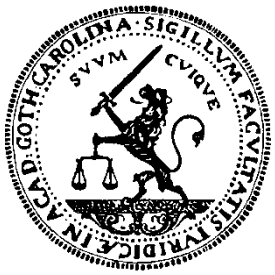

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Regulation of vertical restraints on online sales: is the current EU competition law framework sufficient?

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Contents

Abbreviations

AGCM	Autorità Garante della Concorrenza e del Mercato (Italy)
CMA	Competition and Markets Authority
DSM	Digital Single Market
ECJ	European Court of Justice
EU	European Union
FCO	Federal Cartel Office (Germany)
MFN	Most Favoured Nation
NCA	National Competition Authority
OFT	Office of Fair Trading (UK)
PCW	Price Comparison Website
RPM	Resale Price Maintenance
TFEU	Treaty on the Functioning of the European Union
VBER	Vertical Block Exemption Regulation

1. Introduction

1.1 Research background and material

Vertical restraints constitute a common practice within distribution agreements and are generally allowed under EU competition law due to their possible pro-competitive effects. They are exempted from Art. 101(1) TFEU by the Vertical Block Exemption Regulation (the VBER)[1] provided that the certain conditions are met, with the exception of particular restraints known as 'hardcore restrictions'. To facilitate the implementation of the VBER, the Commission complemented it with the Guidelines on Vertical Restraints (the Guidelines)[2] that elaborate on how certain restraints should be treated under the VBER. Although the Guidelines also cover some restraints to online sales, it should be borne in mind that this framework was established in 2010. Since then, the use of technology and e-sales have greatly increased and created new competition concerns.

The e-commerce and digitalization have grown significantly over the past years. This growth has brought about new market trends, such as enhanced transparency, increasing popularity of platforms, use of advanced digital tools and algorithms. These new market realities increased price competition, transformed consumer behavior and distribution strategies. With the increased visibility and price-comparison tools, free-riding effect is especially common and significant in e-sales. As a result, an increased use of vertical restrictions was reported by the Commission[3], as suppliers strive to have more control over distribution. Moreover, online commerce allowed suppliers to reach the customers directly online, creating competition between them and their own distributors. These online market trends were outlined by the Commission in its Final Report on the E-Commerce Sector Inquiry (the Final Report)[4] issued within the Digital Single Market (the DSM) Strategy.

Concerned about the new challenges brought about by e-commerce, in 2015 the Commission started working on several initiatives that were part of the DSM Strategy. One of its main goals was to eliminate barriers to cross-border sales that, in fact, were infrequent compared

[1] Commission Regulation 330/2010 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 [2010] OJ L102/1 (VBER).
[2] Commission Notice, Guidelines on Vertical Restraints [2010] OJ C130/1 (Guidelines on Vertical Restraints).
[3] Final Report on the E-Commerce Sector Inquiry, 10 May 2017, COM (2017) 229 final (Final Report on the E-Commerce Sector Inquiry).
[4] Ibid 4-6.

to overall e-sales within EU, partially due to geographic restraints imposed by suppliers. Therefore, one of the initiatives to tackle this challenge was adoption of Geo-blocking Regulation[5].

The Final report was issued within another DSM initiative – the E-commerce Sector Inquiry. It was aimed at revealing how common online vertical restraints are and their effects on competition and consumers in order to detect possible competition concerns. As was emphasized by Margrethe Vestager, the Commissioner for Competition, 'if … [the restraints] are anti-competitive we will not hesitate to take enforcement action under EU antitrust rules.' [6] Thus, along with new initiatives the Commission has started numerous investigations into vertical restrictions imposed on online sales. However, over the past decade, enforcement against vertical restrictions was mostly conferred to national competition authorities (NCAs). There are still certain disparities in treatment of online vertical restraints in different Member States, with some countries adopting an overly restrictive approach. Moreover, although there are few relevant ECJ rulings, the ECJ managed to provide some certainty on particular types of vertical restraints.

As the VBER framework is due to expire in 2022, the Commission started evaluation of the VBER meant to 'check whether the Regulation is still effective, efficient [and] relevant'[7] in the context of new market features. The commission collected written contributions from companies, business associations and other interested parties. The submissions are supposed to help the Commission to determine 'whether to let the Regulation lapse, to prolong or to revise it' and as a result, the Commission will adopt a staff working document evaluating VBER in 2020.[8]

In order to identify the most significant challenges created by digitalization overall, the Special Advisers to Commissioner Vestager prepared a report 'Competition Policy for the Digital Era'. The report analysed current market and regulatory framework in order to 'explore how competition policy should evolve to continue to promote pro-consumer innovation in the digital

[5] Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC [2018] OJ L 60I/1 (Geo-blocking Regulation).
[6] European Commission, Press release 'Antitrust: Commission launches e-commerce sector inquiry' 6 May 2015 <http://europa.eu/rapid/press-release_IP-15-4921_en.htm> last accessed 23 May 2019.
[7] European Commission, Published initiative, Staff Working Document 'EU competition rules on vertical agreements – evaluation' <https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-5068981_en> last accessed 23 May 2019.
[8] Ibid.

age'.[9] The report only covered restrictions imposed by platforms. It was published in April 2019 and is still to be examined by the Commission.

Therefore, it is now a debated issue whether the current framework is efficient at regulating vertical restraints to online sales and whether it can be adjusted to fast-developing digital realities.

1.2 Purpose and methodology

The main questions of the thesis are whether the current regulation of vertical restraints is appropriate in online-sales context to ensure effective competition and, where it is not, whether some reasonable measures can be taken. In order to answer these questions, it is crucial to look at the specific challenges of online restraints and see if the current legal framework can address them. Thus, this thesis will try to reveal the treatment of different types of online restraints to discover where the legislative framework is not sufficient and needs to be improved. It is also important to examine relevant case law and investigations to see if the competition law rules can be effectively enforced in the online sales context. Where applicable, it will discuss the reasons for the lack of regulation or legal certainty, also suggesting possible solutions.

The traditional legal dogmatic method will be used in order to analyse the framework with the aim to define the treatment of online vertical restraints and existing gaps or discrepancies. The method of evaluation will be used to see how efficient the current legal framework is at regulating the restraints in online sales context and whether it needs to be and can be improved.

1.3 Outline and limitations

This thesis contains six chapters, including introduction and conclusion. The second chapter analyses the regulation of geographic restrictions. The third chapter examines the treatment of most common non-price restraints imposed by suppliers, while the fourth chapter is devoted to price-based restrictions. The fifth chapter assesses the status of restraints imposed by platforms under the current legal framework.

The thesis will be limited to most common types of restraints to e-commerce and their treatment at the EU and, where applicable, national level.

[9] Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer, 'Competition Policy for the Digital Era' 2019 <http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.> last accessed 23 May 2019.

2. Geographic restrictions to sell and advertise online

Although there has been an overall increase in online sales in past years, cross-border e-sales have been quite infrequent mostly due to the geographic restrictions imposed by sellers.[10] Imposing barriers to cross-border online trade does not seem rational or fair in the context of the Internal Market and increasing e-commerce growth. However, before the Commission took action, geo-blocking practices were only intensifying with the help of new digital tools and algorithms making the practice even more effective.

2.1 Geo-blocking within the context of Digitals Single Market Strategy

Regulating geo-blocking practices was set as one of the priorities for the EU within the DSM Strategy initiated in 2015. The goal of this policy with regard to e-commerce is to tear down unnecessary barriers to inter-state online trade and enhance digital opportunities for customers and businesses, so that it is easier to purchase and sell products across borders. That goal cannot be achieved if e-commerce is geographically restrained. As a result, in 2018 the Council adopted the Geo-blocking Regulation that prohibits unjustified geo-blocking and other similar practices.

Geo-blocking is a discriminatory practice whereby the retailer (trader) blocks or limits the access to their websites or online applications by customers located in other Member States. This also includes re-routing customers to different interface that targets other Member States and prohibiting cross-border payments or deliveries. Along with geo-blocking, many traders apply geo-filtering measures which imply different terms of access to products depending on customers' location, while still allowing customers to purchase from their website.

Before the Regulation was initiated, existing legal framework was not efficient at preventing geo-blocking practices. Although general principle of non-discrimination by service providers was introduced by Art. 20 of the Services Directive[11], in practice it did not prevent discriminatory practices at issue 'due to its large interpretative uncertainties and lack of enforcement' by national authorities.[12] Also, it was outlined by the Commission in the Guidelines

[10] European Commission, Press release 'Antitrust: Commission launches e-commerce sector inquiry' 6 May 2015 <http://europa.eu/rapid/press-release_IP-15-4921_en.htm> last accessed 23 May 2019.
[11] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/36 (Services Directive).
[12] Maria Lorena Flórez Rojas, 'Are online consumers protected from geo-blocking practices within the European Union?' (2018) 26 International Journal of Law and Information Technology 119.

that geo-blocking agreements preventing access, re-routing to other websites or refusing payments from other Member States constitute hardcore restrictions within the meaning of Art. 4 VBER, since they prevent retailers from reaching more customers.[13] This still failed to prevent retailers from applying geo-blocking measures which have been quite common and only increased with newer and more advanced geo-location features and algorithms. Thus, the Commission's recent survey reported that 63% of websites use geo-blocking features and do not allow purchases by customers based in another Member States[14].

Unjustified geographic restraints are aimed at artificially segmenting the Internal Market and limiting the number of retailers in order to maintain higher prices. This inevitably creates barriers to cross-border online commerce, which affects consumer welfare and e-commerce market growth. However, online retailers can have justified reasons to restrict cross-border e-sales, for instance, delivery costs or language requirements, a requirement to register within the tax authority in the destination country, environmental and consumer protection.[15]

The widespread use of geo-blocking, which leads to online trade barriers and fragmentation of Internal Market does not go in line with the aims of Digital Single Market Strategy. In order to reach this goal, the Commission in 2016 came up with the proposal for Geo-blocking Regulation with the objective to stop unjustified location-based discrimination of customers 'to prevent artificial segmentation of the market'.[16] The Regulation is to bring certainty as to which geographic restrictions should be prohibited and cannot be justified and to improve enforceability.

2.2 The Geo-blocking Regulation

Implementation of the DSM Strategy necessitated 'the removal of remaining barriers to the free circulation of goods and services sold online and tackling unjustified discrimination on the

[13] Guidelines on Vertical Restraints, para 52 (a,b).
[14] European Commission, Study 'Geo-blocking of Consumers Online: Findings of a mystery shopping carried out by the European Commission' <https://ec.europa.eu/info/publications/geo-blocking-consumers-online-findings-mystery-shopping-carried-out-european-commission_en> last accessed 23 May 2019.
[15] Flórez Rojas (n 12) 120.
[16] Ibid 121; See also European Commission, 'Proposal of Regulation of the European Parliament and the Council on Addressing Geo-Blocking and Other Forms of Discrimination Based on Customers' Nationality, Place of Residence or Place of Establishment within the Internal Market and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, COM 289' (European Commission 2016) Proposal COM 289.

grounds of geographic location'. [17] Geo-blocking Regulation [18] enacted in 2018 marked a significant step in achieving these goals, since it introduces new rules prohibiting unjustified geo-blocking and other practices that discriminate consumers and companies based on nationality, place of residence or establishment.

Firstly, the Regulation expressly prohibits blocking and limiting interface access as well as redirecting customers to other websites. Where such practices are applied in order to comply with any national regulatory requirements, the trader is supposed to provide customers with explanation as to why such measures are imposed. Geo-blocking prohibition also covers unjustified discriminatory practices related to payments.

Moreover, the Regulation provided more certainty with regard to geo-filtering practices. Applying different terms of access to products should be prohibited in the following cases:

- 'for goods that are either delivered in a Member State to which the trader offers delivery or are collected at a location agreed with the customer;
- for electronically supplied services such as cloud, data warehousing and website hosting;
- for services such as hotel accommodation and car rental which are received by the customer in the country where the trader operates.'[19]

Although the Regulation definitely provided more certainty on geo-blocking and became a significant step within the Digital Single Market project, some academics criticize it for including too many exceptions of services not covered by new geo-blocking rules.[20] These are, *inter alia*, transport-related services, financial services and audiovisual products, mostly because there is sector-specific legislation in place or planned[21]. Some critics are concerned about the audiovisual content services, however, in practice these are usually licensed on a national basis or for a

[17] Council of the EU, Press release 'Geo-blocking: Council adopts regulation to remove barriers to e-commerce' 27 February 2017 <https://www.consilium.europa.eu/en/press/press-releases/2018/02/27/geo-blocking-council-adopts-regulation-to-remove-barriers-to-e-commerce/> last accessed 23 May 2019.
[18] Geo-blocking Regulation (n 5).
[19] Council of the EU, Press release 'Geo-blocking: unlocking e-commerce in the EU' 21 November 2019 <https://www.consilium.europa.eu/en/policies/geo-blocking/> last accessed 23 May 2019; See also Geo-blocking Regulation Art. 4(1).
[20] Flórez Rojas (n 12) 138.
[21] For instance, the Directive on Copyright in the Digital Single Market and the Directive on television and radio programmes, see European Commission, 'Modernisation of the EU copyright rules' 21 May 2019. <https://ec.europa.eu/digital-single-market/en/modernisation-eu-copyright-rules#choiceandaccess> last accessed on 23 May 2019.

common language territories.[22] Furthermore, researchers suggest that prohibition of geo-blocking of audiovisual content raises concerns as it can affect content creation and financing, which can reduce consumer choice and welfare.[23]

2.3 Cases and investigations relating to geographic restrictions

Within the pre-Regulation legal framework, there was nonetheless some scope for enforcing Art. 101(1)TFEU. Thus, several rulings by the European Courts established that agreements or practices segmenting the Internal Market constitute by object restrictions to competition under Art. 101(1) TFEU.[24]

While working on the Geo-blocking Regulation initiative, the Commission already started to take action against retailers imposing unjustified geographic restrictions. It took enforcement action against several companies' geographical restraints on cross-border broadcast services. [25] In a more recent *Guess* decision[26], the Commission fined the company for using practices that restricted retailers from advertising and selling to customers outside the territory designated for retailers. These geo-blocking practices were aimed at maintaining artificially high prices, thus, were construed unjustified. Although Guess operated within the selective distribution system where it is free to choose and authorize retailers based on qualitative criteria, applying practices partitioning the market on purpose was construed as a restriction to competition within the meaning of Art. 101(1) TFEU.

There are also some restrictions challenged at the moment, such as agreements between Valve Corporation, a platform distributing video games and companies publishing video games, Bandai Namco, Focus Home, Koch Media and ZeniMax. As suggested by the Commission, the agreements required using of an 'activation key' to provide access to purchased games that was only available to consumers in a certain country in order to 'prevent consumers from purchasing

[22] Final Report on the E-Commerce Sector Inquiry, para 65.
[23] Georgios Petropoulos, 'Vertical restraints and e-commerce' (2018) 1-2018 Concurrences Review Art. n 8605, paras 59-61.
[24] Final Report on the E-Commerce Sector Inquiry, para 48; See Joined cases 56/64 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* ECLI:EU:C:1966:41; Joined cases C-403/08 and C-429/08 *Football Association Premier League and Others* EU:C:2011:631.
[25] European Commission, Press release 'Antitrust: Commission sends Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland' 23 July 2015 <http://europa.eu/rapid/press-release_IP-15-5432_en.htm> last accessed 23 May 2019.
[26] European Commission, Press release 'Antitrust: Commission fines Guess €40 million for anticompetitive agreements to block cross-border sales' 17 December 2018 <http://europa.eu/rapid/press-release_IP-18-6844_en.htm> last accessed 23 May 2019.

and using PC video games acquired elsewhere than in their country of residence'.[27] The investigation is still going and the decision is to be adopted, though it seems that the Commission is quite sure that the geo-blocked activation keys fall within the meaning of geo-blocking practices under the Geo-blocking Regulation and were used to prevent cross-border sales. The Commission has also initiated a series of investigations into hotel accommodation agreements between the biggest tour operators in Europe (Kuoni, REWE, Thomas Cook and TUI) and Meliá Hotels. The Commission believes the agreements contain discriminatory clauses based on customer's nationality or country of residence.

Although before the adoption of Geo-blocking Regulation there was some certainty as to how geo-blocking should be treated and even some limited enforceability, the previous framework was inefficient at preventing anti-competitive geo-blocking practices, as evidenced by very low cross-border online sales up until now. The Commission's active investigation of geographic restraints within the context of the Geo-Blocking Regulation demonstrates that it did bring about more clarity and certainty as to which geo-blocking practices should be deemed unjustified and prohibited. It can be observed from numerous investigations initiated just recently that, unlike previous general provisions, the Regulation ensures the actual enforceability of unjustified geo-blocking prohibition.

[27] European Commission - Press release 'Antitrust: Commission sends Statements of Objections to Valve and five videogame publishers on 'geo-blocking' of PC video games' 5 April 2019 <http://europa.eu/rapid/press-release_IP-19-2010_en.htm> last accessed 23 May 2019.

3. Non-price restrictions imposed by the supplier

According to the finding of the Final Report, suppliers strive to have more control over their distribution channels as a result of new online market realities. The increased transparency, popularity of the platforms and overall different sales features and experience within the context of e-commerce may all have a detrimental effect on prices, quality or brand image investments. Manufacturers and concerned about free-riding and their brand image, thus, they seek to prevent distributors from certain online sales practices or from selling online at all.

However, generally, retailers should be free to sell the products via the Internet even within the context of selective distribution, as acknowledged by the Commission in the Guidelines. Any requirements or criteria within the distribution terms that are inequivalent for e-sales as opposed to physical stores and, thus, preventing the retailers from using the internet to 'reach more and different customers', should be treated as hardcore restrictions[28]. In this context, it does not mean the same criteria should be adopted, what is crucial is that they are supposed to have the same objectives and similar results or, if the criteria for online and offline sales vary, be justified by the differences of these sale methods.

3.1 Total ban on online sales

A general and absolute ban on using internet as a marketing and sales channel is the strictest measure that can be imposed on online sales by the supplier. It constitutes a hardcore restriction within the meaning of Article 4(c) of the VBER and falls within the scope of prohibition in Article 101(1) TFEU, which was established by the ECJ in landmark *Pierre Fabre* case. Pierre Fabre, a producer of over-the-counter cosmetics, operated within the selective distribution terms, where one of the clauses *de facto* prohibited online sales by retailers. The retailers were authorized provided that, *inter alia*, their shops had a qualified pharmacist assisting the sales. Thus, this clause resulted in prohibition for the distributors to use the Internet as a sales channel. French competition authority held that the clause amounted to a restriction on competition. The decision was then challenged by Pierre Fabre in an appeal court who addressed the question to ECJ. Pierre Fabre attempted to justify such a restriction by the need to provide advice to customers to ensure proper use of the product as well as to protect the prestigious product image.

[28] Guidelines on Vertical Restraints, para 56.

Taking into account previous case law, the ECJ reaffirmed that selective distribution agreements should be considered as restricting competition by object unless justified.[29] Generally, purely qualitative selective distribution (a system not limiting directly the number of sellers) falls outside the scope of Article 101(1) TFEU as long as it meets the following conditions:[30]

- the nature of the goods necessitates such a system 'to preserve its quality and ensure its proper use'[31]: they are usually branded high-technology and luxury goods;
- retailers are authorized based on objective qualitative criteria established uniformly for all potential distributors and applied without discrimination;[32]
- the criteria do not go beyond what is necessary.[33]

Although the ECJ agreed that the distribution system at issue mostly complied with the requirements, it held that the clause prevented retailers from using Internet as a marketing method, which constituted a restriction to online sales that could not be justified in the present case.[34]

The ECJ concluded the clause at issue was aimed at preventing retailers from selling goods to customers outside their area of activity, which restricted competition in that sector. The arguments justifying this restriction by the need to provide individual consultations or to protect a prestigious image of the brand were rejected by the ECJ as not being 'a legitimate aim for restricting competition'.[35] The first argument was construed as invalid since the cosmetics sold were not medical-grade with reference to internal market case law on e-sales ban of prescription products[36]. However, the ECJ did not elaborate on why preserving the prestigious image of the goods cannot justify the restriction in question. The later *Coty* ruling pointed out that products at

[29] Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la Concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi ECLI:EU:C:2011:649*, para 39; Case 107/82 *AEG-Telefunken v Commission* ECLI:EU:C:1983:293, para 3.
[30] Guidelines on Vertical Restraints, para 175.
[31] Case 31/80 *L'Oréal v De Nieuwe AMCK PVBA* ECLI:EU:C:1980:289, para 16.
[32] Case 26/76 *Metro SB-Großmärkte v. Commission* ECLI:EU:C:1977:167, para 20.
[33] See *L'Oréal*, paras 15 and 16; *Metro*, paras 20 and 21; *AEG-Telefunken*, para 35.
[34] *Pierre Fabre*, para 43, 47.
[35] *Pierre Fabre*, para 44, 46.
[36] *Case C-322/01 Deutscher Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval* ECLI:EU:C:2003:664*; Case C-108/09 Ker-Optika bt v ÀNTSZ Dél-dunántúli Regionális Intézete* ECLI:EU:C:2010:725.

issue in *Pierre Fabre* were not of a luxury segment[37], which could have been a reason why the ECJ did not find it a solid justification.

It should be mentioned that the approach of the ECJ in *Pierre Fabre* was in line with the Commission's position as per the Guidelines[38] and with relevant decisions adopted by some NCAs, for instance, in Germany[39]. Thus, the FCO, for instance, held that the ban on sales of contact lenses on eBay breached Art. 101(1) TFEU and could not be justified by the need for an optician to assist the sales.

However, it became a highly controversial ruling. The approach taken by the ECJ with the argument that a brand image is not worthy of protection through vertical restraints was considered quite restrictive and paternalistic by most academics. They suggest that preserving brand's image can be equally crucial for cosmetic products manufacturers or even for 'any product for which demand is sensitive to brand image'[40]. Brand image is an important selling point for many products nowadays, not only luxury ones, since the consumer associates it with certain quality standard, buying experience and customer service. Thus, the ruling is also criticized for not taking into account that 'the consumer's perception and experience of the product itself can translate into consumer welfare'[41].

Furthermore, some researchers supposed that the ruling can affect online trade since it would be very challenging for suppliers to objectively justify e-sales restrictions. If the efficiency reasons such as maintaining the brand image, encouraging brand-enhancing investments from retailers and preventing free-riding is not solid enough to justify such restrictions, there is not many other valid justifications.[42]

Following the logic of the ECJ, one can assume that an outright ban on internet sales can only be justified in cases where due to certain characteristics the goods are not suitable for online

[37] Case C-230/16 *Coty Germany GmbH v Parfumerie Akzente GmbH* ECLI:EU:C:2017:941, para 32.
[38] Guidelines on Vertical Restraints, para 56.
[39] María Belén Sáenz Cardenal, Vertical Restraints on E-Commerce in the Context of the Single Digital Market Initiative of the European Commission, Stanford-Vienna European Union Law Working Paper No. 23; See also Bundeskartellamt, Press release, B3-123-08 (Bundeskartellamt, September 25, 2009) <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Kartellverbot/2009/B3-123-08.html> last accessed 23 May 2019.
[40] Ralph A Winter, '*Pierre Fabre, Coty* and Restrictions on Internet Sales: An Economist's Perspective' (2018) 9(3) Journal of European Competition Law & Practice 183.
[41] Sáenz Cardenal (n 39), 12.
[42] Paolo Buccirossi, 'Vertical Restraints on e-commerce and selective distribution' (2015) 11(3) Journal of Competition Law & Practice 747, 769.

sales. It can also be the case when 'overriding mandatory requirements are set by national or European legislation aimed at protecting public order for reasons of consumer safety and health or any other consideration related to the protection of public order'[43].

3.2 Restrictions to use third-party platforms

Online platforms help retailers to access customers more easily. 'Small retailers may, with limited investments and effort, become visible and sell products through third party platforms to a large customer base and in multiple Member States. This may however clash with the distribution and brand strategies of manufacturers.'[44] Therefore, some suppliers prohibit resale of their products by third-party platforms.

The status of this type of restraint was not very clear until the recent *Coty* ruling *in* 2017. The case also outlined the extent to which e-sales can be restricted by supplier in selective distribution. It is a landmark ruling, where the ECJ gave the issue a sensible direction, taking into account previous relevant case law.

The case concerned the selective distribution of high-end cosmetic products by Coty Germany which allowed the authorized distributors to sell products on their own website – 'electronic shop window'[45] supposed to preserve luxurious image of the goods. The distribution system used prohibited reselling the products to unauthorized third-party e-platforms that are discernible to the public. Coty brought an action before a German first instance court in order to prevent one of its distributors from marketing its products on Amazon. Relying on *Pierre Fabre*[46], the court held that the prohibition at issue was contrary to EU competition law. Coty challenged the decision in the appeal court who referred to ECJ the question whether online platform ban within the selective distribution system at issue was compatible with Art. 101(1) TFEU.

The reasoning of the ECJ was in line with the previous case-law on justified use of selective distribution[47]: it reconfirmed that applying the selective distribution system to luxury products in

[43] Louis Vogel, 'EU Competition Law Applicable to Distribution Agreements Review of 2011 and Outlook for 2012' (2012) 3(3) Journal of Competition Law & Practice 271, 274.
[44] Final Report on the E-Commerce Sector Inquiry, para 14.
[45] *Coty*, para 15.
[46] See section 3.1 and *Pierre Fabre* (29).
[47] See n 31-33.

order to preserve the high quality and prestigious image complies with Article 101(1) TFEU provided that the above-mentioned criteria set out in case-law are met. [48]

The ECJ reaffirmed that selective distribution is necessitated not by material characteristics of the products but by the luxurious image and buying experience that should be preserved, as those are elements distinguishing them from other goods.[49]

Unlike *Pierre Fabre* case, *Coty* acknowledged preserving the luxurious image and quality of the product as a legitimate aim justifying the restriction at issue. Of course, it should be borne in mind that the total ban on internet sales in *Pierre Fabre* was more severe and that the goods in question in *Pierre Fabre* were not of a luxury segment.

The ECJ stated that suppliers are in general allowed to impose proportionate conditions on online sales. Moreover, *Coty* set out a new rule stating that Article 101(1) TFEU does not preclude the supplier from restricting internet sales by third-party platforms used in a discernible manner. Such a prohibition should not be considered a hardcore restriction (a restriction of customers or a passive sales to end users under Article 4 (b) and (c) VBER), since it does not impose an absolute ban on using third-party platforms within the distribution system and 'does not appear possible to circumscribe within the group of online purchasers, third-party platform customers'.[50] Thus, under the distribution terms retailers were allowed to use advertising and search engines run by third-party platforms 'with the result that, customers are usually able to find the online offer of authorized distributors by using such engines'[51].

Coty ruling relaxed the restrictive approach outlined in *Pierre Fabre* and, most importantly, narrowed its interpretation.[52] Unlike *Pierre Fabre*, it refused to classify selective distribution system as a restriction by object. Thus, the ECJ reconsidered the qualification of selective distribution within EU competition law framework. [53] As a result, the Commission and national authorities and courts will now have to assess particular restriction within selective

[48] *Coty*, para 36.
[49] *Coty*, para 25; Case C-59/08 *Copad* ECLI:EU:C:2009:260, paras 24-26.
[50] *Coty*, para 66.
[51] Ibid, para 67.
[52] Winter (40), 183.
[53] Case C-230/16 *Coty* Opinion of Advocate General Wahl ECLI:EU:C:2017:603, para. 2.

distribution on a case-by-case basis, 'rather than discarding [them] as a whole as 'by object' restrictions of competition'. [54]

Commission took similar approach in its Final report on the e-commerce sector inquiry[55] (issued previously to the *Coty* ruling). It explained that online platform bans do not constitute hardcore restrictions, since they are not aimed at segmenting markets based on territory or customers but regulate the way online sales are performed by retailers 'and do not have the object to restrict where or to whom distributors can sell the products'[56].

The selective distribution system has the object to preserve the brand's prestigious image, ensure the goods are marketed in appropriate conditions and manner and the customer is provided with luxurious buying experience. For selling via Internet this includes website interface, the quality of information published, customer service, packaging and delivery, the image of other brands' goods supplied by the shop etc.

As to online marketplaces, their interface and operation do not necessarily correspond to the needs and requirements within the distribution of high-end goods. Such platforms usually have very basic page design and navigation, lack advanced features facilitating product choice, contain intrusive advertisements and also sell various types of goods of different brands, quality and uses. These factors can affect the purchasing experience which is a crucial element to the luxury image of the products.

In order to ensure the luxurious buying experience, the Guidelines recommend that suppliers can impose quality standards for using marketplaces to resell goods, just as they do for brick and mortar stores[57]. However, with third-party marketplaces it is difficult to ensure that they comply with the above-mentioned conditions, since they are not contractually linked with the supplier.[58] Therefore, this measure does not appear to be as effective for preserving the prestigious image and high quality of the product as the prohibition to resale to unauthorized third-party marketplaces.

[54] Keti Zukakishvili, 'Luxury (by) object and the effects of silence of the Court of Justice in Coty', Case note on the Judgment of the Court of 6 December 2017 in Case C 230/16 Coty Germany GmbH v Parfümerie Akzente GmbH 1/2018.
[55] The Final Report on the E-Commerce Sector Inquiry, para 507.
[56] Ibid, paras 508-509.
[57] Guidelines on Vertical Restraints, para 54.
[58] *Coty*, para 48.

Moreover, by preventing distributors from engaging unauthorized online retailers into distribution, the supplier ensures that consumers will associate the goods only with authorized distributors. It is essential for protecting the brand's image, since used, fake or expired goods may be sold through those marketplaces.

Although *Coty* ruling favored interests of suppliers, preserving the luxurious image of products benefits consumers as well, as the 'aura of luxury' is an essential feature of high-end products and is sought by consumers preferring expensive products. Consumers' perception and experience of the products can improve consumer welfare.

It should be mentioned, however, that despite the growing popularity of online marketplaces, they do not constitute a significant sales channel, with more than 90% retailers selling products through their own websites.[59] Therefore, it appears the prohibition to use third-party platforms should not majorly detriment retailers' sales.

The ECJ did not clarify if the rules set out in *Coty* are reserved to selective distribution of high-end goods. The Commission mentioned in the Final report that it should not be assumed that the objective of marketplace bans is to restrict 'the effective use of the internet as a sales channel'.[60]This statement can indicate that rules set out in *Coty* have a wider scope of application, however it should be borne in mind that the marketplace bans should not be allowed in any case and must be assessed case by case.

Coty is a highly significant ruling, since it outlined to what extent the supplier can restrict distribution of their product to online marketplaces. Colangelo and Torti (2018) claim that it will definitely shape the future of European online trade, the luxury industry and online marketplaces.[61] Unlike *Pierre Fabre*, *Coty* acknowledged the supplier's right to restrict platform resale of their product for the sake of the brand image and freedom to define the terms of selective distribution system as long as they are quality-based and proportionate. This will definitely encourage and reinforce image-protecting policies and standards imposed by suppliers using selective distribution. This case is a sensible and crucial step that ensured the rules on selective distribution are applied in an appropriate way to internet sales within the current e-commerce framework.

[59] The Final Report on the E-Commerce Sector Inquiry, para 447.
[60] Ibid, p. 154.
[61] Giuseppe Colangelo, Valerio Torti, 'Selective distribution and online marketplace restrictions under EU competition rules after Coty Prestige' (2018) 14:1 European Competition Journal 81, 99.

Within the evaluation of the VBER, the Commission received some suggestions 'that selective distribution is fully justified as regards luxury brands and that the ability to ban resale on third-party platforms must be continued.'[62] Thus, while now the Commission suggests in the Guidelines that the supplier can impose quality standards or recommend not to visit platforms, it could be rather allowed to impose a justified marketplace ban in accordance with Coty.

Thus, the Pierre Fabre and Coty cases contributed to more certainty as to how far the supplier can go in restricting the retailers' freedom to resell online. The established framework better addressed the challenges and special features of e-sales. Thus, the Commission could take it into account when re-evaluating the VBER framework that is due to expire soon.

[62] Lucy Venn, Martin Rees Online sales and current rules under antitrust regulators' scrutiny (Global IP & Technology Law Blog, 27 February 2019) < https://www.iptechblog.com/2019/02/online-sales-and-current-rules-under-antitrust-regulators-scrutiny/#page=1> last accessed 23 May 2019.

4. Price-based restrictions

Manufacturers recourse to measures controlling retail prices in order to maintain the brand image or product image in downstream markets, since the price generally serves as an indicator of product quality. Price-based restrictions can get especially aggressive with the new tools allowing to monitor, compare and fix prices by computer algorithms.

4.1 Resale price maintenance (RPM)

Generally, imposing on retailers fixed or minimum retail prices is considered as a restriction by object[63] under Article 101(1) TFEU and a hardcore restriction under the VBER. Nevertheless, some price-based practices such as a recommended retail price or maximum recommended price are allowed, provided that the 30% market share threshold is not exceeded[64] and such recommendations do not serve as minimum or fixed prices as a result of pressure or incentives.[65] According to the Final Report findings, retail price recommendations appear to be the most common type of contractual restriction in European online commerce market. [66]

Regardless of its restrictive effects on competition, even RPM practices can provide efficiencies. Basically, they can contribute to consumer welfare by generating incentive for distributors to invest in customer service and providing quality product information[67]. Online retailers lacking such services can set lower retail prices and free-ride on other retailers (offline or online) offering good customer service. Since e-shopping tends to provide a more minimalistic buying experience compared to stores and given the price transparency online, RPM can be especially relevant for online sales because the supplier might want to make sure that their retailers do not underinvest in the brand/product image. While the Commission recognized some of the possible efficiencies that could justify the use of RPM in the Guidelines, there are has been no such successful cases at ECJ so far.

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[63] Case 243/83 *Binon v Agence et Messageries de la Presse* ECLI:EU:C:1985:284; Case 27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne* EU:C:1988:183, para 15.
[64] VBER (n 1), art 3;
[65] Ibid, 4(a); Guidelines on Vertical Restraints, para 226.
[66] Pricing recommendations constitute 42% of all types of restraints imposed by suppliers, See Final Report on the E-commerce Sector Inquiry, para 29.
[67] Pinar Akman, D. Daniel Sokol 'Online RPM and MFN under Antitrust Law and Economics' (2017) 50 (2) Review of Industrial Organization 133, 135 <https://doi.org/10.1007/s11151-016-9560-x> last accessed 23 May 2019.

Although for the past several years resale price restrictions were mostly enforced by national authorities, following the Final Report, in 2018 the Commission fined four electronics suppliers fixing online resale prices[68]. Asus, Denon & Marantz, Philips, and Pioneer monitored their distributors' online prices with the help of software and, in order to maintain the price level, urged them to comply with minimum prices fixed by an algorithm in case they set a price lower than the recommended retail price.

It was held by the Commission in its decisions that the price-fixing practices at issue could not enjoy the exemption under the VBER since they were aimed at restricting retailers from setting retail prices independently. It also excluded the application of Article 101(3) TFEU because there were 'no indications that it was indispensable to induce retailer investment in certain promotional measures or pre-sale services or to alleviate the repercussions of free-riding between online and offline sales channels'[69].

These also became the first decisions by the Commission where it addressed online price fixing by computer algorithms. Researchers believe the decisions to be highly significant in today's digitalization context: they 'forestall the rise of an EU algorithmic antitrust: antitrust analysis carried out by the European Commission shall adapt and necessitate authorities to delve into the complex algorithms elaborated by e-commerce companies'[70].

The Commission outlined a significant role of monitoring software and pricing algorithms in the assessment of the cases, though it held that the use of these tools *per se* was not an infringement of EU competition law. Also, it emphasized that algorithmic-driven price fixing coupled with price-monitoring software affect competition even more than regular RPM, 'multiplying the impact of price interventions'.[71] Meanwhile, some academics suggest that such software can at the same time generate pro-competitive effects. For example, although algorithms can facilitate collusion schemes, they can also be used to overcome them, by 'automating conspirators' responses to changing market developments or speeding them up, mitigating the need

[68] European Commission, Press release 'Antitrust: Commission fines four consumer electronics manufacturers for fixing online resale prices' 24 July 2018 <http://europa.eu/rapid/press-release_IP-18-4601_en.htm> last accessed 23 May 2019.
[69] *Denon & Marantz* (Case AT.40469) Commission Decision, 24 July 2018, para 103; *ASUS* (Case AT. 40465) Commission Decision, 24 July 2018, para 117.
[70] Aurélien Portuese, 'European Algorithmic Antitrust and Resale Price Maintenance**:** *Asus, Denon & Marantz, Philips, and Pioneer* Decisions' (2018) Competition Policy International <https://www.competitionpolicyinternational.com/european-algorithmic-antitrust-and-resale-price-maintenance-asus-denon-marantz-philips-and-pioneer-decisions/> last accessed 23 May 2019.
[71] *PIONEER* (Case AT.40182) Commission Decision, 24 July 2018, para 155.

for ongoing coordination between the participants'[72]. Also, they can lead to price discrimination which in its turn can increase consumer welfare and market output.

As to cases at a member-state level, there were several relevant decisions adopted by OFT and CMA. Infringement decision was adopted against two mobility scooters producers, Roma and Pride. [73] The first prohibited dealers from selling certain models online and advertising any prices. Pride and its retailers were involved in anticompetitive agreements and concerted practices which prohibited online advertising of prices below the recommended ones. This prohibition in fact amounted to fixing a minimum price. The manufacturers tried to justify such measures by efficiencies, as well as by the need to provide quality customer service caused by the particular features of the products at issue. However, OFT held that such restrictions were aimed at maintaining certain price level and constituted hardcore restriction under the VBER. Similar later cases initiated by OFT and CMA later followed the same logic.[74]

The decisions mentioned above are simply RPM cases within online-sales context. This context did not appear to add any new dimension for the competition law assessment[75] in contrast with, for instance, cases of price restrictions involving platforms which will be considered in section on parity clauses below. Overall, it can be observed that NCAs and the Commission are committed to enforcement with regard to pricing restrictions in e-commerce[76] and so far it has been working within the existing framework.

4.2 Dual pricing

Dual pricing is another example of a hardcore pricing restriction. It implies that different prices are set for distributors based on the sales channel through which the product is sold. Within

[72] Terrell McSweeny, 'Algorithms and Coordinated Effects,' Remarks at the University of Oxford Center for Competition Law and Policy Oxford (2017) <https://www.ftc.gov/system/files/documents/public_statements/1220673/mcsweeny_-_oxford_cclp_remarks_-_algorithms_and_coordinated_effects_5-22-17.pdf> last accessed 23 May 2019.

[73] OFT, Decision 'Mobility scooters supplied by Pride Mobility Products Limited: prohibition on online advertising of prices below Pride's RRP', CE/9578-12, 27 March 2014 <https://www.gov.uk/cma-cases/investigation-into-agreements-in-the-mobility-aids-sector> last accessed 23 May 2019.

[74] OFT, Press release 'Bathroom supplier fined £826,000 for restricting online prices' (CMA, April 26, 2016) < https://www.gov.uk/government/news/bathroom-supplier-fined-826000-for-restricting-online-prices> last accessed 23 May 2019; OFT, Press release 'Fridge supplier fined £2.2 million for restricting online discounts' (OFT, May 24, 2016) < https://www.gov.uk/government/news/fridge-supplier-fined-22-million-for-restricting-online-discounts> last accessed 23 May 2019.

[75] Akman, Sokol (n 67) 146.

[76] Richard Whish, David Bailey, *Competition Law* (9th Edition, London, 2018) 661.

the context of e-sales, it means higher wholesale prices for products intended for online sales than offline. This also includes agreeing on a fixed fee to support online sales efforts (not a 'variable fee, where the sum increases with the realised off-line turnover as this would amount indirectly to dual pricing)[77].

Dual pricing can be applied to encourage retailers to use certain distribution channel since they would rather choose the option that will ensure higher margins. The supplier can thereby encourage distributors to invest in brick and mortar stores to strengthen the brand and product image. Also, difference in prices can be attributed to usually higher expenses related to offline sales such as rent, personnel and so on. Economists explain that although it is a discriminatory pricing measure, in general it has procompetitive effects: 'discriminatory pricing allows to prevent exit by setting an advantageous price to an inefficient downstream firm which may benefit final consumers and increase social welfare'.[78] Whereas prohibition of price discrimination can facilitate exit of less efficient companies, thus increasing downstream market concentration.

Dual pricing constitutes a hardcore restriction if it limits geographic trading area where the distributors operate, since it restricts them from reaching more customers. Nevertheless, dual pricing practices can be exempted from the scope of art 101(1) TFEU if they satisfy Art. 101(3).[79] This is the case, for instance, when e-sales lead to significantly higher costs incurred by the supplier than offline sales. It seems that it should be the same in case of higher offline costs as suggested by academics.[80]

Vogel emphasizes that dual pricing can be indirect as well. He criticizes the Commission's approach for being too abstract, restrictive and contrary to 'to the usual commercial practice of suppliers in many economic sectors […] to pay for services rendered by their distributors in the form of discounts, rebates or invoices for the provision of services'.[81] All these, although widely common, are considered as hardcore restraints by the Commission.

National competition authorities also tend to be quite restrictive towards dual pricing. For instance, in *Gardenia* case, the German Federal Cartel Office (FCO) investigated a practice

[77] Guidelines on Vertical Restraints, para 52.
[78] Dertwinkel-Kalt, M., Haucap, J. & Wey, C. 'Procompetitive Dual Pricing' (2016) 41(3) European Journal of Law and Economics 537.
[79] Guidelines on Vertical Restraints, para 64.
[80] Louis Vogel, 'EU Competition Law Applicable to Distribution Agreements Review of 2011 and Outlook for 2012' (2012) 3(3) Journal of Competition Law & Practice 271.
[81] Ibid.

discriminating online sales. Gardenia provided different discounts to its brick-and-mortar and online retailers, whereby only retailers selling in physical stores could enjoy the full discount. The FCO held the discount system used was an illegal dual pricing practice.

4.3 Restrictions on the use of price comparison tools

Price comparison websites (PCW) and software allow to compare goods by aggregating online deals from several retailers and redirecting the user to retailers' website where the product can be purchased. These tools provide benefits for both consumers due to reduced searching costs and enhanced transparency. They elicit higher price competition which affects both online and offline sales.[82] Whereas increased price competition has positive effects for consumers, it can have a negative impact on quality of the products, brand and innovation. While retailers aim for more attractive prices, suppliers need to maintain quality standards and brand image, and PCWs are usually designed and operate in such a way that retailers cannot be distinguished by quality, product and brand image or customer services. Thus, basic functionality, low privacy security and consumer protection and reports from customers misled by PCW can be harmful for brand image. At the same time, the Commission reports that some manufacturers consider PCWs as overall beneficial since they increase the brand visibility and consumer information on their goods.[83]

Some economists argue that PCWs are not necessarily beneficial for customers. In fact, introduction of such tools may lead to increase in prices and harm consumers overall, whether they use price comparison tools or not.

Due to the negative effects of PCWs, manufacturers seek to restrict the use of PCWs by retailers as they still tend to only focus on prices and overlook other crucial aspects of deals, which can harm brand image. Though, such restrictions inevitably affect retailers' freedom of conducting business and can bring about competition issues as well.

The question of how restraints on the use of PCWs should be treated under EU competition law is so far a debated one. Although there is no case-law established by ECJ on that matter yet, academics tend to agree that such restrictions should not be treated as restrictions by object or hardcore restrictions.[84]

[82] The Final Report on the E-Commerce Sector Inquiry, para 12.
[83] Ibid.
[84] María Belén Sáenz Cardenal, Vertical Restraints on E-Commerce in the Context of the Single Digital Market Initiative of the European Commission, Stanford-Vienna European Union Law Working Paper No. 23, 26; See also

The Commission has not yet expressed a clear opinion on the issue. [85] It stated that PCWs do not constitute a separate sales channel unlike online marketplaces but restrictions on PCW use can 'potentially restrict the use of the Internet as a sales channel', also mentioning that absolute PCW bans not based on quality criteria can be considered as a hardcore restriction of passive sales under the VBER. The Commission also indicated cases when such restriction should be exempted by the VBER: restrictions based on objective qualitative criteria, as well as restrictions on the use of PCWs targeted at certain territories abroad. Also, the retailers, just as within offline sales, can impose desired quality standards for advertising their product which will apply to their promotion on PCWs.

When it comes to relevant national case law, *Asics* has become a notable ruling. German Federal Court of Justice held[86] that a complete PCW ban constitutes a hardcore restriction under the VBER is compatible with competition law. The Court emphasized that PWC should be accessible since they play a significant role in online competition, allowing consumers to find the best deals. Given that, the Court underlined that this approach should be applied to a total ban of PCWs, while certain restrictions to their use can be permitted under competition law.

Overall, since most price-based online restraints are explicitly prohibited under the current competition rules as hardcore restrictions, it can be concluded and also observed from the cases discussed that there is enough certainty as to how they should be treated. However, there are still certain concerns. Thus, in the light of evaluation of the VBER, the Commission received several submissions, suggesting that RPM 'should be assessed on a case by case basis, rather than an absolute prohibition'.[87] Although the courts are determined to enforce competition law rules prohibiting RPM, within the current market realities some companies and experts see that approach as overly restrictive.

J. Hederström and L. Peeperkorn, 'Vertical Restraints in Online Sales: Comments on Some Recent Developments' (2016) 7(1) Journal of European Competition Law & Practice 10.

[85] Final report on the E-commerce Sector Inquiry, paras 542-555.

[86] Bundeskartellamt, Case Summary 'Unlawful restrictions of online sales of ASICS running shoes' (Bu ndeskartellamt, 25 January 2016) <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B2-98-11.pdf?__blob=publicationFile&v=2> last accessed 23 May 2019.

[87] Lucy Venn, Martin Rees Online sales and current rules under antitrust regulators' scrutiny (Global IP & Technology Law Blog, 27 February 2019) < https://www.iptechblog.com/2019/02/online-sales-and-current-rules-under-antitrust-regulators-scrutiny/#page=1> last accessed 23 May 2019.

5. Restrictions imposed by platforms

The use of online platforms and marketplaces has rapidly increased over the past few years and will keep growing in future. They have transformed online sales, created a new business model and brought about drastic changes to competition within the digital context. Platforms appear to have brought the most drastic changes not only in e-sales context but for distribution in general.

5.1 MFN clauses: concept, use and challenges

'Platformisation' tends to switch market power from the supplier to the platform.[88] As a result, marketplace giants such as eBay, Amazon, or Booking possessing great market power, are enabled to impose restraints on suppliers.

These are usually 'Most Favoured Nation' (MFN) clauses. They involve the supplier's commitment to treat a retailer as favourably as its other competing retailers, to provide the same terms and conditions. Within online sales, most common type is a price parity clause whereby a supplier guarantees an online retailer platform that the price charged for a product is not higher than the price charged for the product on the supplier's own online shop (narrow clause) or on another platform (wide clause).

MFN clauses are distinguished from restraints imposed by suppliers inasmuch their use by platforms is aimed at preventing free-riding by suppliers. Modern platforms provide enhanced visibility, price comparison features and useful information such as product rating and reviews. Therefore, there is a concern that suppliers can use platform for promotion purposes and then take over platforms' customers by lower prices in their own shops or other sales channels.[89] Thus, MFN clauses serve to prevent or reduce this free-riding effect.

As to online MFN clauses, they are different from traditional ones since they are used in a different business model. Online platforms are two-sided markets, which means they operate as agents for the supplier and the customer who are both their clients. Thus, this is known as 'agency model'. Traditional MFN clauses are used by the parties to maintain the price within their own

[88] J. Hederström and L. Peeperkorn, 'Vertical Restraints in online sales: Comments on Some Recent Developments' (2016) 7(1) Journal of European Competition Law & Practice 10, 17.

[89] Engels, Max, Tobias Brenner and Arno Rasek, 'Evaluating the abolishment of MFN clauses in the online hotel booking sector: the drawbacks of using price comparison data from meta-search sites' (2017) 38 European Competition Law Review 483.

transaction and online MFN clauses control the price of a transaction that the retailer concludes with a party outside the agreement – final consumer.[90] The retail price here is set by the supplier who then pays the commission to the platform. Thus, online MFN clauses 'link prices for the same customer that purchases from different outlets'[91], while traditional ones link prices for different customers purchasing from the same retailer.

MFN clauses elicit various competition concerns, such as barriers to entry, reduced competition between platforms and facilitated horizontal collusion[92]. However, they can provide efficiencies for platforms and consumers as well. Most importantly, they are the ultimate means to prevent free-riding and protect investments put into the operation of the platform and the services provided by it. Such clauses prevent suppliers from using platforms to attract customers and then make them complete the purchase on their own website. MFN clauses can also reduce transaction and negotiation related costs due to the price transparency[93]. Moreover, MFN protect customers from price increases.

It can be seen that MFN clauses can generate both competitive harm and efficiencies, it is therefore hard to suggest a general conclusion on their overall effect on competition. This is probably the reason why so far there has been no guidance or certainty provided by the Commission or the ECJ. This results in heterogeneous enforcement by NCAs across the EU.

5.2 Cases and investigations

Despite the efficiencies, MFN clauses have drawn a lot of attention of national competition authorities in recent years. There is a concern that due to the lack of certainty on the status of MFN under VBER regime, some NCAs are often adopting a more restrictive approach than the others. This section will cover some important cases in this area.

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[90] Pinar Akman, D. Daniel Sokol 'Online RPM and MFN under Antitrust Law and Economics' (2017) 50 (2) Review of Industrial Organization 133 <https://doi.org/10.1007/s11151-016-9560-x> last accessed 23 May 2019.
[91] Pinar Akman, 'A competition law assessment of platform most-favored-customer clauses' (2016) 12(4) Journal of Competition Law and Economics 781.
[92] LEAR (2012). 'Can 'Fair' prices be unfair? A Review of Price Relationship Agreements.' (2012) OFT1438; Ariel Ezrachi, 'The competitive effects of parity clauses on online commerce' (2015) 11:2-3 European Competition Journal 498.
[93] María Belén Sáenz Cardenal, Vertical Restraints on E-Commerce in the Context of the Single Digital Market Initiative of the European Commission, Stanford-Vienna European Union Law Working Paper No. 23, 34.

The FCO adopted decisions against several hotel booking platforms (HRS, Booking, Expedia), prohibiting any type of MFN.[94] This also included any narrow MFN aimed at price parity between the platform and hotel's website. The FCO held that HRS's MFN clauses reduced competition between booking platforms and foreclosed the market. Although HRS attempted to justify the restriction by the aim of preventing free-riding and protecting its investment in the platform, the arguments were rejected by the FCO. It outlined that MFN clauses have an effect equivalent to price fixing. The authority also took into account the market structure and held that the clauses at issue led to consolidation of the platforms' market position. What is more, it concluded that the clauses did not generate any consumer benefits. Booking then suggested to review the clause and only require the hotels not to offer lower prices on their own website but the FCO insisted that it was not sufficient to reduce the risk of competitive harm.

Therefore, the FCO adopted quite a strict approach, where both wide and narrow MFN clause breach Art. 101 TFEU and cannot be exempted under the VBER.

The Italian, French and Swedish national competition authorities took a more relaxed approach compared to that of the FCO. The Italian AGCM investigated wide MFN clauses applied by Booking an Expedia which implied charging hotels a high fee, while also requiring them to set the lowest price possible on the platform.[95] The AGCM held that such clauses could elicit higher fees for hotels which they will have to pass on customers to ensure the profit margin. As a result, competition and consumer welfare is reduced. The Swedish and French competition authorities raised this concern as well. Booking then committed to change the wide MFN at issue for a narrow one and, unlike the FCO, these competition authorities accepted it. Thus, they held that while wide MFNs should be treated as restricting competition, narrow MFN clauses provide efficiencies.

However, later France adopted banned the use of all MFN clauses within the French hotel sector, which is contrary to the approach of the French competition authority that previously allowed narrow MFN clauses. Such heterogeneous approach can be a sign that the current framework doesn't provide enough legal certainty and there are some solutions needed at EU-level.

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[94] Bundeskartellamt, Case Summary: 'Best price' clause of online hotel portal Booking also violates competition law, Decision B9-121/13, 9 March 2016 <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B9-121-13.pdf?__blob=publicationFile&v=2> last accessed 23 May 2019.

[95] AGCM, Press Release of the 19 May 2014 No. I779 < https://www.agcm.it/media/comunicati-stampa/2014/5/alias-6942l> last accessed 23 May 2019.

It is worth mentioning that the Commission cooperated with the NCAs with regard to the investigations. Also, the Danish, Austrian and Irish national competition authorities also agreed with the commitments Booking made.

Recently the Commission investigated MFN imposed by Amazon on e-book publishers requiring them to offer the same conditions to Amazon as they do to other competitors. The Commission's concern was that the MFN clause at issue could reduce the publishers' ability to develop innovative products as well as alternative distribution services and, thus, prevent them from competing with Amazon. However, Amazon reached a settlement with the competition authority, having committed to remove the MFN clauses from present and future agreements.[96]

5.3 MFN: challenges and solutions

Although there is not yet uniform approach to the issue, it can be seen from relevant cases that the competition authorities tend to treat wide MFN clauses as hardcore restrictions infringing Art. 101 TFEU. There is, however, much less certainty about narrow clauses which so far have been treated less strictly with more possibilities to invoke efficiencies justification under Art. 101(3) TFEU. Thus, it can be seen that there is currently no sufficient legislation or Union-level case-law with regard to MFN clauses, which elicits inconsistency and discrepancies in approaches within NCAs in different Member States. Academics suggest that the approach should be less strict and should not presume MFN clauses illegal *per se*, since they can provide certain efficiencies.[97]

Finally, in order to identify the most significant challenges created by digitalization overall, the Special Advisers to Commissioner Vestager, professors outside the Commission, were recently asked to analyse current market and regulatory framework. The goal was to 'explore how competition policy should evolve to continue to promote pro-consumer innovation in the digital age'. The report with the main findings of the analysis was just published in April 2019 and is still to be examined by the Commission.

[96] European Commission Press Release, 'Antitrust: Commission accepts commitments from Amazon on ebooks,' 4 May 2017 <http://europa.eu/rapid/press-release_IP-17-1223_en.htm.> last accessed 23 May 2019.
[97] Pinar Akman, D. Daniel Sokol 'Online RPM and MFN under Antitrust Law and Economics' (2017) 50 (2) Review of Industrial Organization 133 <https://doi.org/10.1007/s11151-016-9560-x> last accessed 23 May 2019.

In its Final report called 'Competition Policy for the Digital Era' issued in April 2019 the Commission briefly outlined its approach to MFN clauses. Whereas the Commission emphasized that the current competition law framework provides a sensible and 'sufficiently flexible basis for protecting competition in the digital era'[98], it discussed MFN clauses as a particularly controversial restriction, in the sense that due to its both pro- and anti-competitive effects it is difficult to suggest a general approach to it. It is rather recommended to make a case-by-case assessment of the clauses. However, the Commission managed to bring at least some certainty to the issue: it was emphasized that any MFN measure imposed in order to protect platform's investments 'should be minimal and well targeted'. When there exists competition among platforms, prohibiting wide MFN clauses would be a sufficient measure. Imposing a ban on narrow MFN clauses is appropriate where 'the competition between platforms is weak, …[and] pressure on the dominant platforms can only come from other sales channels (e.g. in the case of hotel booking platforms, direct sales by hotels on their own websites)'.

MFN clauses appear to be the least regulated type of vertical restraints for a reason. Given the special nature of platforms, different market factors and variety of possible clauses, imposing certain general rules on MFN clauses application could undermine platforms' efforts and investments, as well as raise prices, which can reduce consumer welfare and restrict competition. But the lack of any guidance on how MFN should be treated under EU competition law and possibility to assess cases independently resulted into unnecessarily stricter approach in some Member States compared to others, which definitely creates challenges for platforms operating across the Union. In this case their distribution agreement might not be legal or enforceable in some countries. Due to this it can be assumed that there is still the need for more certainty on MFN clauses treatment, at least in a softer form of guidelines or other recommendations on applying competition law rules to this particular restraint.

[98] Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer, 'Competition Policy for the Digital Era', 2019 <http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.> last accessed 26 May 2019.

6. Conclusion

Although there are new realities and challenges provided by the digital development and e-sales growth, the current legal framework for vertical restraints proved to be a solid basis that allows to fairly and effectively assess certain types of online vertical restraints. However, this basis is not always enough to provide certainty and effective application of the rules to fast-changing context. Moreover, different restraints produce different effects and thus, they require different solutions.

Thus, for instance, due to the highly detrimental effects of the geo-blocking on cross-border sales, the Commission was determined to initiate legislation on geo-blocking measures, since it was a priority for the Commission to lift geo-blocking barriers.

While for other restrictions it is enough to fall into existing legal framework, with slight adjustments made by the courts or guiding principles recommended by the Commission. Still for some restrictions there is a lack of case law or guiding principles so that one could reveal their general status under competition law but even there it is possible to come to general conclusions based on national case law and academic opinions.

The Commission is about to re-evaluate the VBER regime that is due to expire in 2022. Therefore, the possible solutions in order to improve the regulation of vertical restraints and make it more up-to-date, it could take into consideration, for instance, case law established in Coty and provide more certainty on how far the supplier can go in restricting distributors' ability to resell online. It could also relax the approach to RPM, allowing for case-by-case assessment rather that *per se* prohibition. The area that needs the most work and improvement is restrictions by platforms. Without any comments from the Commission or ECJ, they produced a lot of discrepancies across Member States, thus, there is need for some more clarity on how such clauses should be treated. Moreover, it can be observed from case law and academic opinions that even established rules can only be applied along with case-by-case analysis. Vertical restrictions to online sales generate different effects and can be imposed for various reasons and that is why their treatment under EU competition law may vary. Thus, for instance, the status of MFN clauses is a highly debated issue nowadays, since there is still no approach to them outlined by the Commission or ECJ.

However, it should be borne in mind that there is also the need for some flexibility and fast action when reviewing the current framework. The new measures cannot be too precise, nor can

they take too much time, since the e-commerce and digitalization context is a fast-developing one. The new rules and approaches must certainly allow for their flexible application.

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