estate) or tourism.
4. Finally, depending on the appetite of customers for online shopping, the Internet can also change the competitive workings of markets by reducing the transaction costs in the broadest sense of the term, be they transport costs or costs related to searching for information about the various different competing offerings, in particular through various market intermediaries (online marketplaces, price comparison tools, search engines, etc.). From the consumers' perspective, the Internet increases, in particular, their capacity to put vendors who are geographically remote from one another in competition, and enables them to use new vendors, who may be resellers present exclusively online or resellers present on the Internet through online marketplaces. Similarly, from the perspective of businesses, the Internet makes it possible, depending on the sectors and on the products in question, to reduce the distribution costs, sometimes by enabling a manufacturer to distribute its products itself without going through wholesalers or retailers, to improve the offering of services proposed and to develop sales beyond the catchment areas of brick-and-mortar shops, thereby leading to higher competition.

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<sup>8</sup> Thus, in 2017, the proportion of online shoppers in the population exceeded or came close to 80% in the United Kingdom, Sweden, and Denmark, but was considerably smaller in certain Southern European countries such as Greece, Italy, and Portugal (about 30%), and these differences persisted when the focus was shifted to the proportion of Internet users (rather than inhabitants) who shop online. cf. OECD, *Implications of E-commerce for Competition Policy*, 2018, point 9, and European Commission, 2016, *Preliminary Report on the E-commerce Sector Inquiry*, Commission Staff Working Document, SWD(2016)312 final, point 8.

<sup>9</sup> Internet Retailer, 2019, *Top 100 Online Marketplaces*. As regards France, online marketplaces accounted for about 30% of the total turnover from e-commerce in 2019, according to the figures given by FEVAD in its 2019 Key Figures (*Les Chiffres Clés 2019*).

5. In this context of the rise of e-commerce, which is lastingly transforming the way the market operates and the strategies pursued by businesses, the *Autorité de la concurrence* wanted to present how it is approaching the effects of this on the markets and what conducts it has to examine.
6. In many cases, in order to assess the market power of operators, the *Autorité de la concurrence* firstly needs to evaluate to what extent online sales compete with in-store or in-branch sales. Indeed, even today, the competitive pressure exerted by the online distribution channel on traditional retailing can be more or less high depending on the sector, witness, for example, the highly variable significance of online sales depending on the sector<sup>10</sup>. Although, on certain markets, in the consumers' eyes, there is considerable substitutability between shopping online and at physical points of sale, on others, however, online sales are not attractive enough or are too different from brick-and-mortar sales for the two channels to be genuinely in competition with each other. For example, absence of attractiveness of online sales may be due to the immediateness of the need to be satisfied, to the importance for the consumer of being in contact with the product (so as to see it or touch it, for example) or to the large weights or volumes of the articles compared to their values, making the use of delivery disadvantageous<sup>11</sup>. Furthermore, when online sales represent a significant component of the competitive mechanisms at work in any given sector, the *Autorité* has to adapt certain market power assessment tools, such as calculating market shares. It also needs to take into account certain specific parameters, such as indirect network effects<sup>12</sup>, in order to assess the effects of competitive behaviour, be it a merger operation, or unilateral conducts, or concerted practices, such as exclusivities, for example. These various aspects of the analysis by the *Autorité* on markets involving online sales are presented in section I below.
7. The second section of this study then considers the various online-selling-related conducts employed by businesses that the *Autorité* has had to examine. For businesses, online sales represent both an opportunity and a threat. The Internet can help distributors and manufacturers to increase their sales, but it can also be a destabilisation factor, by allowing new competitors (such as "pure online players") to enter the market, or by leading to tougher competition between existing operators: this can, for example, result from the existence of price comparison tools, or merely from catchment areas being extended, the Internet making it easier for consumers to find out about and contact remote vendors.

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<sup>10</sup> cf. below, Table 1 p. 11.

<sup>11</sup> For example, in its Decision 18-DCC-148 of 24 August 2018 regarding the acquisition of sole control of Jardiland by In Vivo Retail, the *Autorité* was able to observe the lowness of the market penetration (2.5% in 2016) of online sales in the sector of gardening supplies. That lowness could, in particular, be due to the excessive weights of certain gardening accessories (e.g. shovels or rakes, and flowerpots) compared with their values.

<sup>12</sup> cf. below, §78.



8. Although this intensification of competition brings opportunities both for manufacturers and for distributors, it can also have negative consequences for them. Certain distributors, whose performance is lower, thus see their sales fall. If they are powerful enough, such distributors can then put pressure on their suppliers to avoid development of competition that is too strong from the Internet, e.g. by encouraging them to agree to imposed resale prices or to restrictions on online sales.
9. Manufacturers may themselves also consider the Internet with distrust. In some cases, online vendors might not wish to or might not be able to propose the same type of service or of selling environment as stores do. And yet such services can be necessary for the consumer to appreciate properly the value of the manufacturer's products. In such sectors, by undermining the brand image of the manufacturer or by no longer enabling the manufacturer to inform consumers sufficiently about the quality of the product or about how to use it, unbridled development of online sales to the detriment of in-store sales could ultimately harm manufacturers and dissuade them from investing in improving the quality of their products. Consumers can also suffer from being less well informed about the products and, ultimately, from a reduction in the quality of the products. Concern among manufacturers to make sure that online sales comply with rules common to traditional distribution channels is fuelling, in particular, the boom in selective distribution<sup>13</sup> and/or the more or less constraining number and nature of clauses governing online sales by retailers.
10. But more worryingly from the point of view of competition, manufacturers can also wish to limit the development of online sales because the stronger competition such sales generate at the retail stage can have repercussions upstream and intensify competition between manufacturers. There too, restrictions can also be used to constrain online sales, but with an aim that is then clearly contrary to the interests of consumers. In the same way, in certain sectors in which online sales are already relatively concentrated between a few operators, those operators might seek to limit competition between them, e.g. through price parity clauses.
11. In such cases, authorities in charge of applying competition law have to weigh up the positive and negative effects of the various restrictions. The second section of this study shows how the *Autorité de la concurrence* bases its analysis of these various practices on the analysis framework formed by European guidelines and case law. The second section also highlights the future challenges with which competition regulators will be faced on digital markets (section II).

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<sup>13</sup> See *Autorité de la concurrence*, Opinion 12-A-20 of 18 September 2012 on the competitive functioning of e-commerce.

## **I. ASSESSMENT OF THE COMPETITIVE PRESSURE EXERTED BY ONLINE ACTIVITIES ON OFFLINE ACTIVITIES**

12. The first question raised by the development of online activities for application of competition law relates to the extent to which that development changes the competitive situation of offline activities. Firstly, the various factors that can lead to online activities being incorporated into assessment of the competitive situation of offline activities are presented (A). Such incorporation then requires the reasonings and the tools of competition law to be adapted (B).

### **A. Taking e-commerce into account in analysing the competitive situation of offline activities**

13. The way in which online sales change the competitive situation of offline activities is frequently approached through the prism of the “relevant market”<sup>14</sup>. The relevant market can be defined as “the meeting place of supply and demand for a specific product or service. In theory, on a relevant market, the units supplied are perfectly substitutable for the consumers who can thus choose between the suppliers when there is more than one, which implies that each supplier is subjected to price competition from the others. Conversely, a supplier on a relevant market is not constrained directly by the price strategies of the suppliers on different markets, because those suppliers sell products or services that do not meet the same demand and that, for the consumers, are not therefore substitutable products. Perfect substitutability between products or services is rarely seen; the Conseil regards as substitutable and on the same market products or services for which it could reasonably be said that those on the demand side view them as alternatives to choose between in order to meet the same demand”<sup>15</sup>. Thus, online sales will be considered as being in competition with in-store sales when the capacity of the customers to put the two channels in competition with each other is such that the two types of supply channels can be considered to be substitutable and thus as being part of the same relevant product and service market<sup>16</sup>.

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<sup>14</sup> When the competitive pressure induced by online sales on offline sales does not make it possible to achieve a delimitation of a relevant market covering both of the activities, or when the qualitative and quantitative information collected does not make it possible to define a market with sufficient certainty (e.g. because the information concerns above all a business that is party to a merger or that is implementing a particular practice, rather than all of the operators), the competitive pressure can nevertheless be taken into account at the stage of the competitive analysis of the effects of a practice or of a merger.

<sup>15</sup> This definition is a translation from the French of a passage in the Annual Reports of the *Conseil de la Concurrence*, in particular for the year 2001. cf. also the merger control guidelines of the *Autorité*. See also European Commission – Commission Notice 97/C 372/03 on the definition of relevant market for the purposes of Community competition law, and European Commission - Communication from the Commission 2018/C 159/01 Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services.

<sup>16</sup> In addition to the analysis of the substitutability of the demand, an analysis of the substitutability of the supply may be performed that consists in assessing whether the online sales websites can develop new stores to compete with the existing stores. Most often, however, setting up new stores comes up against several obstacles that can be

14. Substitutability between two products or two distribution channels (e.g. online and offline) may be assessed through a quantitative evaluation (e.g. by studying whether and to what extent a rise in the price of one of the two products leads demand to switch or shift to the other product) or a qualitative evaluation (by studying the similarities and the differences between the two products). Thus, a first analysis of substitutability between two sales channels consists in analysing directly whether a price rise, generally lying in the range 5% to 10% in the most widely used methodology, in one of the sales channels leads a sufficient proportion of demand to shift to the other channel (1). Another, more indirect, method consists in gathering various essentially qualitative indicators so as to assess whether the behaviour of the operators and of the consumers reflects significant competitive pressure from the online sales on the offline sales (2).

### **1. Analysis of inter-channel demand shifts**

15. As indicated above, online retail can be considered as competing with brick-and-mortar retail if, when faced with a uniform price rise in stores, generally of from 5 to 10%, a large enough proportion of customers choose to buy online rather than in a store, so that the in-store price rise reduces rather than increases the profits of the stores. Thus, if enough customers turn to shopping online, the in-store sales channel cannot raise its prices due to the competition from online sales. The in-store sales channel cannot then be considered to be a relevant market independent from the online sales channel and must therefore include it.
16. In practice, this assessment of the reaction of consumers to an in-store price rise can be based on market tests and/or econometric work, the accuracy of the assessment depending on the available data. It can also be conducted either at the scale of all of the competing stores, or, for example in the case of a merger operation, at the scale of only the parties to the operation in order to assess whether they are sufficiently subjected to the competitive pressure from online sales to be dissuaded from putting the prices up after the operation.
17. Thus, when Darty was taken over by Fnac in 2016, the market tests and surveys conducted with competitors and customers to assess the competitive proximity between the parties and the pure online players showed: i) that the competitors considered Amazon to be the 3<sup>rd</sup>-biggest competitor of Fnac, behind Darty<sup>17</sup> but ahead of other brands having networks of brick-and-mortar outlets; and ii) that in the event of the prices of brown or grey products (communications, multimedia, television, and audio products) being put up by from 5 to 10% by the new entity resulting from the merger operation, for its offline and online sales, the consumers would switch mainly to the brands Boulanger, Amazon, or Cdiscount. More precisely, on this last point, the survey taken by IFOP in collaboration with the investigation services of the *Autorité* showed that in the event of a 10% rise in the prices of the products sold by Fnac or Darty, the percentage of purchases shifting to pure online players would lie in the range 21.1% to 46% depending on the

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regulatory (authorisations for setting up the stores) or economic (costs and lead times for setting them up, in particular) so that online sales websites cannot easily develop offline sales channels. cf. Decision 16-DCC-111 of 27 July 2016 regarding the acquisition of sole control of Darty by Fnac (*Fnac Darty* Decision), §296 *et seq.*

<sup>17</sup> Decision 16-DCC-111 of 27 July 2016 regarding the acquisition of sole control of Darty by Fnac (*Fnac Darty* Decision), §145.

categories of product<sup>18</sup>, i.e. a level deemed sufficiently high for the *Autorité*<sup>19</sup> to consider, while also taking into account other criteria, that online sales exerted a competitive pressure on in-store sales that was sufficient to delimit a single relevant market covering both brick-and-mortar and online sales.

18. However, such assessment exercises are not conducted systematically. Firstly, they can be relatively lengthy and/or costly, in particular when they require surveys to be conducted on a large number of customers, without them always being indispensable for the analysis. Secondly, their results are not always usable, either due to insufficient data, or due to possible uncertainties related to the quality of the responses to a survey. Generally, they thus constitute only one piece of a body of evidence helping the *Autorité* to draw conclusions as to the existence of competitive pressure from the online sales channel on the brick-and-mortar sales channel. Finally, indicators that are easier to gather can frequently help the *Autorité* without it being necessary to make a more accurate assessment of the consumer “shift rate” or “switch rate”.

## **2. Indirect indicators of competitive pressure from online sales on offline sales**

19. Various other indicators may be used, in addition to or instead of consumer shift rates, in order to assess the extent of competitive pressure from online sales on offline sales. It is then not a question of assessing directly whether consumers make online sales compete with physical sales outlets in the event such outlets raise their prices, but rather of assessing indirectly, by means of various indicators, whether it is sufficiently easy to make them compete or whether them being made to compete is reflected in the current behaviours of the businesses, in particular in terms of price. The market penetration of online sales in the sector being studied, the in-house documents of the parties, the price changes and the similarity of the ranges of products and services proposed over the online and offline channels, and, finally, the capacity of consumers to switch from one channel to the other are thus elements that are frequently taken into account in the analysis. The following paragraphs present in more detail how these various indicators are interpreted.

### **a) Market penetration of e-commerce**

20. Development of online sales does not necessarily and immediately have consequences on the competition to which traditional distribution channels are subjected. It is possible that the proportion of customers tempted to shop online is too limited to bring the traditional distribution channels to react to the new competition.
21. The significance of online sales, which is a factor that can give an indication as to the propensity of customers to turn to online sales, thus differs widely depending on the

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<sup>18</sup> Decision 16-DCC-111 of 27 July 2016 regarding the acquisition of sole control of Darty by Fnac (*Fnac Darty* Decision), §147.

<sup>19</sup> The *Autorité* specifies in §149 that the fact that the survey was taken online might have biased the result somewhat in favour of high substitutability between the in-store sales and the sales by pure online sales players. Nevertheless, it considered that the analysis would remain unchanged if that bias were corrected in view of the significant diversion ratios for diversion from the parties to the pure online sales players.

sector. According to the Fevad (*Fédération du e-commerce et de la vente à distance*, French Federation of e-commerce and Distance Selling) and to various market research institutes<sup>20</sup>, in France in 2018, in value terms, online sales accounted for 48% of retail sales of cultural products, 26% of retail sales of high-tech products, and 20% of retail sales of household electrical appliances, but only 7% of sales of Fast-Moving Consumer Goods (FMCG). The competitive pressure that online sales might exert on offline sales is thus very heterogeneous depending on the sectors, and should be assessed on a case-by-case basis, and according to the situation at the date of the operation (cf. **Erreur ! Source du renvoi introuvable.**).

**Table 1 – Market share and turnover of e-commerce in France per sector in 2018**

<b>Sector</b>	<b>Market share 2018</b>	<b>Turnover 2018</b> (in billions of euros)
Tourism	44%	19.8
Cultural products (physical and dematerialised)	48%	4.1
...including new physical cultural products <sup>21</sup>	19%	1.0
Household high-tech	26%	3.2
Household electrical	20%	1.7
Clothing	14%	3.9
Furniture	14%	1.3
FMCG	7.1%	6.7
...including drive-thru pickup	5.7%	5.4

Source: Fevad 2019 Key Figures

22. Thus, in the predominantly food retail sector, the share of online sales, which was 3.2% of the market <sup>22</sup>in 2012, led the *Autorité* to consider, when the takeover of Monoprix by Casino in 2013 was referred to it, that the online channels were not in competition with the physical outlets <sup>23</sup>. Similarly, in the retail sector for gardening, DIY, pet, and landscaping supplies, the proportion of online sales for all of the supplies concerned by the operation was 4.6% in 2016. Thus, the *Autorité* was able to conclude, when a merger operation in this sector in 2018 was referred to it, that “online sales of gardening, DIY, pet,

<sup>20</sup> See Fevad, 2019 Key Figures, p. 2.

<sup>21</sup> These products may, for example, be CDs, video games, or DVDs and Blu-ray discs.

<sup>22</sup> Market excluding traditional shops, markets and other specialist channels.

<sup>23</sup> Decision 13-DCC-90 of 11 July 2013 regarding the acquisition of sole control of Monoprix by Casino Guichard-Perrachon (*Casino Monoprix Decision*), §93.

and landscaping supplies are currently too low to constitute a credible alternative for consumers”<sup>24</sup>.

23. In certain cases, the *Autorité* has been able to assess the existence of competitive pressure exerted by online sales on offline sales by basing its approach on the share of online sales in the turnover of the businesses against whom litigation is being taken or who are parties to a merger. When such parties have both physical outlets and online sales websites, the share represented by the online sales in the turnover of the parties can constitute an indication or evidence of the significance of online sales in the market as a whole. For example, in the sector of low- and medium-price homeware and general merchandise products<sup>25</sup>, online sales accounted for only a small proportion of the turnover of the acquirer and of the target (less than 5%), bringing the *Autorité* to consider, in 2017, that the two distribution channels constituted distinct markets in that case.
24. Conversely, a relatively large share of online sales in the cumulative turnover of brick-and-mortar and online outlets has, several times, been considered as one of the elements making it possible to establish the existence of a single relevant market. For instance, in the case of the takeover of Darty by Fnac, the online sales of the products concerned by the operation had high market penetration, even though it varied depending on the family of products. While differing depending on the sources, the estimates converged to establish that online sales of electronic products represented at least from 20% to 30% of the total sales of those products<sup>26</sup>, and that share was going to increase further in the years to come according to the market tests. Similarly, in its decision regarding a merger in the toys retail sector, the *Autorité*, observing that online sales had accounted for 28.3% of the total sales of toys in France in 2017 (including 20% for pure online players), i.e. nearly twice as much as in 2012 (14.2%) and that the same consumer frequently alternated between online shopping and in-store shopping, concluded that “the market penetration of online sales as a percentage of the total sales of the market is high and persistent”<sup>27</sup>. Finally, in its decision regarding the takeover of Nature & Découvertes by the Fnac Darty Group, the *Autorité* considered that the high and increasing significance of online sales on markets for retailing new printed books (21% in 2018<sup>28</sup>) justified incorporating the online sales channel into the same relevant market as the in-store sales channel<sup>29</sup>.
25. However, it is rare for the market share of online sales to be the only criterion taken into account. Indeed, firstly, it can be difficult to assess from what market share threshold

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<sup>24</sup> Decision 18-DCC-148 of 24 August 2018 regarding the acquisition of sole control of Jardiland by In Vivo Retail (*Jardiland* Decision), §52.

<sup>25</sup> Decision 17-DCC-216 of 18 December 2017 regarding the acquisition of sole control of the assets of Lilnat, Vutura and Agora Distribution by the Philippe Ginestet Group (*Ginestet* Decision), §61.

<sup>26</sup> Decision 16-DCC-111 of 27 July 2016 regarding the acquisition of sole control of Darty by Fnac (*Fnac Darty* Decision), §84.

<sup>27</sup> Decision 19-DCC-65 of 17 April 2019 regarding the acquisition of joint control of Luderix International by Jellej Jouets and the undivided ownership resulting from the succession of Mr Stéphane Mulliez (*Toys ‘R’ Us* Decision), §41.

<sup>28</sup> Excluding textbooks and encyclopaedia in instalments, and excluding second-hand books. Source: Study by the *Service de l’Observatoire de l’économie du livre* (Book Economy Observatory Service) of March 2019, and Kantar TNS Sofres.

<sup>29</sup> Decision 19-DCC-132 of 16 July 2019 regarding the acquisition of sole control of Nature & Découvertes by the Fnac Darty Group, §27.



online sales should be considered to exert sufficient competitive pressure. Secondly, it cannot be excluded that the customers who continue to do their shopping in stores might have a strong preference for that channel and therefore are little disposed to shop online. Thus, what is important for defining markets is not so much the significance of the online purchases as the share of the purchases that could be transferred to online purchase if the in-store prices were to rise. In this respect, the extent to which consumers are disposed to switch from one sales channel to another when they are faced with a difference in price or in quality reinforces the probability that the channels do indeed constitute substitutable shopping modes.

#### **b) Attitude of the businesses with regard to online sales**

26. The in-house documents of the parties concerned by proceedings opened before the *Autorité* can also constitute an element of the analysis framework. Such documents can, in particular, make it possible to assess whether, and possibly to what extent, operators present on the in-store sales channel take into account the conducts of online sales players in developing their commercial and price strategies.
27. Thus, in the retail sector for grey and brown products, the *Autorité* has observed that “both the in-house documents of the parties and also their strategic choices reflect that they adopted a strategy reversal that was to a large extent developed in response to a market environment in which the positioning of an electronic products distributor could not dispense with taking online sales into account”<sup>30</sup>. Indeed, Fnac and Darty had reorganised their commercial management in favour of unified management of the online and offline channels. Analysis of the in-house documents of Fnac also made it possible to establish that online sales, in particular by Amazon, were taken into account in developing its commercial and price strategy. Similarly, while examining the acquisition of control of Luderix in the toys retail sector, the *Autorité* noted that the notifying parties took readings of the prices of pure online players<sup>31</sup>.
28. Conversely, during examination of a merger project in the retail sector for gardening, DIY, pet, and landscaping supplies<sup>32</sup>, the notifying party submitted in-house documents containing price readings taken by the InVivo Group. Those readings only irregularly included the prices charged by online sales websites. In addition, only a limited fraction of the product references identified on the gardening segment were present on the websites of the online competitors who were analysed. In addition, the price readings taken by the points of sale only exceptionally included online sales. As regards the target, several of its in-house documents confirmed that customer awareness of and the prices charged by the online sales sites were not taken into consideration at all or only to a small extent. Those elements reinforced the conclusion of the *Autorité* who considered that, for the products in question, online sales were not likely to constitute a credible alternative for offline shoppers.

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<sup>30</sup> Decision No. 16-DCC-111 of 27 July 2016 regarding the acquisition of sole control of Darty by Fnac (*Fnac Darty Decision*), §94.

<sup>31</sup> Decision 19-DCC-65 of 17 April 2019 regarding the acquisition of joint control of Luderix International by Jellej Jouets and the undivided ownership resulting from the succession of Mr Stéphane Mulliez.

<sup>32</sup> Decision 18-DCC-148 of 24 August 2018 regarding the acquisition of sole control of Jardiland by In Vivo Retail, §§53-56.

### **c) Range of products proposed and of services available depending on the distribution channel**

29. In order for online sales and offline sales to be included in the same relevant market, the range of goods and services proposed should be sufficiently similar on both channels. When, conversely, the share of products that are sold simultaneously on both channels is small, it is difficult for the consumer to put these supply channels into competition with each other, and the same applies if the services provided in addition to sale are very different online and offline.
30. Thus, in the retail sector for brown and grey products, the market test conducted by the *Autorité* for examining the takeover of Darty by Fnac made it possible, in particular, to note that the products that were sold both online and offline represented an essential share in the turnover of the parties, both in volume and in value terms<sup>33</sup>, and that the online websites generally had a wider range than the brick-and-mortar stores did. Thus, the products sold in the stores were generally also sold online<sup>34</sup>. Furthermore, the differences between sales over the Internet and sales in stores were tending to dwindle in view of the increasing richness of advice given on online websites, of the reduction in the delivery times and charges for the products sold over the Internet (same day deliveries by Amazon, for example), and of the online after-sales services that are identical or very similar to those offered when purchases are made in a store (refunding, or breakage or theft cover)<sup>35</sup>. While the competitors of the parties considered that online sales were still coming up against certain obstacles<sup>36</sup>, they also highlighted the advantages of online sales compared with offline sales (shopping comfort, possibility of comparing products and prices across of multitude of store brands, existence of demonstration videos that can make up for the absence of product experience, availability of the products and of the distributors 24/7, broadness of the offering, availability and accessibility of the products, prices sometimes more attractive, or indeed availability of reviews written by consumers about the products)<sup>37</sup>. At the end of that analysis, the *Autorité* concluded that “the services and advantages inherent to online sales or to offline sales are not perceived as being strictly identical by the competitors of the parties and by the consumers, each channel having advantages that are specific to it. However, those characteristics are not such as to call into question the observation of a significant amount of substitution between the two channels, in particular in view of the price uniformity and of the

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<sup>33</sup> In that case, they represented 90% to 100% of the sales in value terms both by Fnac and by Darty, Decision 16-DCC-111 of 27 July 2016 regarding the acquisition of sole control of Darty by Fnac (*Fnac Darty Decision*), §103.

<sup>34</sup> Decision No. 16-DCC-111 of 27 July 2016 regarding the acquisition of sole control of Darty by Fnac (*Fnac Darty Decision*), §105.

<sup>35</sup> Decision No. 16-DCC-111 of 27 July 2016 regarding the acquisition of sole control of Darty by Fnac (*Fnac Darty Decision*), §108.

<sup>36</sup> Such as the conditions for returning products, the charges and times for delivery, the conditions and reliability of the after-sales service, the reticence of consumers to pay online, or indeed the absence of advice from a sales consultant. Decision No. 16-DCC-111 of 27 July 2016 regarding the acquisition of sole control of Darty by Fnac (*Fnac Darty Decision*), §113.

<sup>37</sup> Decision No. 16-DCC-111 of 27 July 2016 regarding the acquisition of sole control of Darty by Fnac (*Fnac Darty Decision*), §114.

development of a distribution model incorporating both distribution channels into the path to purchase”<sup>38</sup>.

31. Similarly, regarding the sector of retail sale of books, during the examination of the merger between Nature & Découvertes and Fnac Darty <sup>39</sup>, the *Autorité* observed permeability between in-store purchases and online purchases of books firstly due to the fact that the parties to the merger proposed almost all of the books sold in their stores on their respective websites, and, in particular, made it possible for consumers to order articles that were unavailable in the stores, and secondly due to the fact that the Fnac Darty Group had their offerings of online and offline services converge through the possibility of making the purchase in “click and collect” mode (ordering it online and then picking it up from the store), of reducing the delivery times for orders placed online, and of consumers being given advice while they are shopping online.
32. Likewise, in the toys retail sector<sup>40</sup>, product references that were common to the online and offline channels represented a substantial share of the sales in volume terms (over 90%). According to the findings of the market test, the vast majority of the competitors operated online sales websites and proposed ranges of products on them that were wider than their in-store ranges. Furthermore, the traditional retail brands were focused “on adapting sales modes incorporating digital technologies and in particular enabling vendors to place orders online for products that are unavailable in the store in question, and enabling their websites to indicate the products that can be picked up in the store” (§51). Furthermore, the parties indicated they had enriched their online documentation about the toys on sale. Furthermore, the modes and times of delivery for the toys sold online made the products available almost immediately, the large stores or superstores specialised in selling toys having developed faster ordering and delivery services (pickup in a store, in the hours following the order, next-day home delivery, or next-day delivery at pickup points or lockers). Finally, the *Autorité* observed that the notifying parties had implemented specific refund policies taking online sales into account<sup>41</sup>.
33. Conversely, the *Autorité* was able to note that, in the field of perfume and luxury cosmetics distribution, the development of online sales was still coming up against obstacles, in particular due to the absence of physical welcome and advice, or to the risk of buying counterfeit products online<sup>42</sup>. Similarly, in the sector of low-price homeware and general merchandise products, the market test highlighted the significance of impulse purchases and the part played in such purchases by the possibility of touching and of seeing the

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<sup>38</sup> Decision No. 16-DCC-111 of 27 July 2016 regarding the acquisition of sole control of Darty by Fnac (*Fnac Darty* Decision), §115.

<sup>39</sup> Decision 19-DCC-132 of 16 July 2019 regarding the acquisition of sole control of Nature & Découvertes by the Fnac Darty Group, §§ 29-30.

<sup>40</sup> Decision 19-DCC-65 of 17 April 2019 regarding the acquisition of joint control of Luderix International by Jellej Jouets and the undivided ownership resulting from the succession of Mr Stéphane Mulliez (*Toys ‘R’ Us* Decision), §§49-53.

<sup>41</sup> The parties proposed a guarantee enabling customers to obtain immediate alignment at the checkout on the lower price if the customer going through the checkout presented an offer for an identical product sold cheaper by a competitor regardless of whether it was sold in a store or online, or else a refund of the difference on any article purchased in-store within fourteen days following the purchase. See §53 of the decision.

<sup>42</sup> Decision 14-DCC-71 of 4 June 2014 regarding the acquisition of sole control of the Nocibé Group by Advent International Corporation, §17.

products in the stores. Indeed, a large majority of the respondent businesses considered that customers were not indifferent as regards whether they bought their homeware and general merchandise products online or offline<sup>43</sup>. In this sector, the *Autorité* also noted that low-price homeware and general merchandise products were often sold brandless, and thus with it being possible for doubts about their quality to be removed by seeing product in the store<sup>44</sup>. The *Autorité de la concurrence* also concluded that the markets were segmented into “online” and “brick-and-mortar” in the sector of betting on horseracing, observing less diversity of gambling and less flexibility of use (as regards opening times, in particular) in the brick-and-mortar channel but also its greater conviviality<sup>45</sup>. In the sector of sports news print media, the Paris Court of Appeal<sup>46</sup> and the *Autorité de la concurrence* alike concluded that, in spite of the choices made by consumers between the various media (print, Internet, radio, television, and mobile apps), the written press retained specificities, in particular reading comfort and reading flexibility, or capacity for analysing news, for taking a step back from it, and for putting it in perspective. The digital media, which tended to prefer instant news, were also considered as more complementary to rather than in competition with the print media. Finally, in its opinion on online advertising<sup>47</sup>, the *Autorité* considered that, in spite of the development of video advertising on the Internet<sup>48</sup>, online advertising and television advertising did not offer the same advantages, television commercials making it possible to reach a wider audience more spontaneously while online adverts made it possible to target the audience more effectively depending on the commercial objective, in a more diverse and interactive form, and thereby offered advertising monitoring and performance measuring tools that could not be used in the sector of television advertising.

34. Finally, it should be noted that it can be difficult to come to a decision on the issue of the significance of the competition between online and offline channels, and so a case-by-case approach can therefore be necessary. In its decision regarding online sales events<sup>49</sup> that was upheld by the Paris Court of Appeal<sup>50</sup>, the *Autorité* thus considered, going against its investigation services, that the criteria characterising this mode of distribution (attractive prices, relative confidentiality of the sales<sup>51</sup>, an impulse buying rationale, top-of-range positioning, and a large stock of products), either should be put in perspective or should

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<sup>43</sup> Decision 17-DCC-216 of 18 December 2017 regarding the acquisition of sole control of the assets of Lilnat, Vutura and Agora Distribution by the Philippe Ginestet Group (*Ginestet* Decision), §66.

<sup>44</sup> Decision 17-DCC-216 of 18 December 2017 regarding the acquisition of sole control of the assets of Lilnat, Vutura and Agora Distribution by the Philippe Ginestet Group (*Ginestet* Decision), §67.

<sup>45</sup> Decision 14-D-04 of 25 February 2014 regarding practices implemented in the sector of online betting on horseracing §§51-54.

<sup>46</sup> Paris Court of Appeal, *pole 5* (Section 5), *chambre 5-7* (Chamber 5-7), Judgement of 15 May 2015, RG (General Repository) No. 2014/05554.

<sup>47</sup> Opinion 18-A-03 of 6 March 2018 on data processing in the online advertising sector, §§173-174.

<sup>48</sup> Decision 14-DCC-50 of 2 April 2014 regarding the acquisition of sole control of Direct 8, Direct Star, Direct Star Productions, Direct Digital, and Bolloré Intermédia by Vivendi SA and Canal Plus Group, §106, as well as the contribution from the CSA (French Broadcasting Regulator) to the consultation of the *Autorité*, and Opinion 18-A-03 of 6 March 2018 regarding data processing in the online advertising sector, §172.

<sup>49</sup> Decision of 28 October 2014 regarding practices implemented in the online sale event sector, §105

<sup>50</sup> Paris Court of Appeal, Judgement of 12 May 2016, RG 2015/00301

<sup>51</sup> Online sale events are generally not advertised at all with the general public and are, in general, accessible only to a club of members.

also be found in brick-and-mortar retail channels, in particular in stores while sales are on, or in factory outlet stores throughout the year. Indeed, analysis based solely on various differentiation criteria can, in some cases, have limitations: firstly, measuring such differentiation is not always easy; and secondly, identifying the threshold from which the differentiation of the ranges or of the services is sufficient to consider that the traditional and online retail channels are not in competition can be difficult. Such uncertainty then frequently leads the *Autorité* to gather other evidence, serving either to support or to put into perspective the significance of such differentiation in the competitive process.

#### **d) Price differentials between the various sales channels**

35. As a general rule, if two products or two sales channels are substitutable, either the price difference between the two is relatively small, or, at the very least, it remains relatively constant. Otherwise, the sales through the channel that is more expensive or whose relative price has increased should decrease, since customers use the competing product or channel as a substitute for it. Thus, identical prices on the two distribution channels or, at the very least, price differences that are relatively limited and constant or decreasing may constitute evidence in support of substitutability between the channels.
36. When examining the merger between Fnac and Darty, the *Autorité* thus noted that the majority of the prices of the products sold at Fnac were set on the basis of the prices charged by the pure online sales players. The data in the case file also made it possible to observe the extent of the closeness between the Fnac's in-store and online prices, and of the closeness of the prices between Fnac or Darty and two of the main online pure players present in grey and brown products, namely Amazon and Cdiscount, at least in certain categories of product (cameras, camcorders, televisions, smartphones, or game consoles, etc.), during the years preceding the operation. Furthermore, the competitors of the parties indicated they had adopted unified online and offline pricing, thereby reinforcing the observations made in the specific cases of the parties. The *Autorité* therefore concluded that "the closeness between the prices of Fnac and the prices of the pure online players is now observable and is tending to become generalised, even though there is not yet a general alignment of the prices for all of the products. This observation also applies to the main competitors of the parties"<sup>52</sup>.
37. Similarly, when it was examining the acquisition of control of Luderix in the toys retail sector, the *Autorité* observed that the majority of the specialist toy superstores who were questioned during the market test confirmed that they applied the same prices in their stores and online. The analysis conducted by the *Autorité* on the basis of the price readings provided by Toys'R'Us confirmed the similarity between the online and offline sales prices of that brand. Furthermore, the analysis also showed that the differences between Toys'R'Us prices and the prices proposed by its pure online player competitors were regularly less than 10%. Ultimately, the *Autorité* concluded that "the notifying parties apply a policy of uniform prices between their two sales channels that takes into account the price readings taken online. The analyses conducted also show that the prices charged by brands such as Toys'R'Us are constrained by the prices of the pure online players, as

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<sup>52</sup> Decision No. 16-DCC-111 of 27 July 2016 regarding the acquisition of sole control of Darty by Fnac (*Fnac Darty Decision*), §133.

illustrated by the small differences in price between these operators”<sup>53</sup>. Furthermore, in its decision on online sale events<sup>54</sup>, the *Autorité* considered that not only sale event websites but also factory outlet shops, discount sales outlets, or ex-brand shops apply large reductions, thereby making it easy for these various channels to be put into competition with one another. Likewise, in the sector of tyre sales, the market test highlighted the high competitive pressure from websites on brick-and-mortar outlets, in particular due to the existence of price comparison tools for tyres<sup>55</sup>.

38. Conversely, in its decision on practices employed by Apple in the sectors of Internet music downloads and digital portable media players (Deezer Decision<sup>56</sup>) that was issued on 9 November 2004, the *Conseil de la concurrence* deemed that downloading music over the Internet and purchasing the same music in a store were not substitutable, in particular because of the significant price differences between the two channels, it being possible for music purchased through traditional channels to cost up to five times more than music downloaded over the Internet for a single and to be up to twice as expensive for an album. Similarly, in its decision regarding the sports news press<sup>57</sup>, the *Autorité* considered that free sports news media, and in particular sports news websites, did not compete with the pay sports news press, because no reduction in the prices of the pay sports press had been observed in spite of the development of the various free sports information media.

#### **e) Consumer mobility between online sales and offline sales, and omnichannel distribution**

39. The operators in a sector using an omnichannel strategy<sup>58</sup>, is also evidence of the intensity of competition that can exist between online and offline sales. Such strategies are responses to consumer mobility and to the joint utility of both shopping channels for consumers, these two factors then tending to indicate that the customers can easily go from one channel to the other and, if necessary, put the two channels into competition with each other.
40. For example, in its decision on the takeover of Toys'R'Us by PicWic<sup>59</sup>, the *Autorité* observed that specialist toys superstores and hypermarkets & supermarkets had developed digital tools enabling, among other things, customers in a store to consult the products and their availability in the store or online, which would tend to indicate that

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<sup>53</sup> Decision 19-DCC-65 of 17 April 2019 regarding the acquisition of joint control of Luderix International by Jellej Jouets and the undivided ownership resulting from the succession of Mr Stéphane Mulliez, §60.

<sup>54</sup> Decision 14-D-18 of 28 October 2014 regarding practices implemented in the online sale event sector.

<sup>55</sup> Decision 15-DCC-76 of 30 June 2015 regarding the acquisition of joint control of Allopneus by the Michelin Group and by Hevea, (*Michelin Decision*), §27.

<sup>56</sup> Decision 04-D-54 of 9 November 2004 on practices implemented by Apple Computer, Inc. in the sectors for Internet music downloads and digital portable media players, §29

<sup>57</sup> Decision 14-D-02 of 20 February 2014 on practices implemented in the sports news press sector (*Amaury Decision*)

<sup>58</sup> An omnichannel strategy consists in businesses using all of the sales channels at their disposal (physical or online) and possibly in mixing and combining them (e.g. click and collect, drive-thru pickup, interactive terminals in stores) in order to improve the consumer experience and to increase consumer purchasing opportunities.

<sup>59</sup> Decision 19-DCC-65 of 17 April 2019 regarding the acquisition of joint control of Luderix International by Jellej Jouets and the undivided ownership resulting from the succession of Mr Stéphane Mulliez.



there was a certain amount of porosity or complementarity between the two channels<sup>60</sup>. Likewise, the market tests conducted during the examination of the takeover of Darty by Fnac confirmed that a significant fraction of consumers compared the online and offline prices, and combined the two channels when purchasing electrical products: the consumers could, in particular, consult both sales channels before making their purchase through one of the two, and the practices of “Research Online, Purchase Offline” (ROPO), i.e. of researching the product online and of purchasing it in a store<sup>61</sup> or, conversely, of “showrooming”, i.e. of going to the store to look at the product and note its price, and then of purchasing it online, were frequent<sup>62</sup>. Similar observations were made in the toys retail sector: “all of the competitors questioned during the market test consider that consumers use both channels when they purchase a toy, and that they compare the online and offline prices before they make their purchases...”<sup>63</sup>.

41. In addition, in the above-cited *Fnac/Darty* Decision, the market tests made it possible to highlight the success of click and collect, i.e. the success of the practice whereby the customer orders online and then picks up the order in a physical store. In particular, the *Autorité* decided that that path to purchase made it possible to “minimise certain drawbacks identified for online sales, in particular delivery charges and times”<sup>64</sup>.
42. Conversely, in the retail sector for gardening, DIY, pet, and landscaping supplies, the *Autorité* observed that an omnichannel strategy being used by the target remained limited, due to the small appetite of consumers for online shopping. Thus, fewer than 5% of the visits to Jardiland’s website were for making an online purchase, and home delivery was not yet proposed to the consumer<sup>65</sup>. Similarly, in the sector of retailing of low- and medium-price homeware and general merchandise products, the high carriage costs, and high cost of creating a model of operators active both in brick-and-mortar sales and in online sales compared with the average shopping basket<sup>66</sup> were not conducive to the development of an omnichannel strategy.
43. It can also be noted that, in certain cases, consumer mobility between the online channel and the traditional channel results from the very nature of the purchased product. Thus, in a decision relating to the tyres sector, the *Autorité* observed that orders placed with pure online players were delivered to a partner brick-and-mortar outlet where purchasers had to go to have the tyres fitted, which attenuated the specificities of online

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<sup>60</sup> Terminals were installed in the stores to make it possible to find out whether a product was available online or in the store, as were lockers making it possible to pick up products purchased online (Decision 19-DCC-65 of 17 April 2019 on the acquisition of joint control of Luderix International by Jellej Jouets and the undivided ownership resulting from the succession of Mr Stéphane Mulliez, §63).

<sup>61</sup> Path-to-purchase journey during which the consumer researches the product online and buys it in a brick-and-mortar outlet.

<sup>62</sup> Decision 16-DCC-111 of 27 July 2016 regarding the acquisition of sole control of Darty by Fnac, §144.

<sup>63</sup> Decision 19-DCC-65 of 17 April 2019 regarding the acquisition of joint control of Luderix International by Jellej Jouets and the undivided ownership resulting from the succession of Mr Stéphane Mulliez, §64.

<sup>64</sup> Decision No. 16-DCC-111 of 27 July 2016 regarding the acquisition of sole control of Darty by Fnac (*Fnac Darty* Decision), §136.

<sup>65</sup> Decision 18-DCC-148 of 24 August 2018 regarding the acquisition of sole control of Jardiland by In Vivo Retail, §53 *et seq.*

<sup>66</sup> Decision 17-DCC-216 of 18 December 2017 regarding the acquisition of sole control of the assets of Lilnat, Vutura and Agora Distribution by the Philippe Ginestet Group (*Ginestet* Decision), §§64-65.

shopping compared with in-store shopping<sup>67</sup>. However, other evidence tended to indicate little substitutability between the two channels and the *Autorité* then left the precise delimitation of the market open.

## **B. Adapting the competition law analysis framework to take on board online sales**

44. When the competitive pressure from online sales on offline sales is high enough for the online sales channel to be incorporated into the same relevant market as the offline sales channel, the analysis framework used for assessing the competitive situation needs to be adapted accordingly. As a general rule, if the development of online sales encourages the operators to harmonise their price and sales policies at national level, the competitive analysis should be conducted at the same level. However, the local specificities of a sector might justify conducting an analysis both locally and nationally (1). Taking the online activities into account also leads to changing the calculation of the market shares (2) and to taking into consideration in the competitive analysis the components that are specific to the online activities or more present in them, and that may be factors either intensifying or attenuating competition (3).

### **1. Taking online sales and local competition into account**

#### **a) A few aspects of the geographic dimension of competition between physical points of sale**

45. Competition between physical points of sale frequently takes place at infra-national, or indeed infra-regional level, or even within a smaller administrative subdivision, such as a “*département*” or a “*commune*” in France, in particular due to the transaction costs that are generally associated with the purchases made from a vendor who is geographically remote from its customers. In particular, the transport costs and times limit how far consumers are prepared to go to put outlets into competition with one another, and thus limit the extent of the geographic market on which the outlets are in competition with one another<sup>68</sup>.
46. But the local dimension of competition can also result from other factors. In particular, in certain cases, in particular when the vendors can apply different prices depending on catchment area, particular local preferences can change the intensity of the competition between goods or services, with goods deemed to be competing in a given area not necessarily being in competition in another. As the *Autorité* explains in its merger control guidelines, subjective considerations as regards the behaviour of demand, such as the regional or national preferences or attachment to brands, can mean that certain products of different geographic origins are not, from the demand point of view, substitutable for

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<sup>67</sup> Decision 15-DCC-76 of 30 June 2015 regarding the acquisition of joint control of Allopneus by the Michelin Group and by Hevea, (*Michelin Decision*), §28.

<sup>68</sup> cf. for example, the merger control guidelines of the *Autorité de la concurrence*.

local products. The cross elasticity of demand between two products can thus be different from one geographic area to another because of local habits.

47. Finally, the local dimension of competition does not exclude it from also being analysed at national level, when it is at national level that the main parameters for determining the competitiveness of the operators are defined. Thus, during the examination of the Banque Populaire/Caisses d'Épargne merger<sup>69</sup>, the competitive analysis of the retail banking markets and of certain commercial banking markets, for small and medium-sized enterprises (SMEs), was conducted both nationally and locally. Indeed, the competitive position of banking establishments depends firstly on the size of the groups at national level (numerous banking services being characterised by economies of scale and of range that work in favour of banks having very broad customer bases), and secondly on their proximity and on the quality of their relations with their customers<sup>70</sup>. Moreover, contrary to what was observed by the European Commission on other national banking markets, these markets, in France, exhibit a certain amount of geographic heterogeneity, as regards both the locations of the various groups and also the price conditions applied within the same group<sup>71</sup>.

**b) Taking e-commerce on board does not obviate the need to take distance into account in competition between physical outlets**

48. Taking online sales into account is naturally conducive to changing the competitive analysis compared with traditional markets, and to doing so in several ways. The question then arises of whether to extend the delimitation of the geographic markets and possibly of whether the local nature of the markets will disappear. Indeed, whenever customers put brick-and-mortar outlets into competition with online operators, stores who might be tempted to raise their prices in a local geographic area could see their customers buy their products online, thereby making such a price rise unprofitable. It could then be considered that even if a brick-and-mortar outlet were to hold a high market share in its local geographic market, it might not, however, have any market power due to the competition on it from the online websites whose prices are frequently defined nationally<sup>72</sup>. More broadly, if the competition between the online websites is national, the market power of stores or chains of stores might then have to be assessed at national level.
49. However, such reasoning suffers from limitations. In particular, the competition between the operators is naturally a question of degree: some operators can exert higher competitive pressure than others on any given business. Conversely, approaching competition through the prism of relevant markets leads to considering that an operator

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<sup>69</sup> Decision 09-DCC-16 of 22 June 2009 regarding the merger between the Caisse d'Épargne and Banque Populaire Groups.

<sup>70</sup> For the retail banking activities, see §§137 *et seq.* of the decision, and for the commercial banking activities, see §§156 *et seq.* of the decision.

<sup>71</sup> §§143 *et seq.*

<sup>72</sup> It cannot be excluded that, ultimately, the online sales websites might more frequently differentiate their prices depending on the geographic location of the purchasers. However, even if they do, it is not certain that the local dimension of the markets will be reinforced, since websites that are not very present in any particular region can sometimes easily increase their presence there if their prices are lower than the prices of their competitors.

is either a competitor of another operator, or not one at all, without necessarily indicating the intensity of the competition. While this simplification of the competitive process is not without grounds<sup>73</sup>, in some cases, the differentiation between the products within the same relevant market can be such that it is necessary to incorporate into the analysis the differences in degree of competitive intensity that exist between operators or between sales channels. This applies particularly when examining merger operations: the effect of such operations depends not so much on the proportion of consumers that turn to the Internet if all of the stores increase their prices, as on the proportion of consumers of one of the businesses that are parties to the operation who switch to the other business that is party to the merger (i.e. the “diversion ratio”). E-commerce can then reduce that proportion. However, even when sales shift to the Internet, the “diversion ratio” between the parties can be high enough for the merger operation to result in a price rise.

50. This reasoning was, for instance, applied during the examination of the takeover of Darty by Fnac<sup>74</sup>. As with most retail outlets, competition between stores takes place at local level<sup>75</sup>. The notifying party maintained that taking into account the competition from online sales on in-store sales should lead to delimiting a national market, for two reasons: firstly because the online sales websites and the main traditional competitors operated at national level; and secondly because the price and non-price sales conditions for retail of brown and grey products were also determined at national level. The competitive pressure exerted by the online sales websites, in particular Amazon or Cdiscount, was indeed such that the prices of the various competitors would have all converged on those charged by the digital players.
51. However, the *Autorité* observed that the purchasers of brown and grey products remained attached to physical stores, which was reflected in particular by the continued openings of new brick-and-mortar stores or by the market penetration of e-commerce in this sector that remained less than 30%. It also observed that the price and non-price sales conditions in the sector of brown and grey products had not become completely uniform under the pressure from the online sales at national level, room for manoeuvre continuing to exist for the brick-and-mortar outlets, depending on the local competitive environments.
52. The combination of these various elements therefore justified conducting the competitive analysis both at national level and at local level. Accordingly, the *Autorité* indicated that “e-commerce constitutes by nature an activity that is dematerialised, enabling each consumer to benefit from it regardless of where they are located. Distribution over the Internet cannot therefore be attached to any one particular area. However, taking on board the online supply does not mean masking the differences in local situations that might be available to the consumer depending on the catchment area in which they are located”. In a local area in which Fnac and Darty are present, and in the event the in-store prices of Fnac (or of Darty) rise, the consumers could shift, as their preferred choice, to

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<sup>73</sup> Indeed, whenever the consumer shift to the Internet exceeds a certain threshold, the physical outlets will be subjected to competition from that channel and will incorporate that competition when they set their in-store sales prices, and will do so regardless of the intensity of the competitive pressure.

<sup>74</sup> Decision 16-DCC-111 of 27 July 2016 regarding the acquisition of sole control of Darty by Fnac, §156 *et seq.*, in particular §§184-186.

<sup>75</sup> C. Armoet, S. Lecou, A. Rossion, *L'intégration des acteurs internet dans le marché : évolution ou révolution ?* (“Integration of Internet players into the market: evolution or revolution?”) *Concurrences* No. 4-2016, pp. 35-41.

Darty (or to Fnac), thereby making a price rise of Fnac (or of Darty) profitable. The *Autorité* thus concluded that “taking into account the competitive pressure exerted by the online sales websites on the physical points of sales does not imply analysing a national market exclusively”<sup>76</sup>.

53. When examining the merger between PicWic and Toys‘R‘Us, the *Autorité* also conducted competitive analyses at national and local level on the toys retail sector<sup>77</sup>. Unlike with the Fnac/Darty merger operation, which could significantly reduce competition in certain local areas in Paris, there were few risks of horizontal effects. At national level, the cumulative market share of the parties remained very limited (less than 15%) with the presence of numerous competitors on the market, including the pure online players like Cdiscount or Amazon. Locally, based on the same postulates as for Fnac/Darty, the analysis of the market shares in value terms made it possible to check the absence of horizontal effects on all of the local areas in which the merger operation gave rise to overlapping between the physical stores of the parties<sup>78</sup>. The merger operation was therefore cleared unconditionally, i.e. without commitments being required, at the end of a phase I.

### **c) Even mainly-online markets can include a strong local dimension**

54. Examining the merger between Fnac and Darty enabled the *Autorité* to reiterate that when a sufficiently large fraction of consumers continues to have a certain preference for offline shopping, taking online purchases into account does not necessarily make it possible to dismiss the local dimension of competition between the stores.
55. However, the markets on which online sales constitute more obvious alternatives to shopping in physical points of sale are not necessarily markets that should be approached from an exclusively national or supranational angle. Indeed, depending on the goods or services in question, significant geographic segmentation of the markets can remain in spite of the highly dematerialised nature of the use of such goods or services. This applies in particular to markets on which consumer preferences for particular products have strong local specificities: in such cases, and depending on the area or region under consideration, the competitive pressure exerted by a competitor product is more or less strong, regardless of whether the product is sold in a store or online.
56. Thus, when it was examining the takeover of Logic-Immo by SeLoger<sup>79</sup>, the *Autorité* deemed that for the sector of online property classified advert platforms, the competitive analysis had to be conducted both nationally and locally. Indeed, a user seeking a property generally targets a specific geographic area, while an owner of a property is aware that, in general, potential buyers will be located in the vicinity of the geographic area in which the property is located. Now, depending on the regions, the market shares of the nationwide property portals can have significant differences, as regards both numbers of

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<sup>76</sup> Decision 16-DCC-111 of 27 July 2016 regarding the acquisition of sole control of Darty by Fnac, §185.

<sup>77</sup> Decision 19-DCC-65 of 17 April 2019 regarding the acquisition of joint control of Luderix International by Jellej Jouets and the undivided ownership resulting from the succession of Mr Stéphane Mulliez

<sup>78</sup> Le Havre (76), Livry-Gargan (93), Lomme (59), Maurepas (78), Orvault (44), Saint-Martin-Boulogne (62), Thillois (51), Vert-Saint-Denis (77) and Villeneuve d’Ascq (59).

<sup>79</sup> Decision 18-DCC-18 of 1 February 2018 regarding the acquisition of sole control of the company Concept Multimédia by the group Axel Springer (*SeLoger Logic-Immo* Decision).

advertises (i.e. as regards property owners) and also audience (i.e. as regards Internet users seeking properties), due, in particular, to the presence, in certain regions, of very large regional portals. In the case in point, the price policies of the national portals could also be adjusted to take account of the characteristics of the local markets, and several in-house documents of the parties and statements from third parties confirmed that the parties conducted competitive analyses by local area<sup>80</sup>. Furthermore, since they were not well known enough outside their main regions of business, the property advert platforms that were very well established in a particular region could not easily roll their services out in a region in which they were not yet present. The combination of these characteristics then led the *Autorité* to conduct its analysis both nationally and locally.

57. To conclude, two types of reason were thus able to lead the *Autorité* to consider that, in spite of high competitive pressure from online sales, the local dimension of the analysis should remain essential: firstly, a strong preference among consumers for purchasing offline, and secondly a high variability of the market shares of the online websites at regional level, combined with price adjustments and barriers to entry at local level.

## **2. Assessing market share in the presence of online sales**

58. In the retail sector, assessing market share is frequently approached by referring to sales floor area. This item of data offers the dual advantage of being more easily accessible than market share in value terms, while also being correlated with it. Incorporating online sales, which are not associated with any sales floor area, then makes it necessary to reconcile the market share in floor area terms with the market share value terms<sup>81</sup>.

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<sup>80</sup> Decision 18-DCC-18 of 1 February 2018 regarding the acquisition of sole control of the company Concept Multimédia by the group Axel Springer (*SeLogger Logic-Immo* Decision), §§74-76.

<sup>81</sup> Similar issues can arise if it is desired to study the significance of drive-thru pickup services on a market made up of traditional retail outlets.



59. Thus, when examining the takeover of Darty by Fnac, the *Autorité* adopted calculation methods that differed depending on the profiles of the players on the market. For the players having points of sale, and since it did not have the turnover figures for all of the competitors of the parties at local level, the *Autorité* based its assessment on the floor areas of the physical sales outlets multiplied by the average turnover per square metre of each retail chain for each major geographic zone, namely the Paris Region, the large provincial cities, and the provinces excluding the large cities<sup>82</sup>. For the online players, the market shares at local level were estimated using a dual postulate: for each catchment area, i) on the online sales segment, the market shares of the players were assumed to be identical to those they held at national level, and ii) the significance in terms of the value of the online sales compared with the in-store sales was assumed to be identical to the significance observed at national level. On this grey and brown product retail market, neither the brand image and the attractiveness of the various online sales websites, nor the extent to which the consumers were disposed to shop online appeared to differ from one region to another<sup>83</sup>.
60. Furthermore, certain digital markets are similar to media markets, in that they seek firstly to capture the attention of the population, and secondly to sell advertising space to advertisers, and the positions of the operators on these markets can then be assessed using several different measurements (i.e. various audience or readership measurements or various advertising activity measurements), in particular since digital markets can have a greater richness of data and therefore a greater variety of indicators than the traditional markets.
61. Thus, in its opinion regarding online advertising of 2018<sup>84</sup>, the *Autorité de la concurrence* observed that, in order to assess the market shares of the players in online advertising, “various volume indicators, which vary depending on the service, can be taken into account. For example, the number of accounts, the number of users per month and per day, the number of visits to a website, the number of users logged in, the number of videos posted online by users, or indeed the number of videos watched are frequently used on markets such as social network markets or video sharing platform markets. Indicators such as the number of users per month or per day can however appear imperfect insofar as they do not indicate, for example, the time actually spent on using a service. Neither do they give indications about the volume of user data that the platform may collect and then use for targeting audience segments”.
62. Similarly, in its decision on the takeover of Logic-Immo by SeLoger, the *Autorité* examined the relative relevance of various measurements of market shares that were based on audience, number of property adverts, or turnover. In particular, it appeared that if measurements based on volumes (audience, number of adverts) can be indicative of the attractiveness and thus of the market power of a property platform, they are not always

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<sup>82</sup> Decision 16-DCC-111 of 27 July 2016 regarding the acquisition of sole control of Darty by Fnac, §§401-403. See also Decision 19-DCC-65 of 17 April 2019 on the acquisition of joint control of Luderix International by Jellej Jouets and the undivided ownership resulting from the succession of Mr Stéphane Mulliez, §§92-94.

<sup>83</sup> Although simple in principle, this reasoning is not without practical difficulties because it requires having turnover sales figures and not commercial floor area figures, which are usually used for analysing this type of merger (cf. below).

<sup>84</sup> Opinion 18-A-03 of 6 March 2018 on the use of data in the Internet advertising sector, (Online Advertising Opinion of 2018), §201.

sufficient. Firstly, measurements in terms of volume depend on the price strategy adopted by the platform, a free-of-charge policy or low prices tending to increase the volumes. Secondly, not all of the types of use by visitors to portals are equivalent: certain property portals are, for example, used by Internet surfers whose intention to purchase is more certain than for other portals, and the type of use by visitors is reflected in the prices that the portal can charge to estate agents. The *Autorité de la concurrence* thus, at least when assessing the market shares of portals compared with estate agents, preferred measurements of turnover, which reflects both the estate agents' propensity to pay (which depends on the size and the quality of the audience) and the number of property adverts posted on the portal<sup>85</sup>.

63. Finally, as the *Autorité* has often had the opportunity to emphasize, market share cannot be the sole criterion for assessing the market power of a business on a market. This applies particularly on multi-sided digital markets. Firstly, such markets, or certain "sides" of them, are frequently characterised by "multi-homing". A customer can then more or less simultaneously go to two or more operators and a fraction of the customer base is therefore common to two or more operators: market shares incorporating such multi-homing might then underestimate the relative attractiveness of the platform, in particular if the multi-homing is observed on only one side of the market or if the market shares are based on number of users of a platform rather than on the intensity of use of each platform<sup>86</sup>. Secondly, on certain digital markets, the market shares can be very unstable and change rapidly, which, in particular for the prospective analyses that are specific to merger control, makes it necessary to take into account other factors, such as the trends in market share change or the investment capacities of the platforms<sup>87</sup>.

### **3. Taking the specificities of digital markets into account in assessing market shares and market power**

64. Beyond the saving in transport costs that it can generate for customers, the digital economy has several other characteristics, some of which are sometimes already present on the "traditional markets" (such as network externalities or provision of certain services free of charge, these specificities being present, for example, in the media sector), others being more specific to e-commerce or e-services (such as the part played by data, or the absence of sales floor area). The increasing significance of the digital economy and the increasingly marked part played by such specificities can then require the competitive analysis tools to be adapted and new issues to be taken into account.

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<sup>85</sup> Decision 18-DCC-18 of 1 February 2018 regarding the acquisition of sole control of the company Concept Multimédia by the group Axel Springer (*SeLoger Logic-Immo* Decision), §231. The turnover taken into account excludes the advertising revenue, which is not relevant for assessing the market power of property platforms compared with estate agents.

<sup>86</sup> For example, two platforms that might be used simultaneously by all of the customers on one side of the market might show market shares in terms of numbers of views or numbers of adverts of only 50% even though the fact that they are used by all of the customers may indicate that, with respect to the customers, they have a certain amount of market power, in particular if, on the other side, the customers are single-homing (i.e. use only one platform). Market shares based on the intensity of use of a platform may make these difficulties less significant when the platforms are relatively asymmetric.

<sup>87</sup> Isabelle de Silva, *Assessing online platform mergers: Taking up the new challenges faced by the French Competition Authority in the digital economy*, May 2018, *Journal Concurrences* No. 2-2018 Art. No. 86701, § 46.

### **a) The factors specific to online activities that can reinforce competition**

65. Certain characteristics of digital markets can reinforce competition by reducing the market power of the operators. In such environments, the risk that specific corporate conducts (taking over a competitor, exclusive distribution arrangements, etc.) might adversely affect competition is then reduced.

#### ***Mobility of customers between operators***

66. Development of online sales frequently has the effect of intensifying competition: freed of the constraint of distance, consumers can more easily change online service provider than they can physical point of sale, and price and product comparison between different websites can be facilitated, including by using price comparison tools. As a result, the negotiating power of the purchasers can be greater when negotiating with digital operators than when negotiating with traditional operators. However, numerous other factors can limit such consumer mobility, in particular the other factors of differentiation between the operators, be it, in particular, the richness and the quality of the product or service offering, it being possible for those factors to depend on the size of the customer base on which the operators can draw and/or on the data they have, the reputation of the operators, customer loyalty programmes, or the effects of consumer experience. The consumers can also show significant inertia, particularly when services are provided free of charge. Thus, the European Commission has observed that a large proportion of users of the search engine Google would not use the services of competitors even if Google downgraded the quality of its services<sup>88</sup>.

#### ***Multi-homing of customers***

67. More specifically, on certain markets, customers can use two or more portals or platforms simultaneously. This characteristic then has major implications on the competitive situation of those markets.
68. Firstly, in the context of a merger operation, this type of multi-homing has ambiguous effects on the risks of price rises that can result from the operation under examination. For example, on the online property classified advert market, estate agents frequently use the services of several portals simultaneously. Such simultaneous multi-homing can reduce the risk of price rises if the customers of one of the two parties to the merger operation simultaneously use the services of the other party: as the *Autorité* observed, “adverts posted simultaneously on SeLoger and on Logic-Immo are not liable to shift to Logic-Immo because they are already posted on that portal”<sup>89</sup>. Conversely, estate agents who might use Se Loger and Le Bon Coin simultaneously would have a higher chance of turning to Logic-Immo if Se Loger decided to increase its price. The risk of price rises is then increased. Assessing which of the two configurations is the most representative of the real situation of the market requires an empirical examination of the conducts of the estate agents.
69. Then, the fact that customers simultaneously use two or more portals or platforms can indicate that the services are not perfectly substitutable. This applies, for example, when

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<sup>88</sup> European Commission, Case AT.39740, *Google Search (Shopping)*, §312.

<sup>89</sup> Decision 18-DCC-18 of 1 February 2018 regarding the acquisition of sole control of the company Concept Multimédia by the group Axel Springer (*SeLoger Logic-Immo* Decision), §288. The *Autorité* also checked that estate agents who used both portals of the parties simultaneously would not be tempted, in the event of a price rise of one of the two parties, to increase their spending on the portal of the other party.

each platform or service gives access to specific content or to a specific customer base segment. When examining the above-mentioned merger operation between SeLogger and Logic-Immo, the *Autorité* was thus able to establish, through a survey that it conducted on estate agents, that in the event of a rise in Se Logger's commission rate, 92% of respondents would nevertheless choose to continue to use the platform SeLogger, due to the size of the audience among that customer base<sup>90</sup>, thereby bearing witness to the potential market power of that operator.

70. Finally, multi-homing of customers can also be evidence of the ease with which the customers will be able to substitute one operator for another. Thus, a customer who uses one operator for 90% of their needs and another operator for the remaining 10% could easily change that distribution if one of the two operators were to downgrade the conditions of its offering and if the users of the platforms on the other side of the market are also multi-homing. More broadly, the possibility of multi-homing can facilitate the development of new competitors, by enabling the customers to use their services without however completely abandoning their usual service provider<sup>91</sup>.

### *The dynamism of digital markets*

71. Due to the capacity of customers to change service providers or to the possibility of new entries, certain digital markets can also prove to be particularly unstable, especially for the phase during which the market is emerging. It can thus be important to take into consideration the possible developments of the market in question in order to determine whether the respective positions of the competitors might change significantly and rapidly.
72. Thus, as regards calculating market share, the *Autorité*, while also indicating in its merger control guidelines that it refers to the most recent market shares available, points out that it can possibly take into consideration the market shares during the two preceding years, if they have changed considerably, and that the market shares can possibly be adjusted for market development estimations, in particular when the market is growing fast.

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<sup>90</sup> Decision 18-DCC-18 of 1 February 2018 regarding the acquisition of sole control of the company Concept Multimédia by the group Axel Springer (*SeLogger Logic-Immo* Decision), §204, see also De Silva (2018), §79.

<sup>91</sup> For an analysis of the various possible multi-homing/single-homing configurations, cf. the *Just Eat and Hungryhouse* Decision of the UK Competition and Markets Authority (2017) (<https://assets.publishing.service.gov.uk/media/5a0d6521ed915d0ade60db7e/justeat-hungryhouse-final-report.pdf>), p.58.

73. Assessment of the possible developments of the market should also take into account the entry possibilities. In particular pure online distributors may see their market power limited by the presence of brick-and-mortar operators and/or by the possibility that those operators deploy omnichannel strategies<sup>92</sup> and develop on online sales.
74. In addition, the online operators can be subjected to the threat of entry of and of potential competition from “super-platforms”<sup>93</sup> or the “Big Four”, also known as the “GAFA” companies (Google, Apple, Facebook, Amazon)<sup>94</sup>. Indeed, through their reputations and their audiences, such “big tech” giants could quickly overcome barriers to entry on any given market, to become major competitors of the incumbent players<sup>95</sup>. Such a threat of entry should, however, be sufficiently probable to be taken into account in the analysis. For instance, when examining the takeover of Logic-Immo by SeLoger, the *Autorité* dismissed the possibility of head-to-head and imminent competition from the super-platforms on the players of the market in question. Indeed, at the time of the merger operation, only Facebook proposed a property advert service via its online marketplace function, and there was no evidence showing sufficiently definite and quick entry of other big players like Amazon or Google into the market in question. Furthermore, Facebook proposed only a peer-to-peer service, which was different from the services for putting consumers and businesses (estate agents) into touch with one another that were proposed by the parties to the merger. In addition, the players on the market (portals and estate agents) did not consider the GAFA companies as credible competitors.
75. However, the *Autorité* did recognise that the GAFA companies could constitute sources of competitive constraint for online classified advert players<sup>96</sup>: “it is true that their financial capacity and a global reputation and audience, as well as considerable opportunities for technological development, which can draw on the success of other services and their access to large volumes of data, enable them to develop their activities very quickly within a sector.”. Moreover, US experience has shown that Facebook has managed to develop

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<sup>92</sup> “If the traditional and online travel agents have different cost structures and each have specific constraints, it is easy to switch from one to the other. Indeed, the technological media and the Internet access services used are within reach of any potential entrant... this absence of barriers to entry is illustrated in practice by the fact that travel agents are increasingly opting for a multi-channel strategy (...) as things currently stand, online travel agents’ services do not constitute a market for products that are distinct [from those of traditional travel agents].” Decision 09-D-06 of 5 February 2009 regarding practices employed by SNCF and Expédia Inc in the sector of online travel sales, §108-109.

<sup>93</sup> Isabelle de Silva, *Assessing online platform mergers: Taking up the new challenges faced by the French Competition Authority in the Digital Economy*, May 2018, *Journal Concurrences* No. 2-2018. §71.

<sup>94</sup> “Potential competition” means the threat, for the incumbent operators on a market, of possible entry of new players. Such entries would increase the actual level of competition and thus reduce the individual profits on the market. The more the threat is credible, the more likely it is to have a disciplining effect on the operators present on the market, who anticipate that raising their prices too much could cause new competitors to enter the market. On dynamic markets such as certain online markets, taking into account such potential competition is difficult in view of the uncertainties related to the entry costs and to the speed of development of new players on such markets, it being possible for those factors to depend on numerous parameters such as the inertia or the mobility of the consumers, the quality of the services proposed by the new platforms or the significance of the direct or indirect network effects. cf. *Autorité de la concurrence*, Guidelines of the *Autorité de la concurrence* regarding merger control.

<sup>95</sup> Decision 18-DCC-18 of 1 February 2018 regarding the acquisition of sole control of the company Concept Multimédia by the group Axel Springer (*SeLoger Logic-Immo* Decision), §186.

<sup>96</sup> Decision 18-DCC-18 of 1 February 2018 regarding the acquisition of sole control of the company Concept Multimédia by the group Axel Springer (*SeLoger Logic-Immo* Decision), §198.

rapidly on this market by entering into partnerships facilitating multi-distribution of the adverts with the main property advert portals. Thus, the *Autorité* urged caution as regards assessing their impact in the longer term “as their penetration on the sector of online property classifieds could be very swift”<sup>97</sup>.

### **b) The factors specific to online activities that can reduce competition**

76. While the above factors can, in certain cases, attenuate or mitigate the risk of anticompetitive effects on the market, the decisions and opinions of the *Autorité* have also identified various specificities of online sales or activities that are conducive to limiting the intensity of the competition, to greater or lesser extents depending on the sectors in question.
77. Among such characteristics, mention might be made, in particular of network effects, which are sometimes accentuated by market foreclosure strategies, access to data, and product diversification strategies of the platforms.

***Network effects can be more significant on online markets than on brick-and-mortar markets and thus contribute to increasing the barriers to entry.***

78. Network effects can be a significant component of the competitive workings of online markets. The term “network effects” is used when the value of a product or of a service increases with increasing numbers of users of it. “Direct” network effects are when value increases with increasing numbers of users of any one type<sup>98</sup> and “indirect” (or “cross-side”) network effects are when value increases with increasing numbers of users of another type<sup>99</sup>.
79. The strategic role of network effects is well known from economic literature and has, in particular, been emphasised by the *Autorité* for hotel booking platforms and online travel agency websites: “the wider the choice of hotels and of overnight accommodation that a website proposes, the more it attracts consumers, and the greater the success enjoyed by a website with consumers, the more it attracts hotels”. As indicated by the *Autorité*, “under certain circumstances, such markets marked by significant network effects can lead to the creation of strong positions related to a phenomenon of market concentration around dominant, or highly dominant, players, known as a “bandwagon effect” or a “snowball effect””<sup>100</sup>. The *Autorité* concluded that “such network effects, if they transpire, raise barriers to entry because the size of a market operator per se is a fundamental parameter in its growth. Thus, the smaller players and the new entrants do not enjoy the same

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<sup>97</sup> Decision 18-DCC-18 of 1 February 2018 regarding the acquisition of sole control of the company Concept Multimédia by the group Axel Springer (*SeLogger Logic-Immo* Decision), §201.

<sup>98</sup> Telecommunications networks are a typical example insofar as the higher the number of users, the more useful they are.

<sup>99</sup> For example, on social networks of the Facebook, Instagram or Twitter type, the expected effects of an advertising campaign increase, among other factors, with the number of users that the platform has. cf. *Autorité de la concurrence*, Guidelines of the *Autorité de la concurrence* regarding merger control.

<sup>100</sup> *Autorité de la concurrence, Bundeskartellamt*, Competition Law and Data, 10 May 2016, p. 13.



advantages as a big established player”<sup>101</sup>. Similarly, in its opinion on online advertising, the *Autorité* emphasised the significance of network effects in assessing barriers to entry in the online advertising sector: “analysis of barriers to entry also takes into consideration the specific features of user services, particularly the levels of investment required and user membership to these services, (in particular, network effects). For ad services, it particularly takes into account network effects associated with the audience required to attract advertisers”<sup>102</sup>. Finally, the relationship between network effects and assessing barriers to entry is also emphasised in the “Google” Decision of the *Autorité* of December 2019<sup>103</sup>.

80. The network effects are not, as such, a specificity of online markets. They can be present on a multitude of offline markets, in particular in the retail or media sectors. However, they can be more significant or more frequent on online markets. Firstly, an online operator is frequently less constrained by a particular sales area or storage area. It can thus propose a wider variety of products for sale, and, to be competitive, its competitors also have to propose a wide variety, without their position on the market necessarily enabling them to do so. The barriers to entry into such a market can then be greater. Furthermore, on offline sales markets, an operator who proposes an offering that is less rich than a competitor can nevertheless differentiate itself from the competitor through other advantages, such as, for example, its geographic location. Disappearance of location as a factor of differentiation between operators leads to the scale of the offering becoming an essential criterion.
81. Network effects can, however, have contrasting effects on competition. Firstly, in the presence of network effects, each operator may be encouraged to increase its customer base, and thus to propose very attractive sales terms and conditions. Conversely, each operator may be reticent about raising its prices because the reduction in its volumes can lead to a reduction in the network effects and thus to it becoming less attractive. Finally, if new entrants can overcome the disadvantage related to their size by means of other factors (e.g. an innovative feature), their sales could increase faster thanks to the network effects<sup>104</sup>.
82. In addition, the significance of the network effects can be very variable depending on the sectors in question. In its decision on the takeover of Logic-Immo by SeLogger<sup>105</sup>, the *Autorité* assessed to what extent the cross-side network effects of the parties to the operation could give rise to a risk of marginalising the competitors. While observing a positive correlation between the audience of the portals and the number of ads published on them (§ 386), the *Autorité* concluded that the cross-side network effects were limited. Indeed, on the side of the advertisers, certain online property advert platforms have, despite relatively limited audiences, succeeded in capturing a significant volume of

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<sup>101</sup> Decision 15-D-06 of 21 April 2015 regarding practices implemented by Booking.com B.V., Booking.com France SAS and Booking.com Customer Service France SAS in the online hotel booking sector, *Booking.com* Decision, §112.

<sup>102</sup> Opinion 18-A-03 of 6 March 2018 on the use of data in the online advertising sector, (Online Advertising Opinion of 2018), pp. 98-99.

<sup>103</sup> Decision 19-D-26 of 19 December 2019 regarding practices implemented in the online search advertising sector, §§319-320.

<sup>104</sup> *Autorité de la concurrence, Bundeskartellamt*, Competition Law and Data, 10 May 2016, p. 28.

<sup>105</sup> Decision 18-DCC-18 of 1 February 2018 regarding the acquisition of sole control of the company Concept Multimédia by the group Axel Springer (*SeLogger Logic-Immo* Decision).

advertisers thanks to very attractive commissions and to the frequency of multi-publication by the advertisers (§388). Similarly, on the side of the Internet users, the reduction by 32% in the number of property classified ads published on the portal Bien’Ici from September to December 2016 following the shift from the free-of-charge model to the pay model only led to a 5% fall in audience over the same period (§392). The *Autorité* emphasised that such limited cross-side network effects reduce the risk that the new entity, by increasing the number of its ads and/or its audience by means of the operation, might, in return, enjoy greater attractiveness on the other side of the market and, ultimately, marginalise its competitors.

***Access to data can also be a barrier to entry and thus reinforce the market power of the incumbent operators***

83. As emphasised by the *Autorité* in its joint study with the *Bundeskartellamt* (the German competition authority) on big data, “provided that access to a large volume or variety of data is important in ensuring competitiveness on the market (which is a market-specific question), the collection of data may result in entry barriers when new entrants are unable either to collect the data or to buy access to the same kind of data, in terms of volume and/or variety, as established companies”<sup>106</sup>. Furthermore, data collection “could possibly also reinforce network effects, when an increase in a firm’s user share enables it to collect more data than its competitors, leading to higher quality products or services and to further increases in market shares”<sup>107</sup>.
84. Like network effects, the part played by data is not specific to online sales, and the *Autorité* has already had to address issues related to data on non-digital markets<sup>108</sup>. However, the variety and the volume of the data that can be collected online compared with the data that can be collected in the physical world means that data can play a more marked role in the world of online sales.
85. The part played by data in the competitive process was, in particular, assessed by the *Autorité* when it examined the above-mentioned SeLogger/Logic-Immo operation<sup>109</sup>, for which the *Autorité* examined whether the combination of the data held by the parties and coming from the users and from the estate agents was liable to create an anticompetitive effect. In particular, certain competitors considered the acquisition of the data held by Logic-Immo to be “the biggest threat” and “the biggest value” of the operation (§470). Furthermore, SeLogger did indeed consider that data as a “strategic priority” and “a factor enabling it to stand out from the competition in the future” (§472). Most of the advertisers who took part in the market test also confirmed the advantage of SeLogger in this regard (§473). However, the *Autorité* considered that the competing portals, such as Bien’ici or Le Bon Coin, could access the same quantity of data as the parties thanks to the makeup

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<sup>106</sup> *Autorité de la concurrence, Bundeskartellamt, Competition Law and Data*, 10 May 2016, p. 11.

<sup>107</sup> *Autorité de la concurrence, Bundeskartellamt, Competition Law and Data*, 10 May 2016, p. 28.

<sup>108</sup> cf. Decision 12-DCC-20 of 7 February 2012 regarding the acquisition of sole control of Enerest by Electricité de Strasbourg; Decision 13-D-20 of 17 December 2013 regarding practices implemented by EDF in the photovoltaic solar power sector; Decision 14-MC-02 of 9 September 2014 relating to a request for interim measures submitted by Direct Energie in the gas and electricity sectors; Decision 14-D-06 of 8 July 2014 regarding practices implemented by Cegedim in the sector of medical information databases.

<sup>109</sup> Decision 18-DCC-18 of 1 February 2018 regarding the acquisition of sole control of the company Concept Multimédia by the group Axel Springer (*SeLogger Logic-Immo* Decision), §§470-477

of their shareholders<sup>110</sup> or to the size of their audiences. Multi-homing, both on the side of the estate agencies and on the side of the Internet uses, also limited the risk that the entity resulting from the operation might be able exclusively to appropriate a large volume of data. Finally, the risk of an anticompetitive effect due to the acquisition and to the sharing of the data was therefore not sufficiently significant (§476). As regards the expected effects of the combination of competitors' databases within a single entity, the Commission, for example in its *Apple/Shazam* decision<sup>111</sup>, used the "Four Vs" test. The Commission thus compared the database that was going to be available to the new entity with the databases of the competitors by using four indicators: the Variety of the data composing the database, the Velocity at which the data is collected, the Volume of the database, and the economic Value of the data.

86. Similarly, during the examination of the takeover of Aufeminin by TF1, more than one-third of the respondents to the market test highlighted a risk of a data-related horizontal effect on the market for online advertising space sales: by acquiring data collected by Aufeminin, TF1 could reinforce the attractiveness of its online advertising spaces. Nevertheless, in view of the limited market share of the new entity (less than 10% with an increment of less than 5%), of the presence of powerful competitors holding large volumes and varieties of data, and of the fact that the readership of the parties was targeted (mainly female) and thus limited compared to generalist websites such as Google or Facebook, the *Autorité* excluded the risk of horizontal effects created by the operation on that market<sup>112</sup>.

## C. Conclusion

87. The development of online sales is increasingly leading the *Autorité* to delimit relevant markets that include both offline and online sales when it is analysing the situation of competition between physical points of sale. Taking online activities into account in this way has led to the framework it uses for analysing markets being adapted in various manners, be it for calculating market share or for taking into account new characteristics of markets. Regarding market characteristics, while online activities appeared, for a long time, to be factors of intensification of competition, certain characteristics, conducive to limiting competition, such as network effects or the growing role of data, are increasingly frequently being emphasised. Consolidating online activities with offline activities then transposes the issues that are specific to online activities, and that are highlighted above, to the consolidated markets.

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<sup>110</sup> The shareholders of Bien'ici, one of the competitors of the notifying party are indeed made up of a large number of property professionals, including networks of estate agents, such as Guy Hoquet, Orpi, Century 21, Laforêt, Era, l'Adresse, Solvimmo, Foncia, Belvia immobilier, Citya immobilier and Square Habitat, so that that competitor can make use of the data of those various networks.

<sup>111</sup> European Commission, Case M.8788 *Apple/Shazam*.

<sup>112</sup> Decision 18-DCC-63 of 23 April 2018 regarding the acquisition of sole control of Aufeminin by TF1, §§46-50.

## **II. THE CONDUCTS OF OPERATORS FACED WITH THE DEVELOPMENT OF E-COMMERCE**

88. The development of e-commerce can lead to commercial strategies being worked out with the aim of attenuating competition between the online and offline channels or within each channel. Operators who are present mainly offline can thus attempt to limit the development of online sales (A). In certain sectors, the regulatory framework can thus constitute an obstacle to growth of online sales (B). Finally, in certain sectors, online operators can also seek to attenuate the competition exerted both by online players and by traditional players (C).

### **A. The conducts likely to reduce the competitive pressure exerted by e-commerce**

89. The study looks firstly at the price practices implemented by certain suppliers to limit competition from online sales (1), and then at the practices based on parameters other than prices (2).

#### **1. Pricing conducts: imposed resale prices and discrimination**

90. When they are price-related, conducts aiming to attenuate competition from online sales can take mainly two forms. Firstly, suppliers can directly impose sales prices on the distributor (a); secondly, they can set wholesale prices that are differentiated according to sales channel (online or offline) or type of reseller (pure online players, pure brick-and-mortar players, or hybrid players active both in offline and in online sales) in order to make online sales less competitive (b).

##### **a) Conducts aiming to impose resale prices**

91. According to the European Commission's E-commerce Sector Inquiry, price restrictions and recommendations are the conducts that are by far the most frequently employed by suppliers with regard to online distributors. Indeed, 42% of the online distributors who responded to the questionnaire declared they were subjected to such restrictions or recommendations<sup>113</sup>. Although price recommendations are lawful, certain distributors reported they had received constraining indications from their suppliers, such as being limited to a discount range (8% of the respondent retailers), having to apply the same price online and offline (7% of the respondent retailers), and having to apply a minimum price (5%) or imposed advertised prices (3%)<sup>114</sup>.

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<sup>113</sup> Sector Inquiry by the European Commission, Staff Working Document, §334.

<sup>114</sup> §557 of the above-cited Sector Inquiry.

92. Also according to the Commission's inquiry, the motivations of the suppliers that lead them to wish to impose sales prices on their retailers are of various types<sup>115</sup>. In particular, the resale price may be a component of the brand image of a product, in particular for premium or luxury products. Furthermore, setting online resale prices would make it possible to avoid online sales becoming dominant over offline sales, in view of the frequently lower marketing and sales costs of online sales, compared with brick-and-mortar retailers, who are dissuaded from investing in presenting their products. Finally, such price restrictions can also make it possible for a supplier to avoid having to reduce its wholesale prices if the margins of the physical stores prove to be insufficient.
93. However, the European competition authorities consider that imposed sales prices are a restriction of competition "by object" that is contrary to Article 101, paragraph 1 of the Treaty on the Functioning of the European Union (TFEU). In this regard, imposed sales prices cannot enjoy the automatic block exemption provided for in Article 4(a) of the block exemption regulation of 20 April 2010 of the European Commission<sup>116</sup> and only an individual exemption may be granted if it is demonstrated by the undertaking in question that the imposed resale price generates efficiency-enhancing effects capable of outweighing the anticompetitive effects<sup>117</sup>. The development of online sales and particularly of pure online sales players can be particularly conducive to implementation of imposed resale prices (resale price maintenance or "RPM"): firstly such distributors are characterised by costs structures and sales strategies that are distinct from those of better established retailers, and that can lead them to charge prices lower than those observed in stores or with hybrid operators who are active both in brick-and-mortar retail and in online sales; and secondly, online sales lend themselves more readily than in-store sales do to monitoring of the prices charged by the distributors. But imposing a fixed or minimum resale price can be particularly disadvantageous for e-commerce insofar as price can be one of its main competitive advantages. Therefore, depriving online operators of the possibility of setting the price at a level lower than the one charged in stores could significantly restrict their capacity to stimulate competition. That practice can also be particularly disadvantageous for consumers who cannot therefore take advantage of the opportunities for low prices and for lively competition that online sales could generate.
94. Several decisions by the European Commission and by the *Autorité de la concurrence* illustrate implementation of this analysis framework. Recently, the Commission fined four manufacturers of consumer electronic products 111 million euros for using threats or sanctions (such as blocking supplies) to prevent their online distributors from charging prices lower than the recommended sales prices for widely used consumer electronic products such as hair driers, laptop computers, headphones, etc.<sup>118</sup>. The decision also emphasized that the use by the retailers of pricing algorithms taking into account the prices of their competitors could have increased the effect of the practices: according to the Commission, "many, including the biggest online retailers, use pricing algorithms

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<sup>115</sup> §560 *et seq.* of the above-cited Sector Inquiry.

<sup>116</sup> 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.

<sup>117</sup> The Commission's Guidelines on Vertical Restraints, §225.

<sup>118</sup> European Commission, 24 July 2018, Asus, Denon & Marantz, Philips, Pioneer, Cases AT. 40465, 40469, 40181 and 40182.

which automatically adapt retail prices to those of competitors. In this way, the pricing restrictions imposed on low pricing online retailers typically had a broader impact on overall online prices for the respective consumer electronics products”<sup>119</sup>.

95. For its part, the *Autorité de la concurrence* has made several decisions against imposed online sales prices, concerning in particular the tableware and kitchen sector<sup>120</sup>, the competitive *pétanque* boules sector<sup>121</sup>, or indeed the sector of liquid fertilisers<sup>122</sup>. In the first of these cases, the practice was implemented through a biannual retail price scale that was sent by the manufacturer to its resellers and through an Internet Charter aimed at ensuring that “the Internet retailers do not slash prices” and urging “the Internet retailer to comply with and apply as best it can, if possible, the recommended sales prices” in order to reassure the brick-and-mortar retailers<sup>123</sup>. Non-compliance with that Charter led to breaking off of commercial relations.
96. In the second of those cases, Obut was fined, not for an anticompetitive agreement, but rather for abuse of its dominant position on the competitive *pétanques* boules market, for having constrained its resellers, in particular pure online sales players, to apply its recommended prices. The business in question had, in particular, put in place a system for monitoring prices, an employee of the company being, in particular, in charge of monitoring the prices charged by the various resellers on the commercial websites, and a series of sanctions, such as delaying or blocking deliveries, for uncooperative retailers<sup>124</sup>.
97. Finally, in two recent decisions<sup>125</sup>, the *Autorité de la concurrence* fined businesses for vertical agreements on online resale prices in the sector of marketing liquid fertilisers used in above-ground home farming. In that sector, the producers and wholesalers in question participated in disseminating wholesale and retail prices to wholesalers and retailers, it being possible, in particular, for the retail prices to be disseminated by the wholesalers by them applying “recommended” retail prices on their online sales websites<sup>126</sup>. Compliance with those resale prices was monitored both by the producers and by the wholesalers and coercive or retaliatory measures (e.g. in the form of pressure or blocking of suppliers) were implemented against wholesalers or retailers who did not comply with the imposed prices. As one of those decisions observes, price monitoring was facilitated by the Internet, which makes it easier than in a store to check that the prices charged by the retailers, and in particular those who sell online, correspond to the “reference” prices that are given to them<sup>127</sup>.

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<sup>119</sup> European Commission, Press Release of 24 July 2018.

<sup>120</sup> Decision 17-D-01 of 26 January 2017 regarding practices implemented in the tableware and kitchen sector.

<sup>121</sup> Decision 17-D-02 of 10 February 2017 regarding practices implemented in the competitive *pétanque* boules sector.

<sup>122</sup> Decision No. 18-D-26 of 20 December 2018 regarding practices implemented in the sector of marketing liquid fertilisers used in above-ground home farming; Decision No. 19-D-17 of 30 July 2019 regarding practices implemented in the sector of marketing liquid fertilisers used in above-ground home farming.

<sup>123</sup> Above-cited Decision 07-D-01, §29.

<sup>124</sup> Above-cited Decision 17-D-02, §53.

<sup>125</sup> Above-cited Decisions 18-D-26 and 19-D-17.

<sup>126</sup> Above-cited Decision 18-D-26, §79, and Paris Court of Appeal, Judgement 19/03410 of 16 January 2020.

<sup>127</sup> Above-cited Decision 18-D-26, §85, and Paris Court of Appeal, Judgement 19/03410 of 16 January 2020.

## **b) Pricing differentiation between distribution channels**

98. Suppliers can also apply different wholesale prices on different sales channels (i.e. online or offline), it being possible for such a price differential then to be passed on to the retail sales prices charged by retailers. Such price differentiation can have various objectives: in certain cases, the aim can be to encourage a distribution channel that is particularly important for the manufacturer by granting it preferential sales terms and conditions, conducive, for example, to making up for higher operating costs. Thus, when the operating costs of stores are higher than those of a website, a manufacturer might wish to grant preferential pricing conditions to store operators, in order to make up for the extra costs associated with selling the products in a store. But the aim can also be to disadvantage a sales channel whose characteristics do not correspond to the expectations of the manufacturer but which, despite that, is impossible for the manufacturer to do without. Thus, a manufacturer could consider that online sales do not correspond to the brand image it wishes to associate with its products, or could regret that websites exert over-significant competition with respect to other channels, while also being obliged to use that channel, be it for purely legal reasons (banning online sales being prohibited – cf. below), or because of the sales potential of that channel.
99. In its E-commerce Sector Inquiry, the European Commission distinguishes between two types of pricing discrimination in the context of e-commerce: firstly, the discrimination consisting in a supplier charging wholesale prices that differ depending on the type of distributor (pure offline players, hybrid players active both in offline and in online sales, and pure online players, for example); and secondly, the discrimination consisting in setting a price that differs depending on the resale channel (offline or online, for example), and known as “dual pricing”. As indicated by the Commission, price differentiation according to type of distributor is generally considered to be a normal component of the competitive process; conversely, dual pricing is a hardcore restriction<sup>128</sup>.

### ***Pricing discrimination between traditional players and pure online players***

100. In its opinion on e-commerce of 2012<sup>129</sup>, the *Autorité* observed the existence of supply pricing conditions that were differentiated between pure online players and the other retailers. Indeed, “as a general rule, click-and-mortar operators enjoy price terms and conditions that are more advantageous than those granted to pure online players. For certain products, the difference between a click-and-mortar operator’s resale below-cost threshold and a pure online player’s resale below-cost threshold can be as large as 10%”<sup>130</sup>. This pricing differentiation can, in particular, be based on differentiated general sales terms and conditions, e.g. that make provision for a discount on the purchase prices of the products subject to having one or more physical sales outlets, or be based on commercial cooperation services that are mainly offered in stores rather than online. It may also result from the greater negotiating power of hybrid distributors who are active

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<sup>128</sup> European Commission Final Report on the E-commerce Sector Inquiry of 2018, Staff Working Document, §597: “Charging different (wholesale) prices to different retailers is generally considered a normal part of the competitive process. Dual pricing for one and the same (hybrid) retailer is generally considered as a hardcore restriction under the VBER”.

<sup>129</sup> Opinion 12-A-20 on the competitive functioning of electronic commerce, §216 *et seq.*

<sup>130</sup> Above-cited Opinion 12-A-20, §219.



both in offline and in online sales, and whose volumes and negotiating power can exceed those of pure online players.

101. The *Autorité* also observed that the pricing disadvantage suffered by the pure online players when purchasing the products wholesale did not generally prevent them from charging retail prices lower than those of hybrid operators active both in offline and online sales, due firstly to their lower operating costs, and secondly to their smaller margins<sup>131</sup>. At the end of its analyses, the *Autorité* clarified its position on supply pricing differentiation between pure online players and the other types of players. It considered that “such pricing differentiation is, in principle, liable to constitute an anticompetitive practice only insofar as it is employed by a business in a dominant position or results from a mutual agreement or “meeting of the minds” between economic operators”<sup>132</sup> and on condition:
- that the scale of the pricing differential can have anticompetitive effects, by limiting the competitive pressure that the pure online players are supposed to be able exert on traditional retailers; and
  - that the pricing differential is not based on any objective justification that is related, for example, to volumes of sales or to services rendered by each distribution channel<sup>133</sup> that could be grounds for an individual exemption for this practice.

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<sup>131</sup> Above-cited Opinion 12-A-20, §220.

<sup>132</sup> Above-cited Opinion 12-A-20, §255.

<sup>133</sup> The *Autorité* then assesses, in particular, whether 1) the considerations in exchange for which the discounts are granted to the traditional retailers and the services rendered by them actually exist; 2) the discounts and remunerations are proportionate to the services rendered; and 3) the discount system is beneficial to the consumers (Opinion 12-A-20 of 18 September 2012, §255 *et seq.*).

***Pricing differentiation aimed at the offline and online sales of one and the same retailer (dual pricing)***

102. According to the Commission's Guidelines on Vertical Restraints, by incentivising the distributor to prefer one sales channel over another, dual pricing practice can constitute a restriction of passive sales by the distributor, and thus a restriction of competition by object. However, such a restriction can benefit from individual exemption<sup>134</sup>. In particular, the Commission's Guidelines make provision for the possibility of justifying the practice, e.g. when "selling online leads to substantially higher costs for the manufacturer than offline sales. For example, where offline sales include home installation by the distributor but online sales do not, the latter may lead to more customer complaints and warranty claims for the manufacturer"<sup>135</sup>. In such a case, the Commission would then examine whether the restriction is likely to limit online sales and hinder the distributor in reaching more and different customers. It would also examine whether the restriction is necessary and proportionate, it being observed that, according to the Commission's Guidelines, "the supplier [may require], without limiting the online sales of the distributor, that the buyer sells at least a certain absolute amount (in value or volume) of the products offline to ensure an efficient operation of its brick and mortar shop (physical point of sales) (...) This absolute amount of required offline sales can be the same for all buyers, or determined individually for each buyer on the basis of objective criteria, such as the buyer's size in the network or its geographic location"<sup>136</sup>.
103. So far, the French competition authority has not encountered dual pricing practices, unlike the German competition authority<sup>137</sup>.

**2. Non-pricing conducts: conditions for inclusion of online sales websites into the distribution network**

104. Retailer's purchase or resale prices are not the only parameters through which suppliers can influence online resale of their products. Various restrictions of a non-pricing nature can thus be imposed on or negotiated with distributors for organising online sales. Suppliers can thus wish to oblige their distributors to use offline sales exclusively (a). They can also wish to ban resale of their products on a third-party platform (online marketplace) (b) or impose other restrictions on their distributors such as banning them from being referenced on a price comparison tool (c). According to the above-cited Sector Inquiry of the European Commission, 18% of the distributors who responded to the European Commission's inquiry had been subjected to restrictions of sales on

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<sup>134</sup> Guidelines on Vertical Restraints of 10 May 2010, SEC (2010) 411 final, §52, d).

<sup>135</sup> Guidelines on Vertical Restraints, §64.

<sup>136</sup> Guidelines on Vertical Restraints, §52, point c).

<sup>137</sup> See the contribution from Germany to the OECD roundtable of 2018, §20 *et seq.*, and the press releases from the *Bundeskartellamt* of 23 December 2013 (relating to conducts employed by Bosch Siemens), of 28 November 2013 (relating to conducts employed by Gardena), and of 13 December 2011 (relating to conducts employed by Dornbracht).

marketplaces, 9% to restrictions of use of online comparison tools, and 11% to restrictions of resale on their own website<sup>138</sup>.

### **a) Banning online sales constitutes a hardcore restriction of free competition**

105. According to the Guidelines on Vertical Restraints<sup>139</sup>, a distributor using a website for selling products constitutes passive selling, which is protected by Regulation 330-2010<sup>140</sup> and banning from selling over the Internet constitutes a “hardcore restriction”<sup>141</sup>. When the Paris Court of Appeal sought a preliminary ruling from the Court of Justice of the European Union in the “*Pierre Fabre*” case (see below), the CJEU also ruled “that Article 101(1) TFEU must be interpreted as meaning that, in the context of a selective distribution system, a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts to a restriction by object within the meaning of that provision where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified”<sup>142</sup>.
106. As shown by the number of decisions on this subject<sup>143</sup>, some of which are already old, the *Autorité* is watchful to apply this principle strictly and is attached to detecting and repressing this type of practice. For instance, in its Decision 08-D-25<sup>144</sup>, the *Conseil de la concurrence* fined Pierre Fabre Dermo-Cosmétique 17,000 euros and ordered it to amend its contracts to allow its distributors to sell its products online. The *Conseil* considered that “by imposing on its approved distributors a ban on selling products online, [the supplier] limits from the outset the commercial freedom of its distributors by excluding a means of marketing and selling its cosmetics and personal hygiene products. As a result, [it] restricts the choice of the consumers who wish to purchase over the Internet and prevents selling to end purchasers who are not located in the “physical” catchment area of the approved distributor” (§57). The *Conseil* concluded that a clause of an agreement that bans the distributors of a cosmetics company from selling its products over the Internet constitutes a restriction of competition by object. That analysis was confirmed by the Court of Justice of the European Union<sup>145</sup>, who was asked for a preliminary ruling on this point by the Paris Court of Appeal, and then by that Court of Appeal<sup>146</sup>.

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<sup>138</sup> European Commission, 2016, Preliminary Report on the E-commerce Sector Inquiry, Commission Staff Working Document, SWD (2016)312 final, Figure B.36 §306.

<sup>139</sup> Guidelines on Vertical Restraints, 2010/C 130/01, § 52.

<sup>140</sup> Above-cited European Commission Regulation 330/2010 of 20 April 2010.

<sup>141</sup> Above-cited opinion 12-A-20, §§ 324-325.

<sup>142</sup> CJEU Judgement C-439/09 of 13 October 2011, *Pierre Fabre*, point 47.

<sup>143</sup> cf. for example Decision 18-D-23 of 24 October 2018 regarding practices implemented in the distribution of outdoor power equipment sector.

<sup>144</sup> Decision 08-D-25 of 29 October 2008 regarding practices implemented in the sector of distribution of cosmetics and personal hygiene products sold on pharmaceutical advice.

<sup>145</sup> CJEU Judgement C-439/09 of 13 October 2011, *Pierre Fabre*.

<sup>146</sup> Paris Court of Appeal, Judgement of 31 January 2013, No. 2008/23812.

107. Nevertheless, even though they cannot benefit from the block exemption of Regulation 330/2010, vertical agreements including such a hardcore restriction can benefit from an individual exemption under Article 101, paragraph 3, of the EC Treaty. However, so far, neither the *Autorité* nor the Court of Appeal have granted any exemption relating to this type of practice. Thus, in its Judgement of 31 January 2013, the Paris Court of Appeal ruled that the efficiency improvements alleged by Pierre Fabre (guaranteed advisory service, prevention of counterfeiting, and prevention of free-riding) were not established. Thus, Pierre Fabre did not establish that a total ban on selling over the Internet was necessary for the consumer to enjoy the best possible advice, nor that absence of such a ban would substantially reduce the quality of the advice offered to the customer. In particular, the Court emphasised that a website could be arranged so that the customer had suitable information, possibly with a “hotline” enabling the consumer to ask questions to a qualified pharmacist. Similarly, nothing made it possible to establish that banning selling over the Internet was conducive to preventing development of counterfeiting of the products in question, given, in particular, the selective nature of the distribution network in question, enabling the manufacturer to control the quality of the websites of the distributors reselling its products; neither was it demonstrated that, thanks to the restrictions, Pierre Fabre products were less counterfeited than those of their competitors that were sold online, certain competitors indicating, on the contrary, that presence of their products online via controlled websites would be an appropriate means of combating counterfeiting. Finally, the alleged risk of free-riding was limited, since the decision allowed selling online only by retailers who were members of the selective distribution network and who complied with the conditions for being approved for the network, including having physical points of sale at which pharmacists were present; neither was the risk of free-riding substantiated in concrete terms, in order to assess whether the price differentials between selling online and offline were actually conducive to incentivising the consumer to prefer purchasing online in spite of the related delivery times<sup>147</sup>.
108. In keeping with this case law, the *Autorité* has, on several occasions, fined suppliers for having banned their distributors from selling their products online. For instance, in 2012, the *Autorité* fined Bang & Olufsen and ordered it to amend its selective distribution contracts for having banned its approved distributors, who were members of its selective distribution network, from selling hi-fi and home cinema products by mail order, that ban extending to include selling over the Internet<sup>148</sup>. In its judgement upholding that decision<sup>149</sup>, the Paris Court of Appeal also observed that Bang & Olufsen had not shown that the free-riding it had alleged to justify its practices could be avoided by alternatives that were less restrictive of competition than a total ban on selling over the Internet, in particular for products that were not very elaborate in the range of Bang & Olufsen products that did not require demonstrations to be given in-store. Furthermore, according to the Court of Appeal, nothing established that the Internet would not enable the products to be presented while respecting the Bang & Olufsen brand image. However, the Court of Appeal considered that, at the time of the practices (going back at least to

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<sup>147</sup> Paris Court of Appeal, Judgement of 31 January 2013, No. 2008/23812, p. 18 *et seq.*

<sup>148</sup> Decision 12-D-23 of 12 December 2012 regarding practices implemented by Bang & Olufsen in the sector of selective distribution of hi-fi and home cinema equipment).

<sup>149</sup> Paris Court of Appeal, Judgement of 13 March 2014, No. 2013/00714 .

2001), the case law applicable in matters of banning selling over the Internet was not clearly set, since above-cited Decision 08-D-25 was not made until 2008, and only led to a Judgement of the Court of Justice of the European Union in 2011; for that reason, it mitigated the seriousness of the practices, and reduced the amount of the fine from 900,000 to 10,000 euros<sup>150</sup>.

109. Similarly, the *Autorité* fined a business from the outdoor power equipment sector and ordered it to amend its selective distribution contracts for having, through its selective distribution system, implemented an unlawful anticompetitive arrangement consisting in banning, *de facto*, sale of the products from the websites of the distributors<sup>151</sup>. In that decision, upheld by the Paris Court of Appeal<sup>152</sup>, the *Autorité* considered that while a manufacturer using a selective distribution system was justified by the hazardousness of the articles sold (chainsaw, brushcutters (string trimmers), etc.) and by the need for assistance and advice to preserve the quality of the products, to ensure they are used properly, and to guarantee that the users remain safe, requiring, in contracts signed with its commercial partners, that any order, even placed over the Internet, be handed over directly to the customer by the staff of the business with whom the order had been placed (either at the physical points of sale, or during a home delivery without going through a third-party service provider) amounted to banning, *de facto*, selling of its products from the websites of its distributors. Such restriction of distance selling that went beyond what was necessary for preserving the safety of both professional and lay users, would thus constitute a restriction of competition by object. Furthermore, the company in question could not benefit from a block exemption, insofar as the ban in question prevented resellers from using the Internet to satisfy demand from purchasers located in another catchment area, and should therefore be considered to be a ban of passive selling, i.e. a “hardcore” restriction in the sense of Regulation 330/2010. Finally, the restriction in question could not benefit from an individual exemption because it was neither required by the regulations on marketing of the products in question, nor applied by the competitors of the undertaking or by many DIY superstores. The characteristics of the products in question and of the advice on how to use them, in this case through videos, could appear online and nothing in the case tended to indicate that users not having had any direct contact with the resellers would be more prone to having accidents.
110. Likewise, in a Decision of 1 July 2019<sup>153</sup>, the *Autorité* fined various companies active in the sector of high-end bicycles for having banned their approved distributors from selling bicycles over the Internet. Those distributors were obliged to deliver the products ordered to the physical points of sale. The *Autorité* considered that that practice firstly

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<sup>150</sup> This uncertainty as to the applicable law and case law was also to be taken into account by the *Autorité* for setting the levels of fines in Decisions 18-D-23 (§§300-302) and 19-D-14 (§§181-182) also for bans on selling over the Internet. cf. below.

<sup>151</sup> Decision 18-D-23 of 24 October 2018 regarding practices implemented in the distribution of outdoor power equipment sector.

<sup>152</sup> Paris Court of Appeal, Judgement of 17 October 2019, which did however reduce the fine from 7 to 6 million euros, since the Court considered that it could be deemed that Stihl had acted in good faith, in particular in view of an email from BKartA relating to its network complying with the competition rules, which mitigated the seriousness of the breach. An appeal against that judgement on points of law was filed by the enterprise in question before the Court of Cassation (French Supreme Court).

<sup>153</sup> Decision 19-D-14 of 1 July 2019 regarding practices implemented in the sector involved in the retail of high-end bicycles.

constituted, *de facto*, a ban of online selling, and secondly went beyond what was necessary for preserving the safety of consumers with regard to the regulatory provisions governing marketing and selling of bicycles, and, finally, was not necessary for guaranteeing that advice was given in choosing or using the bicycle, it being possible, in particular, for such advice to be given online, via an enquiries service of the “hotline” type or via a “chat” service.

111. Under certain circumstances, and rather than going down a litigation route, the *Autorité* has accepted commitments proposed by businesses that their distribution contracts would include the option for distributors to sell online, either without any specific condition<sup>154</sup>, or more specifically while subjecting such online selling to certain conditions in order to take account of specific circumstances. On the latter point, in its decision relating to the sector of distribution of hi-fi and home cinema equipment<sup>155</sup>, the *Conseil de la concurrence* considered that the total ban on selling online or the conditions to which online selling was subjected for Bose, Focal JM Lab and Triangle products that were imposed on the approved distributors of those brands were excessive, in particular in view of the objectives pursued (preserving the brand image and the need to give advice to customers due to the highly technical nature of the products) and in view of the restrictions applying to the physical points of sale of the approved distributors. However, the *Conseil* considered that the commitments proposed by those companies, and consisting in authorising online selling, possibly subject to complying with various conditions, such as graphic codes and standards, the presence of a free information service and of an after-sales service, or indeed, for very high-end products, a statement from customers acknowledging that they had been able to listen to the products and receive customised advice from an approved distributor in a store before purchasing them, put an end to the competition concerns raised. A supplier may, indeed, make rules specific to online selling of its products, provided that those rules are justified and not disproportionate and are not, in reality, equivalent to an absolute ban<sup>156</sup>.
112. Finally, it should be remembered that the fact that undertakings may not ban their distributors from selling their products over the Internet, except where circumstances might justify an individual exemption under Article 101(3), does not stop them from limiting the use of that mode of distribution, in particular through selective distribution. In particular, an operator may refuse to approve as members of its selective distribution network businesses who distribute their products exclusively over the Internet, whenever objective justifications exist for choosing the selective mode of distribution and for the clauses that govern it, and whenever any restrictions resulting from it are proportionate to the objective pursued<sup>157</sup>. We should thus point out that the Paris Court of Appeal dismissed the arguments of Showroomprivé in support of calling into question

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<sup>154</sup> Decision 07-D-07 of 8 March 2007, regarding practices implemented in the sector of distribution of cosmetics and personal hygiene products.

<sup>155</sup> Decision 06-D-28 of 5 October 2006 regarding practices implemented in the sector of selective distribution of hi-fi and home cinema equipment.

<sup>156</sup> Decision 07-D-07 of 8 March 2007.

<sup>157</sup> cf. the “*Metro*” and “*Coty*” Judgements of the Court of Justice of the European Union, respectively C-26/76 and C-230/16, and, for a summary of case law, Camous-Léonard E. et Combe E., “*La distribution sélective après l’arrêt Coty : éclaircissements et zones d’ombre*” (“Selective Distribution After the *Coty* Judgement: Clarifications and Grey Areas”), *Concurrences*, Issue No. 4, 2018.

the requirement of distribution through brick-and-mortar outlets imposed by Coty on its selective distributors<sup>158</sup>.

### **b) Banning from referencing on marketplaces**

113. Online marketplaces, such as those operated by Amazon, Cdiscount, or indeed 1001pharmacies which is a specialist marketplace, are intermediaries that facilitate transactions between the suppliers or distributors of a product or service and their purchasers, in particular by making it easier to compare the products and the prices. According to the above-cited European Commission Sector Inquiry, 35% of the European distributors who responded use such marketplaces (that figure was 30% for French distributors)<sup>159</sup>.
114. While an absolute ban on online selling by a distributor generally constitutes a restriction by object, European case law and decision practice are less clear-cut on the issue of bans of referencing of products on marketplaces. For instance, in its *Coty* Judgement<sup>160</sup>, the Court of Justice of the European Union ruled that a supplier of luxury products who used selective distribution could ban its approved distributors from selling the products on a third-party Internet platform if that restriction was based on objective criteria, applied uniformly to all of the resellers, and if it did not go beyond what was necessary for ensuring that the objectives of the selective distribution put in place by the manufacturer were complied with, that selective distribution being itself considered as appropriate for the products in question. In the case in point, the Court of Justice observed firstly that the ban was aimed to make sure that the products would be marketed and sold by approved distributors, in an environment controlled by them and making it possible to preserve their luxury image, and secondly that the ban applied only to platforms and not to all online sales, which were made mainly via the distributors' own online shops, which were not affected by the ban. It was then considered that the distribution network and its clauses, including the ban on referencing on marketplaces, complied with competition law.

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<sup>158</sup> Paris Court of Appeal, 28 February 2018, *Showroomprive.com*, 16/02263

<sup>159</sup> European Commission, 2016, Preliminary Report on the E-commerce Sector Inquiry, Commission Staff Working Document, SWD (2016)312 final, Figures B.55 §414 and B.60 §419.

<sup>160</sup> Court of Justice of the European Union, Press Release No. 132/17 Case C-230/16.



115. As shown by the recent “*Caudalie*” Judgements of the Paris Court of Appeal and of the French Supreme Court<sup>161</sup>, and above-cited Decision 18-D-23 pertaining to distribution of outdoor power equipment<sup>162</sup>, the same reasoning can apply to other categories of product, whenever the banning of referencing on marketplaces is not equivalent to a ban of selling over the Internet and is necessary for preserving one of the important characteristics or features of the products in question.
116. Furthermore, the Court of Justice of the European Union has ruled that since such a ban on selling on online marketplaces is not a “hardcore” restriction, any absence of necessity or of proportionality to the objectives of the selective distribution or it being used in the absence of selective distribution does not, *per se*, make it contrary to the competition rules, provided that it can benefit from an exemption on the grounds of Exemption Regulation 330/2010<sup>163</sup>. As indicated by the *Autorité* in its contribution of 6 June 2018 to an OECD roundtable, “it is therefore only in the event that the conditions for the exemption regulation are not met, particularly the market share threshold condition, that the clause in question must be examined, while taking into account its content and objectives, as well as the economic and legal context in which it is used. In any event, the clause in question may qualify for an individual exemption on the basis of Article 101(3) of the TFEU<sup>164</sup>.”
117. However, such clauses are not necessarily unlawful. For instance, in 2015, the *Autorité* opened an investigation into a ban imposed by Adidas on its online retailers, prohibiting them from being referenced on online marketplaces. During the investigation proceedings, Adidas decided to authorise use of online marketplaces, provided that they met certain qualitative criteria enabling them then to be approved by the manufacturer. As a result, the *Autorité* closed the investigation against Adidas France, while also indicating that it would make sure that the approved distributors did indeed benefit from access to the online marketplaces<sup>165</sup>.

### **c) Banning referencing on price comparison websites**

118. Price comparison websites reference offerings of goods and services from retail websites and, by means of a comparison search engine specific to the comparator in question, enable users to search for and compare the offerings and, possibly, to access directly the offering of their choice on a referenced retail website. Such comparison websites can also give further information about the products, such as reviews by other users. According to

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<sup>161</sup> Paris Court of Appeal, 2 February 2016, *eNova santé / Caudalie*. Court of Cassation, commercial chamber, Judgement of 13 September 2017, 16-15067. Paris Court of Appeal of 13 July 2018, *eNova santé / Caudalie*.

<sup>162</sup> In this decision, the *Autorité de la concurrence* considered that the ban on referencing on online marketplaces ordered by Stihl for its distributors was lawful because: i) the ban guaranteed that the products were indeed sold by approved distributors, thereby limiting the risk of counterfeiting and of lack of sufficient advice; ii) according to the European Commission’s E-commerce Sector Inquiry, online marketplaces were used by only 31% of the respondent retailers, and there was nothing to indicate that marketplaces would be more necessary for online resale of outdoor power equipment than for online resale of other products (§§278-289).

<sup>163</sup> Court of Justice of the European Union, Press Release No. 132/17 Case C-230/16.

<sup>164</sup> Contribution from France to the OECD roundtable on the Implications of E-commerce for Competition Policy, 2018, §§65, 68, 69. [https://one.oecd.org/document/DAF/COMP/WD\(2018\)58/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)58/en/pdf)

<sup>165</sup> *Autorité de la concurrence*, press release of 8 November 2015 on online selling.

the above-cited Commission Inquiry, 36 % of retailers in Europe use price comparison websites, and 67% of retailers in France use them.

119. As observed by the Commission in that inquiry<sup>166</sup>, comparison websites can be beneficial to suppliers and/or to distributors, by improving the visibility of their brands and by enriching the information given to consumers. However, certain producers or distributors can fear that these tools focus excessively on the price dimension of the goods and services proposed, to the detriment of other criteria, such as luxury image, quality, style, or other characteristics of the products, and they therefore ban referencing of their products on price comparison tools. 10% of the retailers who responded to the E-commerce Inquiry of the European Commission indicated that their contracts with their suppliers included clauses restricting the use of comparators.
120. As the Commission indicates in that inquiry, while price comparison tools allow consumers to compare the offerings more easily and enable distributors to become known by a larger number of Internet users, they do not constitute a distribution channel that is distinct from the websites of the distributors since, in the majority of cases, they redirect Internet users to the website of the chosen retailer: as a result, an absolute ban on use of such comparison tools could be less justified than an absolute ban on use of online marketplaces, and could constitute a hardcore restriction of competition by restraining the use of the Internet as a sales channel. However, manufacturers may require communications by retailers about their products to meet a certain quality standard, both online and offline, and the Exemption Regulation thus authorises them to define qualitative criteria that the comparison tools must satisfy in order to be used by retailers<sup>167</sup>.
121. So far, there have been few decisions by the European competition authorities concerning bans on referencing on online comparison tools. In the *Asics* case<sup>168</sup>, the *Bundeskartellamt* considered that the selective distribution system put in place by Asics in late 2012, and that, in particular, restricted the possibility for resellers of cooperating with price comparison websites, constituting a restriction of competition by object contrary to Article 101, paragraph 1, of the TFEU. In 2017, the German Federal Court of Justice upheld the decision of the *Bundeskartellamt* and ruled that any absolute ban on the use of online comparison tools that was not linked directly to quality requirements was illegal<sup>169</sup>.

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<sup>166</sup> European Commission, Working Document accompanying the Final Report on the E-commerce Sector Inquiry on E-commerce, p. 166, see also the Report by the Competition and Markets Authority (CMA) on online comparison tools or “Digital Comparison Tools”, §1.14.

<sup>167</sup> cf. European Commission, Final report on the E-commerce Sector Inquiry, §500 *et seq.*

<sup>168</sup> *Bundeskartellamt*, Case Summary, *Unlawful restrictions of online sales of Asics running shoes*, Decision B2-98/11, published 25 January 2016.

<sup>169</sup> *Bundeskartellamt*, Press Release, *ASICS dealers allowed to use price comparison engines – Federal Court of Justice confirms Bundeskartellamt’s decision*, published on 25 January 2017.

## **B. Regulatory frameworks that are sometimes dissuasive for online selling**

122. The conducts of businesses are not the only factors that sometimes constrain or hold back the development of online sales. In some sectors, state regulations can also limit the use of this sales channel by businesses, thereby reducing consumer choice, competition between operators and opportunities for operators to develop. It is therefore important to assess both how well founded and how proportional the restrictions on Internet sales instituted by such regulations are. Furthermore, certain forms of online selling can lead to new players appearing and can stimulate competition on traditional markets. But, placed under different conditions, such new players have sometimes benefited from conditions that are more advantageous, in terms of regulations. Therefore, in certain cases, the development of online sales that can lead to competition between regulated services and non-regulated services can also make it necessary to adapt the regulations. These various issues can be approached through the example of two sectors, namely public individual passenger transport, in which the development of online sales appears very significant (1), and the sector of retail distribution of medicinal products, in which online sales currently remain very marginal, in particular due to regulatory constraints (2).

### **1. The example of individual passenger transport**

123. In the public individual passenger transport sector, the regulatory framework has had to adapt to the rapid growth of the chauffeur-driven private hire vehicle (PHV) sector (known as the “VTC” or “*véhicule de transport avec chauffeur*” sector in France), whose offering is essentially rolled out via online applications. This adaptation had two objectives: firstly to regulate competition on the pre-book market between the “traditional” operators, i.e. the “hackney carriage” taxis, and the public hire vehicles, and secondly to reassert the legal monopoly of taxis on the “plying for hire” or “hail and rank” market<sup>170</sup>.
124. Thus, the French Government confirmed the legal monopoly for taxis on the “plying for hire” market, i.e. on the “hail and rank” market, Decree 2013-690 of 30 July 2013 making it obligatory to pre-book PHV services. Similarly, a particular provision of French Law No. 2014-1104 of 1 October 2014 on taxis and private hire cars banned “electronically plying for hire”, i.e. banned a PHV driver from informing a customer of the location and availability of a vehicle prior to booking when that vehicle is located on a street open to public traffic. Conversely, the *Autorité* has, on several occasions, recommended excluding provisions that exceed the objective of legitimately protecting the hail and rank market, such provisions frequently resulting in artificially degrading the quality of PHV services and of the online applications that market and sell them. For instance, French Decree No. 2013-1251 of 27 December 2013, which established a minimum lapse of time between a booking and a customer being picked up by a PHV, received a negative opinion from the *Autorité de la concurrence*. The *Autorité* considered that the measure in question was not

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<sup>170</sup> i.e. the market corresponding to picking up customers on streets open to public traffic without pre-booking.

justified by protecting the monopoly of taxis on the hail and rank market and indeed was contrary to the public order objective of keeping traffic moving. Although that opinion was not followed by the French Government, the measure in question was suspended by the judge responsible for dealing with urgent matters<sup>171</sup>. Subsequently, that provision was annulled by the French Administrative Supreme Court which, ruling in administrative proceedings brought to set aside an administrative decision, considered that “the Government was not authorised to add new conditions to the regulations on PHVs that would restrict their activity”<sup>172</sup>. Similarly, above-cited French Law No. 2014-1104 of 1 October 2014 on taxis and private hire cars also established the obligation for PHV drivers to return to their base or to a place off the streets after completing a ride. That obligation brought reservations from the *Autorité* as to its effectiveness with regard to the objective of combating illegal plying for hire, the *Autorité* emphasising both the heavy constraint that the obligation imposed on PHVs and on the online applications marketing and selling their services, and also the complexity of monitoring whether it was being implemented properly.

125. In parallel, the French Government endeavoured to institute a regulatory environment making it possible to secure fair competition between taxis and PHVs on the pre-book market. The *Autorité* welcomed the regulatory amendments making it possible to level out the competitive playing field between taxis and PHVs. For instance, regarding the introduction of a professional examination for PHV drivers, Opinion 14-A-17 of 9 December 2014 of the *Autorité de concurrence* concerning a draft decree on public individual passenger transport welcomed the removal of the obligation for formal training of 250 hours for PHV drivers (Article D.231-7 of the *Code du Tourisme* (French Tourism Law Code)), that obligation not applying to taxi drivers, and the replacement of the initial examination with an examination similar to the one that taxi drivers have to take<sup>173</sup>. The French Government also authorised taxis to use prices and booking means comparable to those used by PHVs. Opinion 15-A-07 of 8 June 2015 of the *Autorité* thus welcomed the government initiative to allow taxis to charge fixed fares for rides between the Paris airports and Paris, and fixed call-out fees, in a context of competition with PHVs. Furthermore, in its Opinion 15-A-20 of 22 December 2015, the *Autorité* gave an opinion in favour of the authorities setting up a platform called “Le.taxi” centralising the offerings of taxis on the hail and rank market.

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<sup>171</sup> Ordinance dated 5 February 2014.

<sup>172</sup> *Conseil d’Etat* (French Administrative Supreme Court) dated 17 December 2014 relating to the French Decree on Private Hire Vehicles (PHVs, known as “VTC” in French).

<sup>173</sup> This argument was taken up by the *Autorité* in its Opinion 17-A-04 of 20 March 2017 in which it recommended that the French Government harmonise the examinations for access to the comparable professions of private hire car drivers (VTC), private hire motorbike or three-wheeler riders (*moto-pro*), and private hire minibus or people carrier drivers (*LOTI légers*).

## 2. The example of retail sales of medicinal products.

126. In the sector of retail sales of medicinal products, the *Autorité* has, on several occasions, recommended relaxing the conditions for online selling of over-the-counter (OTC) medicinal products<sup>174</sup>. Indeed, it results both from the “*Doc Morris*” Court of Justice Decision of 11 December 2003<sup>175</sup> and from Directive 2011/62/EU of 8 June 2011 that Member States of the European Union must allow online sales by dispensing pharmacies of this type of medicinal product. Now, although that European directive was transposed into French law in 2012<sup>176</sup>, several regulatory provisions of regulations made subsequently<sup>177</sup>, appear not to be justified by public health considerations and continue to hold back the development of online selling by French pharmacies. In particular, the *Ordre national des pharmaciens* (French General Pharmaceutical Council) frequently indicates that it fears online sales will encourage overconsumption or misuse of medicinal products through lack of appropriate advice, and the risk of counterfeiting, and lead to possible loss of turnover<sup>178</sup>.
127. In its Opinions 13-A-12<sup>179</sup> and 16-A-09<sup>180</sup>, the *Autorité* considered that “good practice” as regards marketing and selling medicinal products online as defined by draft regulations were frequently so restrictive that they deprived selling medicinal products online of any interest, to the detriment both of the consumer patient and of the pharmacists, and did so without being justified by public health considerations. Although some of the recommendations of the *Autorité* have been taken into account, it nevertheless remains that the regulatory framework for online selling of medicinal products is highly constraining<sup>181</sup>.
128. Thus, beyond the restriction of online sales being restricted to OTC medicinal products<sup>182</sup>, and beyond the obligation of having the online sales website anchored to and secured by

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<sup>174</sup> Opinion 13-A-12 of 10 April 2013 regarding a draft regulation from the French Ministry for Social Affairs and Health on good practice in dispensing medicinal products online; Opinion 16-A-09 of 26 April 2016 regarding two draft regulations on e-commerce of medicinal products; Opinion 19-A-08 of 4 April 2019 regarding the sectors of non-hospital distribution of medicinal products and of private chemical pathology.

<sup>175</sup> CJEC Judgement of 11 December 2003, *Deutscher Apothekerverband* C-322/01, Rec. 2003 p. I-14887.

<sup>176</sup> Ordinance 2012-1427 of 19 December 2012 relating to reinforcing the security of the medicinal product supply chain, to regulating online sale of medicinal products, and to combating falsification of medicinal products

<sup>177</sup> Regulation of 20 June 2013 relating to good practice in dispensing medicinal products online (annulled), then the regulations of 28 November 2016 relating to good practice in dispensing medicinal products in pharmacies and relating to the technical rules applicable to medicinal product e-commerce websites.

<sup>178</sup> See the contribution from the *Ordre national des pharmaciens* (French General Pharmaceutical Council) to the sector inquiry of the *Autorité de la concurrence* on the functioning of competition in the sectors of non-hospital distribution of medicinal products and of chemical pathology (source: <http://www.ordre.pharmacien.fr>)

<sup>179</sup> Above-cited Opinion 13-A-12. The final regulation took on board some of the recommendations of the *Autorité* but was annulled by the French Administrative Supreme Court (*Conseil d'Etat*) on 16 March 2015 due to it exceeding the scope of authorisation conferred by law and due to it not being notified to the European Commission. cf. CE (*Conseil d'Etat*) 16 March 2015 Requests Nos. 370073, 370721, 370820, *M A, société Gatpharm SELAREL Tant D'M*.

<sup>180</sup> Above-cited Opinion 16-A-09.

<sup>181</sup> cf. Above-cited Opinion 19-A-08.

<sup>182</sup> Article L. 5125-34 of the French Public Health Code (*Code de la Santé Publique*).

a brick-and-mortar dispensing pharmacy<sup>183</sup>, those restrictions being deemed to comply with European law by the French Administrative Supreme Court <sup>184</sup>, the current regulations impose a series of bans and obligations liable to discourage online selling of OTC medicinal products by pharmacies, namely, in particular the ban on using storage premises remote from the pharmacies<sup>185</sup>, the ban on paying to reference the website on price comparison tools or on search engines, the ban on grouping pharmacies together on a joint website, the obligation to appoint an assistant pharmacist for each new slice of 1.3 million euros of turnover, regardless of the nature of the products sold (including, therefore, if the products are cosmetics, hygiene & personal care or health & beauty products), the limitation on the content of newsletters that can be sent by the online sales websites that is limited to only information coming from the health authorities, or indeed the ban on hypertext links to other pharmacy websites (including to websites belonging to the dispensing pharmacy who is the holder of the website being used).

129. Various observations substantiate the scale of the impact of these obstacles on the development of online sales of medicinal products in France<sup>186</sup>. Although growing, the proportion of pharmacies having online sales websites and the proportion of sales of OTC medicinal products via that channel out of total OTC sales remain very low (respectively 1.6% and 1%). This low development of online sales contrasts with the development of this activity in other European countries, where online operators are more developed including operators who are active on the French market. The French share in online OTC sales in the European Union is only 3%, as against 34% for Germany (where 6% of the pharmacies have online sales activities and where online sales represent 12% of the OTC sales market), and 45% for the United Kingdom.
130. Furthermore, the risks put forward to justify very restrictive regulations on online selling of medicinal products do not appear to be substantiated. For instance, the figures put forward by France's General Pharmaceutical Council (*Ordre national des pharmaciens*) on the increased risk of market penetration by counterfeit medicinal products concern, in reality, medicinal products purchased on illegal websites. In addition, overly strict online selling conditions that limit the development of this distribution channel can, paradoxically, facilitate the development of unauthorised websites, which are more likely to sell counterfeit medicinal products.

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<sup>183</sup> Articles L. 5125-34, 35, 27 and 38 of the French Public Health Code.

<sup>184</sup> Decisions 370072, 370721 and 370820 of 16 March 2015 of the *Conseil d'Etat*.

<sup>185</sup> In particular, such a provision requires pharmacies located in the centres of towns and cities to have large storage premises in the town/city centre, which is almost impossible (Article R. 5125-8 of the French Public Health Code).

<sup>186</sup> cf. above-cited Opinion 19-A-08.

131. To remedy this situation, the *Autorité* has made several recommendations, such as, for example:

- Relax regulations on communications and advertising relating to online selling: allow online websites to use pay referencing and pay price comparison tools, broaden the scope of information that can be passed on in newsletters sent to customers, enable the website of one pharmacy to include a link to another pharmacy, relax the ban on “enhancer devices” (bold characters and large, flashing characters, etc.).
- Rationalise the economic model of French cyber-pharmacies: allow dispensing pharmacies to group together and consolidate their offering via a common or joint website, explicitly make provision for it to be possible for pharmacy websites to use platforms for selling medicinal products online, allow pharmacists to use storage premises remote from their pharmacies, apply a criterion more relevant than overall turnover of the pharmacy for setting the number of pharmacists to recruit, in particular for taking account of the sales of hygiene, personal care, health and beauty products that do not need the same level of advice.
- Finally, clarify the regulations applicable to foreign operators, in a context in which the communications and good practice requirements were defined with regard to national operators while their applicability to foreign operators remains imprecise. Indeed, as the *Autorité* notes in its opinion, apart from one article of the French Public Health Code<sup>187</sup>, French legislations and regulations do not specify what applies to operators located in other Member States of the EU and selling medicinal products in France<sup>188</sup>. Such legal insecurity could dissuade certain foreign players from venturing onto the French market for online distribution of OTC medicinal products or, conversely, give such players an advantage over French operators.

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<sup>187</sup> According to Opinion 19-A-08 of the *Autorité*, Article L. 5125-40 of the French Public Health Code merely specifies “that a person legally authorised to sell medicinal products to the public in the EU Member State in which it is located may sell online, to a person residing in France, over-the-counter medicinal products only, and must comply with the legislation applicable to medicinal products marketed and sold in France”.

<sup>188</sup> On this point, a request for a preliminary ruling had been submitted to the Court of Justice by the Paris Court of Appeal (*CA Paris*, 28 September 2018, RG 17/17803) in order to determine whether a Member State can impose specific rules concerning advertising applicable to cyber-pharmacies on pharmacists who are nationals of another State of the European Union. The Advocate General, in his opinion of 27 February 2020 (CJEU, opinion, 27 February 2020, Case C-649/18, *A vs Daniel B, UD, AFP, B and L*), considered that, as regards the restrictions related to physical advertising, that Article 34 TFEU does not preclude a regulation from a Member State that bans advertising for services providing online selling of medicines supplied by a pharmacy located in another Member State “provided that such regulation is necessary and proportionate to achieving the objective of protecting the dignity of the profession of pharmacist, this being a matter for the referring court to verify”. As regards the restrictions relating to digital advertising (ban on posting of promotions on the websites of the service provider, ban on paid referencing, obligation to answer a questionnaire first), he considered that Article 3 of European Directive 2000/31/EC required the destination Member State to have notified the Member State in which the service provider is located and the European Commission “of its intention to apply the regulation in question to the same service provider, this matter being for the referring court to verify”, and that the said Article 3 of European Directive 2000/31/EC also required that such application be “appropriate and necessary for protecting public health, this matter being for the referring court to verify”.



## **C. Conducts likely to distort competition between online sales operators**

132. Conducts aimed at reducing the competitive pressure exerted by e-commerce on offline commercial activities are not the only ones that can raise competition concerns. Certain practices can also aim to limit competition between online operators, either by reducing their incentives to compete with one another, or by excluding or preventing the development of competing online operators. In the light of the decisions taken by the *Autorité de la concurrence*, such strategies have, so far, been rarer than those aiming to limit competition from online sales: indeed, they can be difficult to implement because online operators are often new entrants and are therefore more focused on developing rather than on freezing positions they have already acquired. Competition with offline commerce can also reduce the incentives for an online operator to exclude its competitors: even if online competition would be reduced, offline competition would continue to keep high competitive pressure on e-commerce. However, it can happen that the level of development of online operators, including on purely digital markets, is sufficiently high for them to have an incentive to limit competition between them or to exclude their competitors. This applies to hotel booking platforms and to the “broad” price parity clauses that they have used (1). Furthermore, excluding online operators can enable hybrid operators who are present mainly offline to reduce the competitive pressure from e-commerce on their offline activities while also keeping for themselves the biggest share of the online sales channel. Thus, various incumbent operators have, in the past, attempted to enable their online services to benefit from their particular position on a related offline sector (2). Finally, as the online activities shake off and cut themselves off from the competition from offline activities, the digital operators will be increasingly incentivised to reduce the competition between them and able to do so, with, in certain cases, anticompetitive conducts that have been little analysed in the offline world (3).

### **1. The case of parity clauses in the hotel booking platform sector**

133. The development of online sales has been accompanied by a boom in various types of intermediaries between those offering goods and services and their customers. In the sector of hotel booking, in which online sales have rapidly become dominant over brick-and-mortar travel agent sales, hotel booking platforms thus make it easier for any particular hotel demand to meet the corresponding hotel supply, by enabling consumers to choose the hotel that suits them best and enabling accommodation suppliers to become known to consumers more easily. The hotel booking platform is then remunerated by receiving a commission, which is most often deducted from the accommodation suppliers when a transaction is agreed between a customer and a hotel who subscribes to the platform.

134. In 2015, in a matter referred to it by the main French hotel trade associations and the Accor Group, the *Autorité* had to examine the lawfulness of the price parity clauses imposed by Booking.com on the hotel operators referenced on its platform for booking hotel rooms online<sup>189</sup>. Those parity clauses, which are of the “broad” type, prohibit the hotel operators, on their own sales channel or on a platform other than Booking.com, from charging a price per night that is more advantageous than the price offered on Booking.com, or from proposing more nights on their own sales channel or on platforms competing with Booking.com than on Booking.com.
135. Such parity clauses can produce various anticompetitive effects. Firstly, they dissuade the booking platforms from lowering their commission, because such a reduction will not necessarily enable the hotel operators to lower their retail price on the platform that is lowering its commission, since the hotel operators are constrained by the parity clauses they have signed with the other platforms. Conversely, if a platform considered as being a must-use one by the hotel operators decides to increase its commission, it will not have to fear its customer base massively switching to another, competing platform if the contracts between it and the hotel operators include a price parity clause, since the hotel operators will not necessarily be able to increase the prices per night for sales made on that platform. Similarly, the hotel operators cannot open up a higher number of nights to booking on the platform that proposes the lowest commission to them, which, once again, dissuades the platforms from decreasing their rates. Secondly, the parity clauses will prevent any new platforms from becoming known by charging lower commission rates, because such low rates cannot result in room prices that are lower than on the incumbent platforms<sup>190</sup>.
136. But price parity clauses can possibly meet pro-competition objectives. Firstly, they could reduce the “risk of free-riding” or “parasitism” of certain platforms by competing platforms or by the hotel operators themselves. Indeed, empirical data demonstrates the acute price sensitivity exhibited by consumers in this sector<sup>191</sup>. A hotel operator could then set a lower price on its own website than on the booking platform in order to attract customers and thereby avoiding paying over a commission to the platform, even though the platform has enabled the consumer to identify the hotel by means of the various features on the platform that are more or less elaborate. Ultimately, such “free-riding” could dissuade the platforms from making the investments necessary for correctly informing the consumers about the characteristics of the hotels presented. Price parity clauses could also reduce the cost for the consumer of prospecting and thus intensify competition between hotels (rather than between platforms): by making the online and

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<sup>189</sup> Decision 15-D-06 of 21 April 2015 regarding practices implemented by Booking.com B.V., Booking.com France SAS and Booking.com Customer Service France SAS in the online hotel booking sector. A complaint had also been filed in 2013 against Expédia and HRS, which are hotel booking platforms in competition with Booking.com but which have significantly smaller market shares in France. However, the French law known as the “*loi Macron*” (“Macron Law”) coming into force in 2015 and banning the use of any price parity clauses, and the way such clauses were dealt with by other European competition authorities led to those complaints being dismissed by the *Autorité* (Decision 19-D-23 of 10 December 2019) relating to practices implemented in the online hotel booking sector).

<sup>190</sup> Contribution from France to the OECD roundtable on the Implications of E-commerce for Competition Policy, June 2018, §§75-77.

<sup>191</sup> Contribution from France to the OECD roundtable on Across Platform Parity Agreements, 12 October 2015, §49.

offline prices uniform, since such clauses offer the consumer better visibility on the price and availability of rooms in hotels, thereby making it easier to put the various hotels in competition with one another.

137. Depending on the sectors, such efficiency gains can be more or less marked. For example, the prospecting costs could be relatively low in the hotel sector, without parity clauses being particularly necessary for further reducing them by instituting prices per night that are uniform across all of the platforms<sup>192</sup>. Thus, according to the European Commission, parity clauses should be examined on a case-by-case basis<sup>193</sup>.
138. In the case of hotel booking platforms, after the inquiry conducted in cooperation with the Italian and Swedish competition authorities, the French competition authority accepted the commitment from Booking.com to replace the “broad” parity clauses with “narrow” parity clauses, only applying to the prices charged over the hotel’s online channel excluding loyalty programmes. By virtue of these commitments, hotel operators can thus propose prices lower than those posted on the Booking.com website on platforms competing with Booking.com. Furthermore, it is possible for them to advertise lower prices on their offline channel and to offer their customers the possibility of benefiting from their loyalty programme. Finally, hotels are free to allocate to Booking.com a number of nights that is lower than the number proposed to other platforms and/or on their own channels. Such measures should make it possible to limit the reticence of the platforms to propose improved conditions to the hotel operators, e.g. through a reduction in the amount of the commissions.
139. In its assessment of the effectiveness of the commitments that it published on 9 February 2017<sup>194</sup>, the *Autorité* reported methodological difficulties encountered for assessing their effects, in particular taking into account the 2016 Paris tourism context related to the terror attacks, and the fact that the commitments came into effect at the same time as the “Macron Law”, which banned parity clauses both broad and narrow. However, it observed a certain differentiation between the prices proposed by the same accommodation on different online booking platforms, which could attest to the effect of the commitments on the conducts of the hotel operators. However, that increased differentiation, if indeed it is established and related to the commitments having been made, has not led to any substantial changes in the market shares of the booking platforms, in the quality of their offerings, or in their levels of commission. Similarly, in the report by the European Competition Network (ECN) on the same topic<sup>195</sup>, converting broad parity into narrow parity made it possible to differentiate between the prices per night charged by hotels in eight out of the ten participating Member States, without that leading to a reduction in the commission rates.

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<sup>192</sup> Contribution from France to the OECD roundtable on Across Platform Parity Agreements, 2015, §§59-60.

<sup>193</sup> European Commission, Final Report on the E-commerce Sector Inquiry, Working Document, 2017, §623.

<sup>194</sup> [https://www.autoritedelaconcurrence.fr/sites/default/files/bilan\\_engagements\\_booking\\_final\\_9fev17.pdf](https://www.autoritedelaconcurrence.fr/sites/default/files/bilan_engagements_booking_final_9fev17.pdf)

<sup>195</sup> ECN, *Report on the monitoring exercise carried out in the online hotel booking sector by EU competition authorities in 2016*, 6 April 2017, [http://ec.europa.eu/competition/ecn/index\\_en.html](http://ec.europa.eu/competition/ecn/index_en.html), §§11 to 14.

## 2. Exclusionary practices employed by dominant operators to develop online

140. Article 102 of the TFEU prohibits anticompetitive exclusionary practices by dominant undertakings, i.e. hampering or eliminating “effective access of actual or potential competitors to supplies or markets”<sup>196</sup>. On this basis, the European competition authorities have the task of detecting, correcting, handing down penalties for and/or dissuading attempts by dominant undertakings to exclude incumbent competitors or to prevent potential competitors from entering a market.
141. The attention thus paid to exclusion or foreclosure risks may be particularly necessary in the context of the digital economy. On such markets, network effects can frequently hamper the development of new entrants, who, due to their small market shares, do not have the inputs (number of suppliers of offerings, number of customers, richness of data, etc.) necessary for being attractive. The same network effects can also lead to situations of dominance, in which an operator who performs very slightly better than its competitors can, thanks to such network effects, acquire a very significant advantage over its competitors (i.e. a “winner takes all” situation).
142. But cases of abuse of a dominant position can result from factors other than network effects. In this regard, various decisions or opinions of the *Autorité* observe that incumbent or historic old monopolies are likely to commit abuse of a dominant position since they can use their positions and their offline advantages to develop swiftly online, to the detriment of other online operators.
143. For instance, in its opinion relating to the online gambling and gaming sector<sup>197</sup>, the *Autorité* identified various means by which a historic monopoly (like *La Française des Jeux (FDJ)* for lotteries and sports betting at physical points of sale or *PMU* for horserace betting at physical points of sale) can abuse its position on the offline market to win over the online market: using awareness of it and its reputation related to its historic activity to develop on the online market, cross-subsidisation between the activities carried on under the monopoly and the activities open to competition (e.g. if the physical points of sale promote the online activity of the historic monopoly or if advertising campaigns target online and offline activities without distinction), and pooling or “mutualisation” of the total amount of the bets placed offline and online<sup>198</sup>. In response to these competition concerns, the *Autorité* made a series of recommendations aimed at organising a genuine separation between the online and offline activities, in particular:
- compile distinct databases for online and offline activities and set up a commercial separation between the operator’s structures that are dedicated to these two activities;

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<sup>196</sup> European Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, §19.

<sup>197</sup> Opinion 11-A-02 of 20 January 2011 regarding the online gambling and gaming sector, §178.

<sup>198</sup> By making it possible to assign a fraction of the total amount of the bets placed offline to the online activity, this pooling or “mutualisation” enables the business implementing it to reward the winners of online gambling/gaming better than its competitors who are present offline only.

- use distinct trading names and brands for the two activities, as *FDJ* did when it launched its online betting brand *Parionsweb* and its online sports betting brand *Parionssport*;
  - more generally, separate the two types of activity, with the resulting separation being “legal, physical, accounting, financial, and commercial”<sup>199</sup>, so that, for example, it is possible to identify in-house financial transfers between the online and the offline activities; and
  - as regards horserace betting, set up conditions for access to the horseracing information necessary for organising betting (such as race programmes, horses and jockeys running, and official results) that are transparent and non-discriminatory for competitors.
144. Subsequently, the *Autorité* also accepted commitments proposed by *PMU* aimed at separating the sum total or “pool” of its bets registered online from the sum total or “pool” of its bets registered at physical points of sale<sup>200</sup>. However, in 2020, the *Autorité* handed down a penalty for non-compliance with some of those commitments, in particular as regards “separating its pools of “brick-and-mortar” bets from its pools of online bets for foreign races under a partnership for a joint pool between *PMU* and various foreign operators”<sup>201</sup>.
145. Similarly, in the rail transport sector, a travel agency complained to the *Autorité* that the *SNCF* (France’s rail operator) proposed advantageous commercial conditions to its own travel agency and subsidiary *Voyages-SNCF.com*<sup>202</sup>. More precisely, in the context of cooperation between travel agents and the *SNCF*, the travel agents had access, via the *Ravel* and *WDI* interfaces, to the *Résarail* database, which is also the main computerised booking system for the *SNCF*, in exchange for payment of an access fee. They then received a commission for the ticket sales service. In this context, the *Autorité* considered that various practices of the *SNCF* were liable to pose competitive risks. Thus:
- the financial consideration (remuneration) applied to *Voyages-SNCF.com* and to the competing travel agencies was differentiated, in particular through an agency and commission mechanism that was highly complex, to the detriment of the competing travel agencies;
  - the commercial and technical strategies of the travel agencies could potentially be known to *voyages-sncf.com*, given the absence of a clear separation with the *SNCF* subsidiary that was assigned to receiving the requests for access to *Résarail*; and
  - the price information provided by the website *SNCF.com* did not contain the timetable and referred the customers systematically to the *Voyages-SNCF.com* website, thereby unduly procuring traffic for that website.

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<sup>199</sup> Above-cited Opinion 11-A-02, §175.

<sup>200</sup> Decision 14-D-04 of 25 February 2014 regarding practices implemented in the sector of online betting on horseracing.

<sup>201</sup> *Autorité de la concurrence*, press release of 7 April 2020.

<sup>202</sup> Decision 14-D-11 of 2 October 2014 regarding practices implemented in the train ticket distribution sector. cf. also Decision 09-D-06 of 5 February 2009 regarding practices implemented by *SNCF* and *Expédia Inc* in the sector of online travel sales.

146. The SNCF proposed commitments for mitigating the anticompetitive effects likely to be generated by those practices. Firstly, the competitor travel agencies would be granted financial consideration conditions similar to those applied to Voyages-SNCF.com and would have access to the entire offering of transport of the SNCF, including Idtgv or Ouigo. Secondly, the SNCF would reorganise itself so as genuinely to separate Voyages-SNCF.com from the subsidiary in charge of access to the ticket dispensing system for the travel agencies. Finally, the SNCF website would henceforth separate the timetable information function from the booking function in order to remedy the issue of customers being referred automatically to its own commercial website. The *Autorité* considered that those commitments sufficed to address the competitive concerns raised in the case, and closed the litigation proceedings.

### **3. The diversity of the practices that can be implemented by operators who are active online**

147. As indicated above, it is probable that as the online sales and services sector becomes more structured, certain businesses will have the capacity and the incentives to reduce competition in it and/or to exclude some of their competitors from it. The price parity clauses to which the competition authorities put an end in 2015, are thus likely to produce significant anticompetitive effects only when the hotel booking platforms have sufficient market power with the hotel operators (without which the hotel operators would refuse such clauses), which presupposes that the more traditional travel agencies or the direct sales channels of hotel operators are no longer or only to a small extent able to compete with them. In its commitments decision, the *Autorité* thus took care to emphasise the specificity of the services offered by booking platforms to hotel operators, and in particular the incapacity of hotel operators to make themselves visible on the Internet, either by themselves, or through some other channel (search engines, or metasearch engines)<sup>203</sup>. Similarly, the exclusivities required by Vente-privee.com of its suppliers in the online sales event sector are likely to be detrimental to suppliers and/or consumers only if the structuring of the sector is such that they do not have any other channels via which to access sales of comparable products at low prices. For this sector, unlike what it observed in the online hotel booking sector, the *Autorité* considered that the offline sales channels, through sales and factory outlet stores in particular, competed sufficiently with the online sales channels, so that the conducts employed by Vente-privee.com were unlikely to generate an anticompetitive effect<sup>204</sup>.
148. The many recent reports concerned with how significant certain digital operators are becoming<sup>205</sup> show that, increasingly, certain online services have specificities such that it would henceforth be illusory to consider that offline operators can compete with them. The significance of economies of scale and of experience, the direct and indirect network externalities, and the mass of data acquired by such digital operators through their various activities can lead some of these online service operators to be able, in certain

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<sup>203</sup> Decision 15-D-06 of 21 April 2015 regarding practices implemented by Booking.com B.V., Booking.com France SAS and Booking.com Customer Service France SAS in the online hotel booking sector, §§100-101.

<sup>204</sup> Decision 14-D-18 of 28 October 2014 regarding practices implemented in the online sale event sector, §§113-115.

<sup>205</sup> See, for example, the “Furman” Report, *Unlocking Digital Competition, Report of the Digital Competition Expert Panel*, March 2019 or *Competition Policy for the Digital Era, report for the European Commission*, 2019.

hypotheses, to adopt conducts without being subjected to the constraints of online competition. Such operators could therefore increasingly adopt conducts likely to be detrimental to competition.

149. In this regard, the decisions made by the competition authorities with regard to online operators show that there are a wide range of practices that can be deployed to restrict competition in the field of online selling. In particular, online operators can employ exclusionary abuse practices, e.g. by using network effects to prevent the emergence of competitors, and exploitative abuse practices. As regards exclusionary abuse, it can involve exclusivities implemented by a dominant operator, possibly backed up by contractual systems similar to those used offline. It can also involve mechanisms of the “tied selling” type (similar, for example, to the practices for which Google was reproached in the “*Android*” case<sup>206</sup>), such behaviour frequently being examined with regard to abusive conducts by dominant operators, in the offline environment. Other mechanisms have also existed offline but they have been implemented above all in the online sales sector<sup>207</sup>. This applies, for example, to the price parity clauses employed by hotel booking platforms, and that were able to be used in particular because of the very high price competition existing over the Internet, especially in that sector. To a certain extent, the same applies to certain rules governing referencing of websites on the advertising service associated with Google searches (*Google Ads*), whose opaque nature and discriminatory application have recently been reprimanded twice by the *Autorité de la concurrence*<sup>208</sup>. While similar referencing practices have also been implemented offline and in other contexts<sup>209</sup>, the significance taken on by advertising services associated with searches, and more generally by certain platforms putting suppliers and customers in touch with one another, for certain activities, should lead the operators managing such platforms to be particularly watchful, so that such referencing rules do not distort the competition existing between their customer businesses.
150. Another issue that should be noted is the problem of economic dependence of businesses affiliated to online marketplaces, such businesses, in certain cases, having difficulty finding any alternative to being referenced with such marketplaces. Such marketplaces imposing unfair or unbalanced commercial conditions on the affiliated businesses has so far often been dealt with from the angle of restrictive competitive practices and, in particular of significant imbalance<sup>210</sup>, but it could well be examined under abuse of a situation of economic dependency as provided for in the second subparagraph of Article L. 420-2 of the French Commercial Code.

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<sup>206</sup> European Commission, Case AT.40099, *Google Android*.

<sup>207</sup> See, for example, Decision 15-D-06 of 21 April 2015 regarding practices implemented by Booking.com B.V., Booking.com France SAS and Booking.com Customer Service France SAS in the online hotel booking sector, or European Commission, Case AT.40153, *E-book MFNs and related matters (Amazon)*.

<sup>208</sup> Decision 19-D-26 of 19 December 2019 regarding practices implemented in the online search advertising sector, and Decision 19-MC-01 of 31 January 2019 relating to a request by Amadeus for interim measures. cf. also Decisions 10-MC-01 of 30 June 2010 relating to the request for interim measures submitted by Navx, and 10-D-30 of 28 October 2010 regarding practices implemented in the online advertising sector.

<sup>209</sup> cf. for example the Judgement of the Court of 21 March 1974, *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs (“BRT”) /SV SABAM*, C-127/73 or the Judgement of the Court of 16 July 2015, *Huawei Technologies*, C-170/13.

<sup>210</sup> Commercial Court of Paris, 2 September 2019, *Amazon* RG 2017050625.



151. Online operators can thus distort competition over the Internet by employing conducts more specific to that competitive environment, in particular by using tools specific to it, such as algorithms or “big data”. Ranking algorithms thus constitute a vehicle via which the operator who develops such an algorithm and uses it can advantage its own services or disadvantage those of any particular competitor.
152. Thus, in the “*Google Shopping*” case<sup>211</sup>, the European Commission considered that Google had abused its dominant position on the search engine market to promote its own price comparison service to the detriment of the competing comparison services. Demonstrating that practice required using not only conventional investigation means, such as analysing documents from Google and from other market players, but also more specific means related to the fact that Google’s activity takes place online. For example the Commission had to analyse “very significant quantities of real-world data including 5.2 Terabytes of actual search results from Google”.
153. Finally, various reports have recently highlighted the role of pricing algorithms in online competition<sup>212</sup>. While most of the illegal conducts employing price algorithms that have been detected so far have been able to be approached conventionally, either through meetings between the executives of the business, or through contractual clauses with which the algorithms had to comply or implementation of which they had to monitor<sup>213</sup>, such algorithms could also, in certain market situations<sup>214</sup>, lead to tacit arrangements, as shown by some of the recent experimental economics research<sup>215</sup>. Such algorithms would thus lead to supra-competitive pricing, without requiring contact between the competitors. Identifying this type of effect of pricing algorithms requires specific technical skills, e.g. so as to identify the mode of operation of the algorithm.

## D. Conclusion

154. So far, the practices likely to reduce the competition exerted by online sales have, most often, been employed by manufacturers wishing to limit the development of online sales of their products by facilitating offline distribution and/or by limiting the attractiveness of online distribution. The practices likely to raise competition concerns can also be employed by dominant offline operators seeking to use their advantages on the offline channel to develop online, to the detriment of their pure online player competitors. As shown by various decisions of the *Autorité de la concurrence* relating to sectors that are

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<sup>211</sup> European Commission, Case AT.39740, *Google Search (Shopping)*.

<sup>212</sup> cf. *Autorité de la concurrence* and *Bundeskartellamt*, *Algorithms and Competition*, November 2019; CMA, *Pricing algorithms: Economic working paper on the use of algorithms to facilitate collusion and personalised pricing*, October 2018; *Autoridade da Concorrência*, *Digital ecosystems, big data and algorithms*, July 2019; OECD, *Algorithms and collusion: Competition policy in the digital age*, June 2017.

<sup>213</sup> See, for example, CMA, Decision of 12 August 2016, Case 50223, European Commission, Case AT.40099, *Google Android* or European Commission, Cas AT.39740, *Google Search (Shopping)*.

<sup>214</sup> According to the Judgement of the Court of Justice of 21 January 2016 (*Eturas* (C-74/14)), the use by a network of online travel agencies, of common software putting upper limits on the discount rates granted to customers may constitute concerted practice, whenever, aware of the automatic upper limitation resulting from the software, the travel agencies have not distanced themselves from that practice.

<sup>215</sup> *Autorité de la concurrence* and *Bundeskartellamt*, *Algorithms and Competition*, November 2019. See, in particular, section III.B.3.b).

not concerned by the development of online sales, such a rationale is not new and is frequently to be found when, alongside a regulated sector, opportunities appear for developing on a non-regulated sector. Finally, in certain sectors, the attractiveness of online sales is so strong that trying to restrain them is illusory. On such markets, online sales have rapidly become dominant over offline activities. As shown by the example of hotel booking platforms, conducts have then appeared aiming to reduce the intensity of the competition between pure online players. It cannot be excluded that, gradually, with the growth in online purchases, such a rationale might replace the rationale aiming to prevent the online channel from developing. In this regard, the technological specificities of the Internet can lead to relatively atypical conducts compared with what is observed offline: while the analysis framework proposed by competition law is sufficiently flexible to continue to be applied to such conducts, examining them will frequently need technical skills to be added to the legal and/or economic skills that are usually mobilised in competition authorities. In various competition authorities, in particular in Europe, and more particularly in France, the fact that digital departments or services aiming to combine these various skills is therefore both necessary and welcome.

## General conclusion

155. By enabling new operators to come and compete with those already present on a market, the Internet constitutes a vehicle for intensifying competition. To this extent, the existence and development of e-commerce has a pro-competitive effect, and mitigates the competition risks that might be posed by certain conducts of businesses, be they mergers and acquisitions, vertical agreements or abuses of dominant positions. But, as the *Autorité* has observed on several occasions, in the various different sectors, the competitive pressure from online sales is not of the same significance – be it in terms of its scale or of the factors on which it acts (e.g. the nature of the products, the prices, the competition on the services associated with the purchase itself or the after-sales service). Therefore, as this study shows, it is important to analyse each of the sectors concerned on a case-by-case basis to determine whether the characteristics of the products and of the customers are conducive to attenuating or to reinforcing this competitive pressure. Furthermore, taking this competitive pressure into account has also been bringing the *Autorité* to change or enrich its analysis framework, in particular for assessing market share or taking into account new factors and competition risks related, for example, to network effects or to big data.
156. The competitive pressure exerted by online sales on in-store sales could, in the years to come, continue to grow stronger. Various factors are working in favour of a reinforcement of the significance of online sales: the development of delivery networks, both external and internal to certain distributors<sup>216</sup>, the more or less immediate access to online sales (via smartphones and tablets, or other terminals such as smart speakers than can

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<sup>216</sup> cf., for example, <https://www.lesechos.fr/2018/04/la-poste-adapte-son-outil-de-distribution-a-lessor-du-colis-988592> or <https://www.lesechos.fr/industrie-services/conso-distribution/la-majorite-des-colis-amazon-sont-desormais-livres-par-amazon-1158271>.

constitute a new relay for this development<sup>217</sup>), the progress in the general population's command of digital techniques and practices, the improvement in the marketing techniques of online sales websites, who can now target potential customers increasingly finely and present their products increasingly attractively online (e.g. with new tools such as 3D virtual try-on, or customisation of the products). Finally, the global health crisis related to Covid-19, which started at the end of 2019, has shown, in particular during the lockdown periods decreed by many States, the role played by e-commerce in replacing or supplementing physical distribution. Since this situation is an exceptional one, it will be necessary to monitor in the medium term the extent to which this health crisis has changed the habits of certain consumers lastingly, and in particular has increased the share of online sales in retail sales, and, more broadly, the appetite of consumers for this distribution channel.

157. However, competitive analyses based on a single market combining offline and online sales, and, what is more, conducted at national rather than local level, are not necessarily going to become generalised. Firstly, the share of e-commerce will likely remain variable depending on the sectors, it being possible for certain products to continue to be ill-suited to online shopping. In addition, the transformations undertaken by the physical points of sale can also reinforce the attractiveness of the brick-and-mortar channel. The increase in the number of "shops-in-shops" bears witness to the efforts made by points of sale to enrich their offerings. The development of temporary "pop-up stores" dedicated to a particular brand or product, and also takeover of existing chains or networks of physical stores by operators who are essentially present online, also emphasise the need for physical points of sale so as to forge ties between the brands and their customers<sup>218</sup>. Finally, physical commerce can also take advantage of the digital world to enrich its services: using digital technologies such as QR codes<sup>219</sup> or interactive terminals, "smart stores" thus enable the consumer and the store to benefit from the services available over the Internet. To be effective, generalisation of "click and collect" (ordering online and picking up the order from a shop) requires a network of points of sales that is sufficiently dense. Furthermore, a whole range of digital tools are being developed today to make stores more attractive to visit: making tablets and Wi-Fi access available in the shop to enable consumers to interact with the digital world while they are shopping (price comparison tools, social networks, etc.) geolocated notifications on smartphones to attract consumers near physical shops to go into them, and smart sales equipment (smart hangers, and smart changing booth mirrors) for collecting and giving out information about the digital world. Depending on the sectors, these selling techniques will be more or less developed, and more or less attractive and will be able to influence the scale of the competitive pressure from online sales, and thus the delimitation of the markets.
158. As also shown by this study, in order for online sales to be able to play their part as a vehicle for intensifying competition, they must be protected with vigilance by the

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<sup>217</sup> cf. Study by HADOPI/CSA, *Assistants vocaux et enceintes numériques connectées* ("Voice assistants and smart speakers"), May 2019.

<sup>218</sup> cf., for example, the takeover of the physical food store chain Whole Foods by Amazon (<https://www.bloomberg.com/news/articles/2017-08-23/amazon-s-whole-foods-deal-wins-fast-track-u-s-antitrust-nod>) or the takeover of the physical footwear store chain André by Spartoo (*Autorité de la concurrence*, Merger Decision 18-DCC-53 of 20 April 2018).

<sup>219</sup> The "QR" or "Quick Response" code is a type of bar code that can be read and decoded using a smartphone or a tablet and that makes it possible to trigger actions such as directing to a webpage, indicating a geographic location on a map, displaying a video or a text, etc.

competition authorities. Manufacturers and distributors alike can attempt to restrain development of them, either with a view to preserving guaranteed earnings, or because unrestricted development of online sales could jeopardise certain services or aspects of the products that are also desired by consumers. It is then for the competition authorities to distinguish between lawful restrictions and unlawful ones. The European Commission's Guidelines on Vertical Restraints and the corpus of decisions made by competition authorities and review courts now form a clear and consistent analysis framework, which will be further reinforced by the review currently in progress of the vertical restraint exemption regulation and of the related guidelines. Indeed, it is possible that as online sales develop and are appreciated by consumers, distributors and manufacturers alike find it less and less effective to try and hamper their development. In addition, the improvement of digital techniques should make online sales increasingly compatible with the requirements of advice and brand image of the manufacturers. However, conducts aiming to limit the gains or earnings associated with online sales, such as imposing resale prices, will continue to require very careful attention from the competition authorities, in particular since, in a digital world, it is easier to keep check on whether minimum price rules are being kept.

159. Finally, it can be observed, at the end of this assessment, that competition authorities approach e-commerce by intervening not only on the conducts of the manufacturers or of the distributors but also on those of the intermediaries or platforms, whose role is becoming ever more significant. One of the specificities of the Internet is the richness of the available offerings. This has made it necessary and has enabled players to emerge and develop who are capable of organising the transparency of the online market that is necessary for it to operate properly. The development of online sales has been underpinned by a variety of intermediaries (search engines, price comparator tools, online marketplaces, etc.) who make it possible, in particular, to put vendors and purchasers better in touch with each other online.
160. As online sales have developed, these intermediaries have been able to benefit from economies of experience and from network externalities that have led some of them today to have not only considerable market power but also, thanks to their financial and technological assets, very significant capacities for development, both within the sectors in which they are already present and also towards other sectors. The fears that these operators might then prevent the arrival of new competitors, limit competition between incumbent operators or, by their dominant position on one market, distort competition on other markets have thus, very recently, been the subject of many debates and reports<sup>220</sup>. In this regard, in recent years, the many litigation proceedings initiated by competition authorities show that competition law is capable of detecting, analysing, penalising and constraining the conducts of such intermediaries that might reduce competition. As indicated in the contribution from the *Autorité* to the debates on competition policy and digital challenges<sup>221</sup>, the current tools of competition law, by means of their adaptability to the specificities of each sector, constitute effective means of regulation and of intervention on the digital markets. And yet, these tools can be further honed and enriched, in order to increase the effectiveness of the interventions by

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<sup>220</sup> cf., for example, IGF (French Inspectorate-General of Finance), *La politique de la concurrence et les intérêts stratégiques de l'UE* ("EU competition strategy and EU strategic interests"), April 2019.

<sup>221</sup> The *Autorité de la concurrence*'s contribution to the debate on competition policy and digital challenges, February 2020.

competition authorities on digital markets. In this regard, in addition to developing the digital analysis capacities of the authorities in terms of algorithms and of big data processing, developing the use of interim measures, already facilitated by the adoption of the ECN+ Directive, improving the capacity to control takeovers of businesses by digital platforms, and introducing obligations or bans specific to structuring platforms are possible avenues for reinforcing the actions of competition authorities.



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