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## Table of contents

<b>1. Introduction .....</b>	<b>5</b>
<b>2. The e-commerce sector inquiry .....</b>	<b>6</b>
<b>3. Public enforcement of vertical agreements on e-commerce across the EU.....</b>	<b>9</b>
<b>4. Restrictions imposed by suppliers.....</b>	<b>11</b>
4.1 Total ban on marketing through the Internet .....	12
4.2 Restrictions imposed on online pricing .....	16
4.3 Restrictions on advertising or selling on third-party platforms .....	20
4.4 Restrictions on the use of price comparison websites .....	24
4.5 Restrictions on online advertising other than price .....	26
<b>5. Restrictions imposed by platforms.....</b>	<b>27</b>
5.1 Effects on competition of MFN and price parity clauses .....	29
5.2 Cases and investigations involving MFN and price parity arrangements.....	33
<b>6. Geo-blocking restrictions .....</b>	<b>42</b>
6.1 Geo-blocking and the Digital Single Market .....	43
6.2 Geo-blocking in the field of copyrighted works .....	45
6.3 Cases and investigations involving geo-blocking restrictions .....	46
<b>7. Conclusions .....</b>	<b>51</b>
<b>8. Bibliography.....</b>	<b>55</b>

## **List of abbreviations**

AC	Autorité de la Concurrence [France]
AG	Advocate General
AGCM	Autorità Garante della Concorrenza e del Mercato [Italy]
CJEU	Court of Justice of the European Union
CMA	Competition and Markets Authority [United Kingdom]
Commission	European Commission
ECN	European Competition Network
EEA	European Economic Area
EU	European Union
FAPL	Football Association Premier League
FCO	Federal Cartel Office ( <i>Bundeskartellamt</i> )[Germany]
GWB	Gesetz gegen Wettbewerbsbeschränkungen [Germany]
HRS	Hotel Reservation Service
IHG	InterContinental Hotels Group
ICN	International Competition Network
IP	Intellectual Property
MFN	Most Favoured Nation
MRP	Maximum Recommended Price
MS	Member State
NCA	National Competition Authority
OECD	Organization for Economic Co-operation and Development
OFT	Office of Fair Trading [United Kingdom]
OTA	Online Travel Agent
PCW	Price Comparison Website
RRP	Recommended Retail Price
RPM	Resale Price Maintenance
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
VAT	Value Added Tax
VBER	Vertical Block Exemption Regulation
3G	Third-generation Mobile Networks



## **1. Introduction**

Since the advent of the Internet, the electronic commerce (e-commerce) sector has grown exponentially and has radically transformed the way of doing business. Indeed, the Internet has fuelled new business models and has offered new opportunities for accessing new global markets. It has become an essential distribution channel for companies to reach more customers and facilitate transactions. Overall, e-commerce is forecasted to remain on an upward trend and to be an essential distribution channel.

In May 2015, the European Commission (hereinafter the Commission) initiated an inquiry into the electronic-commerce sector, within the framework of the Single Digital Market Strategy in the European Union (EU). This initiative is aimed at removing barriers to trade across the EU and enhancing online opportunities to attain the goal of the Internal Market, as well as strengthening the global competitiveness of European companies. The inquiry is expected to shed some light on the dynamics and widespread practices of the sector. It places particular emphasis on vertical arrangements between suppliers and distributors that may raise competition concerns.

Over the last decade, National Competition Authorities (NCAs) have been essentially entrusted with the scrutiny of vertical agreements. In the absence of uniform guidance, NCAs have dealt with some of the numerous challenges stemming from digital markets, leading to the adoption of heterogeneous approaches towards vertical restraints across the EU. These considerable disparities among NCAs add uncertainty to the already complicated debate over vertical restraints on e-commerce. Owing to the market fragmentation this situation creates, the achievement of the European Internal Market is ultimately hindered. In this context, the announcement of the e-commerce sector inquiry is received as an indication of the Commission's determination to provide coherence and legal certainty to businesses and law enforcers.

The aim of this paper is to examine the treatment given to vertical restraints on e-commerce by national and European authorities and courts on a European level, through some investigations carried out and decisions adopted in this field; and to identify some of the controversial issues the Commission might address in the e-commerce sector inquiry.

For this purpose, the paper presents an overview of the e-commerce sector inquiry's main objectives and characteristics. Furthermore, it deals with the system of public enforcement of vertical agreements in the e-commerce context and the issues on interpreting competition laws in the digital context. Moreover, it discusses some of the most frequent restraints on vertical agreements and it analyses the most relevant decisions delivered by supervisory bodies at a national and European level in the EU. For that purpose, the analysis is divided into restrictions imposed by suppliers and restrictions imposed by platforms. In addition, it discusses the use of geo-blocking on e-commerce. And finally, it provides a general assessment of the law concerning the topic at hand, taking those cases into consideration.

## **2. The e-commerce sector inquiry**

On the 6<sup>th</sup> of May 2015, the Commission announced the launch of an inquiry into the electronic-commerce sector<sup>1</sup> as part of the completion of a Single Digital Market Strategy in the European Union.

The Digital Single Market Strategy, which was unveiled on the same day, is one of the main priorities of the Commission for the upcoming five years.<sup>2</sup> This ambitious initiative aims at creating an effective Internal Market by eliminating all barriers that may hinder trade within the EU by promoting innovative digital services, and by reinforcing cross-border transactions. It ultimately aspires to create conditions for European companies to embrace the opportunities offered by the digital revolution and to defend their global commercial position.<sup>3</sup>

The Digital Strategy is structured in three main pillars, being: Pillar I, guaranteeing access for consumers and businesses to digital goods and services across the EU; Pillar II, creating the right conditions and a level playing field for digital networks and innovative services to flourish; and Pillar III, maximizing the growth potential of the digital economy. For this purpose, the Commission has presented sixteen proposals some

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<sup>1</sup> European Commission, Commission Decision of 6 May 2015 initiating an inquiry into the e-commerce sector pursuant to Article 17 of Council Regulation (EC) No. 1/2003 C (2015) 3026 final.

<sup>2</sup> European Commission, Press release 'Antitrust: Commission launches e-commerce sector inquiry', (European Commission, 6 May 2015), <[http://europa.eu/rapid/press-release\\_IP-15-4921\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4921_en.htm)> last accessed on the 6th of December 2016.

<sup>3</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Digital Single Market Strategy for Europe COM(2015) 192 final.

of the most central ones being the review of copyright, telecommunications, e-privacy and data protection, cyber security, standards and interoperability, cloud services, value added tax (VAT), parcel delivery costs, geo-blocking, consumer protection, and to identify potential competition concerns affecting European e-commerce markets, which is the focus of this paper.<sup>4</sup>

Under EU competition law, the Commission is empowered to conduct competition law inquiries into specific industry sectors where circumstances suggest that the restriction or the distortion of competition<sup>5</sup> could result in territorial fragmentation of the European Single Market and in the reduction of price competition. In the past, the Commission has conducted sector inquiries into the energy and pharmaceutical sectors as well as into the provision of sports content over third-generation (3G) mobile networks, roaming, the financial services sector focussing on payment cards, core retail banking, and business insurances.

The Commission's decision to carry out the e-commerce sector inquiry is motivated by the results revealed by EU trade statistics. Data suggest that despite the overall increase in online shopping, purchases from sellers based in other EU Member States (MS) are still infrequent.<sup>6</sup> Undoubtedly, this could be explained by language barriers, preferences and habits of the consumers. Nevertheless, the Commission suspects that companies could be setting up barriers to trade by means of contractual restrictions in order to obtain protection from competitors located in other MS. This, in effect, leads to the undesired result of fragmentation of the Internal Market and restricts competition within the EU.

The e-commerce sector inquiry has a broader scope than the ones the Commission has previously launched. It has the objective of studying the e-commerce sector as a whole and of identifying obstacles and barriers set up by companies that cause territorial fragmentation and hinder competition within the Internal Market. Additionally, another of the inquiry's main concerns is the analysis of geo-blocking practices in order to

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<sup>4</sup> For the purpose of this paper, electronic commerce (or e-commerce) is referred to as the purchase and sale of goods and services through electronic channels.

<sup>5</sup> Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] L 1/1, art 17.

<sup>6</sup> European Commission, 'Consumer Conditions Scoreboard. Consumers at home in the Single Market' (2015) <[http://ec.europa.eu/consumers/consumer\\_evidence/consumer\\_scoreboards/11\\_edition/docs/ccs2015scoreboard\\_en.pdf](http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/11_edition/docs/ccs2015scoreboard_en.pdf)> last accessed on the 6th of December 2016. This document reveals that 61% of users feel confident about buying online in their own MS. However, only 38% are confident about purchasing goods or services online from retailers or providers located in other MS, 69.



determine which of those practices restrict the rules of EU competition law. In parallel with the Sector Inquiry, the Commission is pursuing investigations in the field of pay-TV services,<sup>7</sup> video games, and the distribution of consumer electronics products.<sup>8</sup>

The Commission is gathering information upon the functioning of the sector and widespread business practices applied in the markets of goods and services where e-commerce is more frequent. The target markets are consumer goods (in particular clothing, shoes and accessories, electronics and household appliances, healthcare products, books, and online travel services), and digital content (movies, TV shows, music and video games, for instance). The information gathered is provided by a wide variety of market players, including manufacturers, retailers, wholesalers, marketplaces, and price comparison websites (PCW), among others.

A preliminary report of the results has been published in September 2016,<sup>9</sup> and a final report will be released during the first quarter of 2017. The launch of the Sector Inquiry does not preclude the existence of anti-competitive agreements and/or abuse of dominance laid down in Articles 101 and 102 of the Treaty on the Functioning of the European Union<sup>10</sup> (TFEU) respectively. Nevertheless, there may still be negative effects that damage consumer welfare, which may demand the implementation of mechanisms to correct asymmetries. Not to disregard that should the Commission find specific anti-competitive behaviours in practices developed or agreements entered into by business, or in the legal framework passed by Member States themselves, potential sanctions and fines for infringement of EU competition law could be imposed.

As a result, the e-commerce sector inquiry might potentially have significant consequences in the years to come. The Commission's findings could crystallize into future investigations and enforcement actions. In this sense, the Sector Inquiry is expected to shed light on the functioning of online markets, possibly triggering the review of the legislative framework on vertical restraints, and introducing amendments into the Vertical

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<sup>7</sup> European Commission, Press Release, 'Antitrust: Commission accepts commitments by Paramount on cross-border pay-TV services' (European Commission, 26 July 2016) <[http://europa.eu/rapid/press-release\\_IP-16-2645\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2645_en.htm)> last accessed on the 6th of December 2016.

<sup>8</sup> European Commission, Press release 'Antitrust: Commission confirms inspections relating to potential restrictions on online sales' (European Commission, 5 December 2013) <[http://europa.eu/rapid/press-release\\_MEMO-13-1106\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-1106_en.htm)> last accessed on the 6th of December 2016.

<sup>9</sup> European Commission, Commission Staff Working Document on Preliminary Report on the E-commerce Sector Inquiry SWD(2016) 312 final, 15 September 2016, <[http://ec.europa.eu/competition/antitrust/sector\\_inquiry\\_preliminary\\_report\\_en.pdf](http://ec.europa.eu/competition/antitrust/sector_inquiry_preliminary_report_en.pdf)> last accessed on the 6th of December 2016.

<sup>10</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

Block Exemption Regulation (VBER)<sup>11</sup> and into the Guidelines on Vertical Restraints (henceforward referred to as the Guidelines),<sup>12</sup> which are due to expire in 2022.

### **3. Public enforcement of vertical agreements on e-commerce across the EU**

Since the modernization of EU competition law in 2003, the public enforcement of vertical agreements in the EU has been practically delegated to the NCAs of the Member States, while the Commission has been dedicated to the enforcement of horizontal agreements. The new system removed the centralized notification and authorization system for the application of Article 101(3) TFEU, under which agreements that generates anti-competitive effects can be found legal if they produce sufficient countervailing benefits that are passed on to consumers.<sup>13</sup> The new Regulation allows undertakings to invoke individual exemption directly before NCAs or national courts.

Over the last decade, the Commission's scrutiny into vertical agreements and e-commerce has been scarce, although the recent investigations carried out by the Commission into consumer goods and pay-TV distribution rights could be indicative of an increasing attention in this field.<sup>14</sup> The Commission's inactivity contrasts with the highly pro-active approach as regards public enforcement of competition law in digital markets showed by the International Competition Network (ICN) and the Organisation for Economic Co-operation and Development (OECD) and some of the NCAs.<sup>15</sup>

The German *Bundeskartellamt* (Federal Cartel Office, FCO) has set the proper functioning of digital markets as one of its key objectives to guarantee and boost

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<sup>11</sup> Commission Regulation (EU) 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 (EU Vertical Block Exemption Regulation) [2010] OJ L102/1.

<sup>12</sup> Commission Guidelines on Vertical Restraints [2010] OJ C130/1.

<sup>13</sup> European Commission, Press release 'Commission finalises modernisation of the EU antitrust enforcement rules' (European Commission, 30 March 2004) <[http://europa.eu/rapid/press-release\\_IP-04-411\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-04-411_en.htm?locale=en)> last accessed on the 6th of December 2016.

<sup>14</sup> European Commission, *supra* note 8; European Commission, *supra* note 7.

<sup>15</sup> See: ICN and OCDE have delivered extensive reports in this field: ICN, *Online Vertical Restraints Special Project Report. 2015 International Competition Network Annual Meeting*, (2015) <<http://www.internationalcompetitionnetwork.org/uploads/library/doc1070.pdf>> last accessed on the 6th of December 2016. OECD, *Vertical Restraints for Online Sales* (2013), <<http://www.oecd.org/competition/VerticalRestraintsForOnlineSales2013.pdf>> last accessed on the 6th of December 2016. F. Carloni, S. Megregian and M. Bruneau, 'The E-Commerce Sector Inquiry: Can It Stop National Competition Authorities from Adopting an Overly Restrictive Approach?' (2015) 6(9) *Journal of European Competition Law & Practice* 639, 646.

competition. Likewise, the NCA of the UK, the *Office of Fair Trading* (OFT, its successor being the *Competition and Markets Authority*, CMA) as well as the French *Autorité de la Concurrence* (AC) have recognized online and digital markets as one of their highest priorities.<sup>16</sup> This is evidenced by the great number of investigations opened in recent times. Additionally, the *Autoriteit Consument en Markt* of the Netherlands, the Austrian *Bundeswettbewerbsbehörde*, the Swedish *Konkurrensverket*, and the Italian *Autorità Garante della Concorrenza e del Mercato* (AGCM) have also played an active role in the digital market field.

The lack of clear guidance and to the independent performance of the different NCAs without the Commission's observation has led to the adoption of divergent, sometimes even opposing, approaches towards vertical restraints across the EU MS. For that reason, companies, legal advisors and competition enforcers face extensive uncertainty when assessing the compliance with EU competition law of certain practices or behaviours. Ultimately, this insecurity ultimately results in the fragmentation of the EU into national markets, which obstructs the accomplishment of the European Internal Market.

In this respect, the e-commerce sector inquiry could be the first step towards the Commission to develop a systematic EU-wide policy to ensure compliance with European competition law in the digital context. This could bring about far-reaching changes in the business practices employed in the e-commerce sector. Some scholars, however, suggest that it remains to be seen to what extent the Sector Inquiry is an appropriate instrument when assessing the functioning of fast-changing and constantly-developing markets, as it is the case with online markets. According to these scholars, there exists the risk that once the results of the Sector Inquiry are made public in 2017, the results might have already lost their significance.<sup>17</sup>

There is a general consensus that traditional competition rules are to be applied both to offline and online markets, making the creation of ad hoc rules unnecessary.<sup>18</sup> In

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<sup>16</sup> In this respect, it is interesting noting that, as the Commission has admitted, e-commerce in the EU is geographically concentrated, amounting the United Kingdom, Germany and France 65% of the total EU online sales. European Commission, *supra* note 9, para 8.

<sup>17</sup> F. Carloni, S. Megregian and M. Bruneau, *supra* note 15, 643.

<sup>18</sup> M. Colangelo, 'Parity Clauses and Competition Law in Digital Marketplaces: The Case of Online Hotel Booking' Approach' (2016) 7(8) *Journal of European Competition Law & Practice* 1, 1; And 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, 12.

practice, distributors do not resort to purely offline or online sales channels. On the contrary, most distributors integrate both brick & mortar and online shops simultaneously, which has popularized the term “brick & click”. As a consequence, applying different rules to online and offline purchases would be too complex. This would presumably lead to unproductive and ineffective distinctions as well as increased risks for forum shopping.<sup>19</sup> Given the fact that the competition concerns in both sales channels are essentially similar, there should be a unique competition policy.

It is therefore clear that European competition rules are applicable for online and offline markets, albeit the interpretation of EU competition rules should be adapted to the specificities of the e-commerce world. As the Commission has implied, new developments in digital markets may lead to new types of contractual restrictions which may require closer scrutiny and, perhaps, revisions in the future.<sup>20</sup> Such rules include the TFEU, VBER and the Guidelines, among the most relevant instruments.

The following section deals with the treatment online sale restrictions are being given in the EU. To that end, the most recent and relevant cases and investigations issued by the national and European competition authorities as well as courts are examined. It is important noting that the gross of the discussion is focused on the cases dealt with by the German FCO and the UK OFT, given their outstanding activity in this field.

For the purpose of this paper, the analysis of vertical restraints is divided into two major categories of restrictions. On the one hand, restraints of online sales imposed by suppliers on their distributors. On the other hand, restraints imposed by platforms on traditional suppliers and distributors.<sup>21</sup>

#### **4. Restrictions imposed by suppliers**

Applying restraints is an effective way for manufacturers and retailers to reduce direct competition among competitors, especially competition stemming from new online distribution channels. The Guidelines on Vertical Restraints enable suppliers of selective distribution systems to align their selective distributors’ online activity with their

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<sup>19</sup> Note by the European Union (2013) DAF/COMP(2013)13 OECD Policy Roundtable on Vertical Restraints for Online Sales, 76 <<http://www.oecd.org/competition/VerticalRestraintsForOnlineSales2013.pdf>> last accessed on the 6th of December 2016.

<sup>20</sup> European Commission, *supra* note 9, para 574.

<sup>21</sup> J. Hederström and L. Peeperkorn, *supra* note 18, 18.

distribution model by permitting the adoption of qualitative criteria—such as quality requirements for websites, or potential bans on certain third-party marketplaces—. Such restrictions may only be acceptable if they are justified by the nature of the product and meet objective needs,<sup>22</sup> and if they do not limit distributors’ ability to conduct passive online sales,<sup>23</sup> provided that their market shares are below 30%. Otherwise, those restraints are deemed as hardcore restrictions of competition, and hence they are excluded from automatic exemption of the VBER.

#### **4.1 Total ban on marketing through the Internet**

The most severe online sale restriction a manufacturer can adopt is the absolute and general ban on online sales. In the landmark *Pierre Fabre* case,<sup>24</sup> the CJEU delivered a preliminary ruling on whether a ban on Internet sales was to be considered a restriction to competition pursuant to Article 101(1) TFEU. Currently, this case is one of the leading cases in the field of vertical restraints on online sales, despite the fact that it has come under fierce criticism.

##### ***Pierre Fabre***

The judgement arises from a decision adopted by the French AC against the selective distribution system through which Pierre Fabre Dermo-Cosmétique marketed its products. The decision was challenged before the Paris Cour d’Appel, which referred the question to the CJEU for preliminary ruling.

Pierre Fabre Dermo-Cosmétique, a cosmetic and personal care products manufacturer, marketed its products through a selective distribution network. The distributors were chosen according to the quality of the physical point of sale and to the mandatory physical presence of a qualified pharmacist to assist the sale.<sup>25</sup>

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<sup>22</sup> Guidelines on Vertical Restraints, 54.

<sup>23</sup> Those sales deriving from unsolicited requests from individual customers. See Vertical Restraints Guidelines, 51 in combination with Article 4(b) VBER.

<sup>24</sup> 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* [2011] ECR I-9419.

<sup>25</sup> The CJEU has reiterated in *Pierre Fabre* [41] that: agreements constituting a selective distribution system are not prohibited by Article 101(1) TFEU to the extent that “they aim to improve competition where this relates to factors other than price, and provided that resellers are chosen on the basis of objective criteria of a qualitative nature, not applied in a discriminatory fashion to potential resellers, and that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use and, finally, that the criteria laid down do not go beyond what is necessary”.

Due to this aforementioned requirement, the CJEU determined that the clause in the selective distribution contract *de facto* operated as a limitation on the distributors' ability to use the Internet as a sales channel. The CJEU considered that the object of the clause was to prevent authorized distributors from selling products to customers located outside their area of activity, which led to a restriction of competition in that sector.<sup>26</sup> In addition, the clause precluded passive online sales to consumers located outside the physical trading area of the distributor,<sup>27</sup> which limited their freedom to shop in other geographic areas as well as to compare prices.

In this regard, the Court refuted Pierre Fabre's arguments to justify the ban on Internet sales. Referring to its previous case-law on Internet sales of non-prescription medicines and contact lenses,<sup>28</sup> the Court considered that the anti-competitive restriction could not be objectively substantiated by safety and public health grounds, nor by the aim preventing free-riding, nor by customer protection purposes,<sup>29</sup> nor by the need of maintaining the prestigious image of the products.<sup>30</sup>

Therefore, it concluded that in the absence of objective justification, the clause qualified as a restriction of competition by object within the meaning of Article 101(1) TFEU and as a hardcore restriction within the meaning of Article 4 (b) and (c) VBER. Consequently, a selective distribution agreement containing such restriction cannot benefit from the exclusion of Article 2 VBER, since it is equivalent to an absolute prohibition on active and passive sales by members of the selective distribution system. Finally, the CJEU considered that the individual restraints at issue could hypothetically benefit from an individual exception of Article 101(3) TFEU. In that case, it would be for the supplier to prove that the conditions therein contained are cumulatively satisfied.<sup>31</sup>

Despite the CJEU's restrictive approach as regards absolute prohibitions on online sales is consistent with the literature contained in the Guidelines, the *Pierre Fabre*

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<sup>26</sup> *Pierre Fabre* [38].

<sup>27</sup> *Pierre Fabre* [54].

<sup>28</sup> Referred to non-prescription medicines: Case C-322/01 *Deutscher Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval* [2003] ECR I-14887; referred to contact lenses: Case C-108/09 *Ker-Optika bt v ÁNTSZ Dél-dunántúli Regionális Intézete* [2010] ECR I-12213.

<sup>29</sup> Such as the need to provide individualized advice to the customer and ensure its protection against the incorrect use of products.

<sup>30</sup> *Pierre Fabre* [44] – [47].

<sup>31</sup> The request of individual exemption presented by Pierre Fabre was referred back to the Cour d'Appel de Paris, as the CJEU did not have information to verify that the alleged conditions were fulfilled, namely the existence of efficiency gains stemming from the restriction of online sales and their indispensability to achieve those efficiencies. *Pierre Fabre* [50].

decision has been highly controversial. Due to the several problems it raises, some academics question whether the Commission will be able to rely on *Pierre Fabre* as a leading case in the Sector Inquiry.<sup>32</sup>

Firstly, it has been criticized for not having taken into consideration the state of competition on the market, although the impact on inter-brand competition would have been negligible since the company's market share was lower than 20%.<sup>33</sup>

Secondly, economists have condemned the decision for not bearing in mind that the consumer's perception and experience of the product itself can translate into consumer welfare. An increase in consumer welfare could justify and validate the adoption of an agreement which in principle was deemed as anti-competitive.

Thirdly, critics claim that the behaviour was treated as a restriction by object. Restrictions by object are always presumed to generate adverse effects as experience shows that they always do. However, the experience in the field of Internet sales and the economic analysis that could be carried out when the decision was released "lacks of sufficient distance" to conclude that the effects are always negative from a competition perspective.<sup>34</sup>

Fourthly, several scholars have showed their opposition to the restrictive approach adopted by the CJEU and they have warned about the negative influence it might have on online trade, as in practice companies might rarely satisfy the "objective justifications" that would enable them to restrict online sales.

In a recent article, P. Buccirossi raised an objection to the CJEU's position in this field by noting that if the efficiency reasons that justify the adoption of a selective distribution system—such as protecting the company's brand image, encouraging investments, and preventing free riding—cannot objectively justify a ban of Internet

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<sup>32</sup> F. Carloni, S. Megregian and M. Bruneau, *supra* note 15, 645.

<sup>33</sup> L. Vogel, 'EU Competition Law Applicable to Distribution Agreements' (2012) 3(3) *Journal of Competition Law & Practice* 271, 274.

<sup>34</sup> L. Vogel, 'Vertical Restraints: Towards More Rigid Rules for Distribution Networks in Europe?' (2014) 5, 6 *Journal of Competition Law & Practice* 393, 397. Moreover, it has been pointed out by the CRA International Final Report prepared for LVMH Group and their legal advisors, 22 September 2008, <[http://ec.europa.eu/competition/sectors/media/lvmh\\_economic%20analysis.pdf](http://ec.europa.eu/competition/sectors/media/lvmh_economic%20analysis.pdf)>, para 46.

sales, little justifications can be invoked by suppliers when trying to obtain individual exemption under Article 101(3) TFEU.<sup>35</sup>

Having regard to the foregoing, it seems that a total and absolute ban on online sales could be justified only when the particular circumstances and the nature of the product make online sales completely inadequate, and in case overriding mandatory requirements are set by national or European legislation, justified on grounds of consumer health, safety, and public order.<sup>36</sup> This contrasts with the Opinion of AG Mazák, who did however accept that “there may be circumstances where the online sale of certain goods may undermine the image and the quality of those goods, thereby justifying a general and absolute ban on Internet sales”.<sup>37</sup>

Particularly problematic for businesses and brand owners is that according to the CJEU, “the aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU”.<sup>38</sup> In the case of luxury, experience, and technically sophisticated goods, the brand image usually signals the quality of the product. The perceived quality consumers may have is built through a conscious selection of the distribution channels and an attentive pre-sale and post-sale service, which may require the exclusion of the Internet as a sales channel. However, the *Pierre Fabre* decision expressly closes this possibility.

The same position has been upheld by the German FCO in the *CIBA Vision* case.<sup>39</sup> The FCO concluded that CIBA Vision, the leader of the contact lenses market in Germany, had infringed Article 101(1) TFEU by preventing sales via eBay. The company had argued that the ban responded to the necessity to have an optician to assist the purchase in order to protect consumer health. This argument was dismissed. Likewise,

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<sup>35</sup> P. Buccirossi, ‘Vertical Restraints on e-commerce and selective distribution’ (2015) 11(3) Journal of Competition Law & Practice 747, 769.

<sup>36</sup> L. Vogel, *supra* note 33, 769.

<sup>37</sup> 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* [2011] ECR I-9419, Opinion of AG Mazák[54].

<sup>38</sup> *Pierre Fabre* [46].

<sup>39</sup> *Bundeskartellamt*, Press release, B3-123-08 (*Bundeskartellamt*, 25 September 2009) <<http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Kartellverbot/2009/B3-123-08.html>> last accessed on the 6th of December 2016; see also *Bundeskartellamt*, Press release ‘Bundeskartellamt imposes fine on CIBA Vision’ (*Bundeskartellamt*, 25 September 2009) <[http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2009/25\\_09\\_2009\\_Ciba-Vision.html](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2009/25_09_2009_Ciba-Vision.html)> last accessed on the 6th of December 2016.



the OFT of the UK confirmed the *Pierre Fabre* ruling in the Roma and Price cases that are discussed in the following section, as regards online sales of mobility scooters.<sup>40</sup>

## 4.2 Restrictions imposed on online pricing

The use of resale price maintenance (RPM), in other words, agreements or concerted practices that establish a fixed or minimum resale price, are treated as hardcore restrictions because they restrain the buyer's ability to set prices.<sup>41</sup> However, suppliers may apply some form of price restrictions in their agreements. According to the Guidelines, manufacturers are allowed to suggest a Recommended Retail Price (RRP) or define a Maximum Recommended Price (MRP), provided those recommendations are not used as minimum or fixed prices.<sup>42</sup> Despite recognizing that such restrictions may increase price transparency and facilitate collusion, they may be used for legitimate purposes, such as maintaining or strengthening the brand image or avoiding cannibalization across sales channels, for example.

Another mechanism used by manufacturers is dual pricing, whereby retailers are allocated different purchase prices depending on the sales channel through which the product is sold. As a result, retailers are charged higher wholesale prices for products intended to be sold online than for those products intended to be sold offline.<sup>43</sup> By means of dual pricing systems manufacturers influence retailers to choose a distribution channel for the sale of their products, as retailers will opt for the channel that allows them to obtain higher margins.

Dual pricing may constitute a hardcore restriction of competition when it limits the retailers' geographic trading area, which, in term, prevents those retailers from reaching a greater number of customers.<sup>44</sup> However, agreements containing dual pricing clauses may satisfy the conditions laid down in Article 101(3) TFEU to obtain an individual exemption. One possible justification would be the case of a dual pricing

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<sup>40</sup> OFT, Decision 'Mobility scooters supplied by Pride Mobility Products Limited: prohibition on online advertising of prices below Pride's RRP' (CMA, 27 March 2014) <<https://www.gov.uk/cma-cases/investigation-into-agreements-in-the-mobility-aids-sector>> last accessed on the 6th of December 2016.

<sup>41</sup> Guidelines on Vertical Restraints, 223.

<sup>42</sup> Guidelines on Vertical Restraints, 226.

<sup>43</sup> European Commission, *supra* note 9, paras 541-544.

<sup>44</sup> Guidelines on Vertical Restraints, 52.

system whereby online sales are charged higher prices on account that such sales lead to substantially higher costs for the manufacturer than offline sales do.<sup>45</sup>

### ***FCO cases: Dornbrach, Bosch Siemens, Gardena and LEGO***

The German FCO has dealt with dual pricing on online sales in the *Dornbracht* case. The manufacturer of high-quality sanitary fittings Aloys F. Dornbracht GmbH & Co. KG had rendered agreements which contained a rebate scheme that favoured offline sales. As a result, goods that were to be sold on the Internet were offered by the wholesalers at higher prices than goods intended to be sold in brick-and-mortar shops. In the proceedings opened by the FCO in 2011, Dornbracht was forced to adapt its specialized trade agreements with its wholesalers because it failed to demonstrate that online sales result in substantially higher costs for the manufacturer than offline sales.

In the *Bosch Siemens* case the FCO found that the company's rebates system incentivized offline sales of its products at the detriment of online sales.<sup>46</sup> Likewise, in the *Gardena* case, concerning garden products, the German FCO dealt with a case of discrimination of online trading. The company had applied different discounts for its brick-and-mortar retailers and online retailers so that only brick-and-mortar retailers were able to benefit from the full discount. In the FCO's view the rebate scheme constituted an illegal dual pricing system. The procedure was closed when Gardena agreed to apply the same discounts for all of its retailers.<sup>47</sup>

More recently, in the *LEGO* case, the FCO imposed a fine on LEGO, the toys manufacturer, for enforcing vertical RPM. The company had applied a rebate system whereby retailers were forced to raise the prices of some of the manufacturer's items. Indeed they were threatened with either a reduction in supply or even with the refusal to supply if they offered articles at retail prices below the set prices.<sup>48</sup>

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<sup>45</sup> Guidelines on Vertical Restraints, 64.

<sup>46</sup> *Bundeskartellamt*, Press release 'Household appliance manufacturer Bosch Siemens Hausgeräte GmbH abandons anticompetitive rebate system' (*Bundeskartellamt*, 23 December 2013) <[http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/23\\_12\\_2013\\_Bosch-Siemens-Haushaltsger%C3%A4te.html?nn=3591568](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/23_12_2013_Bosch-Siemens-Haushaltsger%C3%A4te.html?nn=3591568)> last accessed on the 6th of December 2016.

<sup>47</sup> *Bundeskartellamt*, Press release 'Bundeskartellamt gets GARDENA to amend its dealer discount system' (*Bundeskartellamt*, 28 November 2013) <[http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/28\\_11\\_2013\\_GARDENA.html](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/28_11_2013_GARDENA.html)> last accessed on the 6th of December 2016.

<sup>48</sup> *Bundeskartellamt*, Press release 'Bundeskartellamt fines LEGO for vertical resale price maintenance' (*Bundeskartellamt*, 12 January 2016) <[http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/12\\_01\\_2016\\_Lego.html](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/12_01_2016_Lego.html)> last accessed on the 6th of December 2016.

***OFT cases: Roma Medical Aids, Pride Mobility Products, Ultra Finishing Limited and Foster Refrigerator***

Likewise, the OFT has dealt with restrictions in the field of price restrictions in the Roma and Pride cases. In 2012, it undertook an investigation into the mobility aids sector that identified different competition concerns. The OFT found that Roma and Pride, two of the UK's largest mobility scooters manufacturers for people with reduced mobility, operated a selective distribution system which imposed qualitative and quantitative criteria by means of which they intended to impair competition among its dealers.

In August 2013, the OFT issued an infringement decision against Roma and some of its retailers for having committed to prohibit online sales and online advertising of any prices in respect of Roma-branded products.<sup>49</sup> Roma claimed that such restrictions were necessary to provide a quality customer service due to the special characteristics of its products. However, the measures were considered a deliberate attempt to maintain a certain level of prices across its distribution network to the detriment of people with reduced mobility.<sup>50</sup>

Subsequently, in March 2014, the OFT found that Pride and certain of its retailers had engaged into contractual arrangements and concerted practices which had the object of impairing competition in respect of certain mobility scooters, by prohibiting online advertising of prices below a RRP.<sup>51</sup> In practice such RRP, which did not match the real economic value of the products,<sup>52</sup> increased price transparency among retailers, impaired competition, and limited consumers' ability to compare prices. Moreover, Price monitored retailers' compliance with the set RRP on a regular basis and threatened non-

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<sup>49</sup> OFT, *supra* note 40.

<sup>50</sup> M. O'Regan, 'Pride before a fall in online advertising restrictions or getting away with illegal behaviour that harms vulnerable consumers?' (Kluwer Competition Law Blog, 18 November 2014) <<http://kluwercompetitionlawblog.com/2014/11/18/united-kingdom-pride-before-a-fall-in-online-advertising-restrictions-or-getting-away-with-illegal-behaviour-that-harms-vulnerable-consumers/>> last accessed on the 6th of December 2016.

<sup>51</sup> CMA, Press release 'CMA publishes decision on mobility scooters' (CMA, 30 October 2014) <<https://www.gov.uk/government/news/cma-publishes-decision-on-mobility-scooters>> last accessed on the 6th of December 2016.

<sup>52</sup> As reflected in the Pride case non-confidential decision, Pride indicated that its RRP's were arbitrary and set high to facilitate discounting. See: Non-confidential Pride decision, OFT, 30 October 2014, 24 <[https://assets.publishing.service.gov.uk/media/54522051ed915d1380000007/Pride\\_Decision\\_Confidential\\_Version.pdf](https://assets.publishing.service.gov.uk/media/54522051ed915d1380000007/Pride_Decision_Confidential_Version.pdf)> last accessed on the 6th of December 2016.

compliant suppliers with charging them higher wholesale prices or expelling them from its distribution system.<sup>53</sup>

The OFT considered that the pricing restrictions involved constituted hardcore restrictions within the meaning of Article 4(b) of the VBER, and therefore they did not benefit from the VBER, rendering Article 101(1) TFEU applicable. Roma and Pride were accused for having committed an object restriction of competition that was incompatible with Chapter I of the Competition Act 1998 and with Article 101(1) TFEU.

As far as the prohibition of online sales and pricing restrictions are concerned, the undertakings expressed that the pricing restrictions were necessary for the authorized dealers to provide customers with personal advice in order to guarantee the suitability of the device and ensure an adequate pre- and post-sale service. Roma and Pride claimed that the pricing restrictions applied gave rise to market efficiencies, were exemptible under Article 101(3) TFEU. In the OFT's opinion the claims put forward by the undertakings could not prosper because the undertakings could have implemented less restrictive measures and there was no evidence that the pricing restrictions were suitable to attain the claimed objectives.

In a nutshell, the OFT confirmed the *Pierre Fabre* ruling by concluding that a manufacturer can neither impose that its products be exclusively sold through a “bricks and mortar” store nor can they prohibit their prices be advertised online because such practices are deemed as by object restrictions. In this sense, even though mobility scooters are classified as medical devices, the OFT excluded the restriction being grounded on public health or safety grounds. The “objective justifications” set out in *Pierre Fabre* are to be interpreted restrictively.<sup>54</sup> No fines were imposed due to the small size of the undertakings but the NCA ordered the companies involved to refrain from entering into such agreements in the future.

Likewise, the OFT has recently fined Ultra Finishing Ltd., a bathroom supplier, and Foster Refrigerator, a fridge supplier, for engaging in RPM in respect of online sales of some of their products and for preventing retailer's ability to offer discounts. Ultra Finishing threatened retailers with charging them higher prices, withdrawing their rights to use suppliers' images and ceasing of supply if they did not apply the so-called

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<sup>53</sup> M. O'Regan, *supra* note 50. For a deeper analysis of the *Roma* and *Pride* cases.

<sup>54</sup> M. O'Regan, *supra* note 50.

‘recommended’ prices.<sup>55</sup> Foster Refrigerator, which operated a minimum advertised price, threatened retailers with charging them higher prices or refusing to supply Foster-branded products if they advertised below that minimum price.<sup>56</sup>

#### **4.3 Restrictions on advertising or selling on third-party platforms**

As a general rule, suppliers may require certain quality standards to their distributors in order to resell their products online, as well as they may impose quality standards on products intended to be sold offline. It has been a common practice among suppliers operating selective distribution systems to impose quality criteria on the conditions or the types of online platforms on which they can advertise and/or sell the suppliers’ products. The Guidelines explicitly allow such restrictions: “a supplier may require that its distributors use third party platforms to distribute the contract products only in accordance with the standards and conditions agreed between the supplier and its distributors for the distributors’ use of the internet”.<sup>57</sup>

The Commission has noted in its preliminary report that bans on sales on marketplaces do not constitute hardcore restrictions per se, as in principle their object is not to prevent, restrict, or distort competition. However, the Commission has admitted that bans on marketplaces might not always be in compliance with EU competition law. For instance, they might amount to hardcore restrictions when the suppliers and distributors exceed the market share threshold in Article 3 VBER.<sup>58</sup> In this line, the Guidelines seem to allow such prohibitions under certain market conditions. The position of the German and the French NCAs in relation to restrictions on advertising or selling on third-party platforms is markedly different from the approaches entrenched in EU competition law.

#### ***Adidas and Asics***

Two prominent cases that illustrate the particular approach held by the German and French NCAs are the *Adidas and Asics cases*. The sport equipment online market has been thoroughly analysed by the FCO and the CA. Its market structure is characterized

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<sup>55</sup> OFT, Press release ‘Bathroom supplier fined £826,000 for restricting online prices’ (CMA, 26 April 2016) <<https://www.gov.uk/government/news/bathroom-supplier-fined-826000-for-restricting-online-prices>> last accessed on the 6th of December 2016.

<sup>56</sup> OFT, Press release ‘Fridge supplier fined £2.2 million for restricting online discounts’ (OFT, 24 May 2016) <<https://www.gov.uk/government/news/fridge-supplier-fined-22-million-for-restricting-online-discounts>> last accessed on the 6th of December 2016.

<sup>57</sup> Guidelines on Vertical Restraints, 54.

<sup>58</sup> European Commission, *supra* note 9, para 473.

for by having a high concentration on the supplier level—in 2011 ASICS, Adidas and Nike amounted for a market share of more than 75%—and having a low degree level of concentration on the distribution level.

Under these circumstances, the above mentioned NCAs noted that if big market players apply excessively restrictive conditions within their selective distribution system not only intra-brand competition but also inter-brand competition are bound to be adversely affected. Both NCAs noted that anti-competitive effects are further increased when competitors impose similar conditions.

In 2013, the French CA opened administrative proceedings against Adidas, while the German FCO opened administrative proceedings against several sports clothing and running shoes manufacturer, including Adidas and ASICS, on account of their distribution policies. The proceedings were initiated under the suspicion that the conditions established by the referred companies were going beyond reasonable requirements of quality standards. By the end of 2012, ASICS had introduced a selective distribution system by which its distributors were prohibited from using ASICS' brand name in online advertisements and from advertising ASICS' products in price-comparison-websites, such as Amazon or eBay.

#### *a) Germany*

The FCO adopted an infringement decision in August 2015. It concluded that the conditions imposed by ASICS to its authorized retailers consisting on preventing the use of ASICS brand name and the ban on the use of price-comparison websites could lead to a restriction of intra-brand competition.<sup>59</sup> In effect, the FCO considered that these restrictions could be particularly detrimental to small and medium-sized distributors. For large retailers that can rely on their own online shop, having presence on online marketplaces may be commercially irrelevant. However, for small and medium-sized retailers, a ban on online marketplaces truncates their possibilities to reach end-users.

In the view of the FCO, ASICS' distribution system contained provisions that qualified as restrictions of competition by object pursuant to Article 101(1) TFEU and section 1 GWB. Those provisions were non-exemptible under Article 2 VBER, as they

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<sup>59</sup> *Bundeskartellamt*, Case Summary 'Unlawful restrictions of online sales of ASICS running shoes' (*Bundeskartellamt*, 25 January 2016) <[http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B2-98-11.pdf?\\_\\_blob=publicationFile&v=2](http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B2-98-11.pdf?__blob=publicationFile&v=2)> last accessed on the 6th of December 2016.

were deemed as hardcore restrictions within the meaning of Article 4(c) VBER. The requirements for individual exemption under Article 101(3) TFEU or section 2(1) GWB were not proved.<sup>60</sup>

Regarding Adidas's distribution system, the FCO concluded that since 2012 Adidas had operated a selective distribution system that also contained certain clauses that constituted per se violations of German and EU competition law. These included among others a far-reaching prohibition on the sale of Adidas products on online marketplaces, and a demand that the authorized retailers designed their websites in such a way that end consumers could visit the site through a third-party platform where the logo of the latter was visible.<sup>61</sup>

The FCO considered that prohibiting approved distributors from selling on online marketplaces was not a necessary qualitative criterion to ensure the quality of the products and of their distribution within a selective distribution system. On the contrary, such ban eliminated the possibility to use the Internet as a distribution channel, which was treated as a restriction of competition under Article 101(1) TFEU. Despite having found that Adidas' conditions were also anti-competitive, the FCO closed the proceedings in June 2014 after Adidas reversed its anti-competitive sale conditions.<sup>62</sup>

#### ***b) France***

Likewise, the French AC confirmed the *Pierre Fabre* doctrine and concluded that manufacturers can organize their distribution networks freely, as long as they do not unjustifiably restrain competition. It opined that Adidas' prohibition limited intra-brand competition, subsequently depriving consumers of lower prices.<sup>63</sup> No fines were imposed given the fact that Adidas removed the contested clause from its selective distribution agreements.

It follows from both investigations that according to the French and German NCAs the aim of protecting the brand or a luxury image does not justify a restriction on

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<sup>60</sup> *Ibid.*

<sup>61</sup> *Bundeskartellamt*, Case Summary 'Adidas abandons ban on sales via online marketplaces' (*Bundeskartellamt*, 19 August 2014) <[http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2014/B3-137-12.pdf?\\_\\_blob=publicationFile&v=2](http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2014/B3-137-12.pdf?__blob=publicationFile&v=2)> last accessed on the 6th of December 2016.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Autorité de la Concurrence*, Press release 'The Autorité de la concurrence has closed an investigation against Adidas' (AC, 18 November 2015) <[http://www.autoritedelaconcurrence.fr/user/standard.php?id\\_rub=607&id\\_article=2671](http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=607&id_article=2671)> last accessed on the 6th of December 2016.

the use of online marketplaces in selective distribution systems. This position has been further upheld by the French NCA in the *Bang & Olufsen* case<sup>64</sup> and by the German FCO in the *Sennheiser* case,<sup>65</sup> among others. Conflicting positions can nevertheless be found across the EU. For instance, the Dutch NCA stated that authorities should be cautious when qualifying vertical agreements involving online sales as hardcore violations of competition law, and the line followed by the German courts in this matter is not consistent, as the *Coty* case has shown.

### *Coty*

In April 2016, the Regional Court of Frankfurt submitted the *Coty* case to the CJEU for a preliminary ruling,<sup>66</sup> in an attempt to seek more clarity as regards whether in selective distribution systems containing online platforms bans are compatible with European law.

The dispute at hand involves the selective distribution system applied by Coty, the manufacturer of a great number of perfume and cosmetic brands, to Akzente, one of its authorized distributors. In 2012, Coty had introduced new terms and conditions for its selective distribution system that prohibited its distributors from selling Coty's products on online marketplaces. Coty brought a lawsuit against Akzente for allegedly infringing the prohibition at hand, as the latter had sold Coty's products through Amazon Germany. The lawsuit was dismissed arguing that Coty's terms and conditions were unenforceable for contravening German and European competition law. Coty appealed the decision, and the German court referred the case to the CJEU for a preliminary ruling.

The ruling, which has not been decided yet, is expected to have a broad impact on distribution agreements. The CJEU faces the opportunity to delimit the suppliers' legitimation to restrict online sales within selective distribution systems. Presumably, the CJEU may clarify certain central and unresolved aspects stemming from the *Pierre Fabre*

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<sup>64</sup> *Autorité de la Concurrence*, Press release 'Selective distribution of Hi-fi and home cinema equipment' (AC, 12 December 2012) <[http://www.autoritedelaconcurrence.fr/user/standard.php?id\\_rub=418&id\\_article=2009](http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=418&id_article=2009)> last accessed on the 6th of December 2016.

<sup>65</sup> *Bundeskartellamt*, Case Summary 'Sennheiser hebt für Händler im selektiven Vertriebssystem das Verbot des Verkaufs über "Amazon Marketplace" auf' (*Bundeskartellamt*, 24 October 2013) <[http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2013/B7-1-13-35.pdf;jsessionid=B101875E81C75CA825270FF764A99B04.1\\_cid387?\\_\\_blob=publicationFile&v=4](http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2013/B7-1-13-35.pdf;jsessionid=B101875E81C75CA825270FF764A99B04.1_cid387?__blob=publicationFile&v=4)> last accessed on the 6th of December 2016.

<sup>66</sup> Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* [2016] C-260/21, Request for a preliminary ruling from the Oberlandesgericht Frankfurt am Main <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CN0230&from=EN>> last accessed on the 6th of December 2016.



case: in particular, whether or not the *Pierre Fabre* case should be interpreted as meaning that the protection of brand image can be put forward as a legitimate reason to restrict online sales; whether that qualifies as a hardcode restriction; whether it is permissible to impose an absolute ban on online sales through third-party platforms; whether banning sales on online platforms qualify as a restriction of passive sales.<sup>67</sup>

#### **4.4 Restrictions on the use of price comparison websites**

Price Comparison Websites (PCW) are one type of online platforms that facilitate comparison of products based on price and other criteria. The PCW aggregates products from different retailers and directs potential consumers to the retailers' website, where the actual sale might be concluded. PCW are usually compensated on a pay-per-click basis, irrespectively of whether the sale is ultimately completed or not. The preliminary findings of the Commission show that, between 2012 and 2014, the number of retailers offering products on PCWs increased around 240% and the trend is expected to grow.<sup>68</sup>

Although PCWs are powerful tools for consumers and retailers as they reduce searching costs and enhance visibility, some manufacturers have criticized PCWs for not allowing retailers to differentiate themselves in terms of quality, features, brand image, or post-sale services. Some manufacturers point out that PCWs exclusively focus on price, which is not necessarily the decisive factor in the consumer decision making process.<sup>69</sup> Despite PCWs may contribute to increase sales in the short-term owing to the intense price competition, in the long-term they may reduce margins and remove incentives for retailers to invest in quality and post-sale experience.<sup>70</sup>

Many manufacturers thereupon prohibit retailers from advertising the former's products on PCWs. The prohibition on the usage of PCWs has the ultimate effect of limiting retailers' ability to take free business decisions, and it might consequently give rise to competition concerns. Though one might argue that at the same time that e-commerce develops, platforms become more sophisticated, the parameters that are

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<sup>67</sup> M. Dietrich, M. Nuys, and M. Zedtwitz von Arnim, 'German court asks ECJ to rule on legality of online sales bans', (Lexology, 03 May 2016) <<http://www.lexology.com/library/detail.aspx?g=810a9237-4922-4b7f-9caa-7e69e9128182>> last accessed on the 6th of December 2016.

<sup>68</sup> European Commission, *supra* note 9, para 482.

<sup>69</sup> *Ibid.*, para. 495.

<sup>70</sup> *Ibid.*, para. 496.

analysed and compared increase, the information provided is more accurate, and thus brand image would not be affected by the use of PCWs.

The Commission has identified different types of contractual restrictions on the use of PCWs. While the most widespread type of restriction in this field is the prohibition to use any PCW, the use of other restrictions based on quality criteria is also quite popular. Among the most frequent restrictions on PCWs the following could be highlighted: restrictions to advertise on PCWs, restrictions to provide price or product information to PCWs, restrictions to use PCWs targeting customers located in other territories, restrictions to use PCWs, or restrictions on the use of the brand name or of any information provided by the manufacturer in connection with PCWs or for marketing purposes.<sup>71</sup>

In general, these restrictions comprehend the restriction to advertise on PCWs. It has been suggested by Josefine Hederström and Luc Peeperkorn that the assessment of such prohibitions could adopt two possible interpretations. On the one hand, it can be argued that restricting advertising on PCWs would limit retailers' ability to promote suppliers' products on certain websites but they would not be refrained from advertising on any other website different from PCWs. In this sense, the prohibition to advertise on PCWs should not be considered as a hardcore restriction under Article 4(b) and (c) of the VBER. On the other hand, it can be argued that a prohibition of advertising on PCWs entails a restriction as regards the territory or the consumers to which distributors can sell manufacturers' products. In this case, the prohibition to advertise on PCWs would not be deemed as a necessary qualitative criterion to ensure the quality of the products; and on the contrary, it would amount to a hardcore restriction under Article 4(b) and (c) of the VBER.<sup>72</sup>

Therefore, the Commission intends to refer digital comparison tools for an in-depth investigation in the context of the e-commerce sector inquiry. Additionally, some NCAs have recently launched market studies into price comparison websites, which are expected to explore both the relationship between PCWs and retailers as well as the relationship between PCWs in order to identify possible competition concerns.<sup>73</sup>

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<sup>71</sup> European Commission, *supra* note 9, paras 477-488.

<sup>72</sup> This analysis is expressed in J. Hederström and L. Peeperkorn, *supra* note 18, 20.

<sup>73</sup> The market study into Price Comparison Tools launched by the CMA serves as an example of the growing focus on the usage of PCWs. See CMA, Press release 'CMA launches study into digital comparison tools'

#### 4.5 Restrictions on online advertising other than price

In the previous section, some of the most frequent vertical restrictions have been dealt with. However, many other restrictions can be encountered and they might not necessarily be limited to price. Notwithstanding several types of restrictions are being analysed in the Commission e-commerce sector inquiry, that does not imply that the restrictions therein contained are a *numerus clausus*. On the contrary, as e-commerce and digital market evolve new restrictions may arise.<sup>74</sup>

The residual category dealt with in the present section includes restraints on the use of trademarks and brand names for online advertising. Retailers' ability to use or bid on the trademark of certain suppliers or manufacturers may be limited. In that way retailers are refrained from using suppliers' trademark as a keyword to advertise the latter products on the websites of referencing service providers, such as Google Adwords. Usually, manufacturers claim that such restrictions are justified by the brand image and free-riding concerns; however, they are often used to prevent retailers' websites to achieve a privileged position on search engines by using manufacturers' trademarks as keywords.

Josefine Hederström and Luc Peeperkorn offer some meaningful insight into this topic that are worthy of notice. Following the line of reasoning in *Pierre Fabre*, they maintain that where suppliers allow distributors to use their logo or commercial name for offline activities but prohibit it for online sales, the practice qualifies as an object restriction. Additionally, they analysed other circumstances under which this kind of restrictions are imposed. On the one hand, where the prohibition relates to the distributor's own website, the result could be an impaired effectiveness thereof and, consequently amount to a restriction on online sales. On the other hand, where the prohibition applies to the use of logos or commercial names on third-party websites or on online advertising services, the effect would be likewise to restrict online advertising and sales.<sup>75</sup>

In conclusion, the authors consider that in any case a prohibition on the online use of the supplier's logo or commercial brand online would be deemed as a hardcore restriction under Article 4(b) and (c) of the VBER. In this respect, little or no objective justification could be adduced to escape the prohibition laid down in Article 101(1) TFEU.

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(CMA, 29 September 2016) <<https://www.gov.uk/government/news/cma-launches-study-into-digital-comparison-tools>> last accessed on the 6th of December 2016.

<sup>74</sup> European Commission, *supra* note 9, para 179.

<sup>75</sup> J. Hederström and L. Peeperkorn, *supra* note 18, 20.

Conversely, the Commission's preliminary results of the sector inquiry maintain a less pragmatic approach than the one mentioned above. Despite the Commission upholding that restrictions on the use of trademarks on third-party websites or online advertising services may raise competition concerns under Article 101 TFEU, it admits that restrictions on the use of such distinctive signs on distributors' websites may generate efficiencies, as they may contribute to avoid confusion with the manufacturers' websites.<sup>76</sup> This implies that restrictions on the use of manufacturers' trademarks and commercial names should not be considered as hardcore restrictions of competition, and that such restrictions may generate pro-competitive effects.

## **5. Restrictions imposed by platforms**

Online platforms have radically changed the digital economy. The use of online platforms has grown steadily and the current trend is expected to continue. The platforms' business model is essentially based on providing an online trading platform to traditional retailers. There are many types of online platforms: platforms that offer suppliers or retailers a marketplace, or platforms that act as online distributors or intermediaries selling supplier's products, for instance.

Online platforms have rapidly proliferated and have become an important tool for companies to reach potential consumers. This explains why the term of "platformization"<sup>77</sup> of the markets has been coined. Such platforms are particularly important for small and medium-sized retailers that lack the resources to create their own online shop and offer them direct access to a large number of potential consumers. Additionally, they allow for price comparison and reduction of search costs, which translates into an increase in consumer welfare.

Online platforms offer suppliers the possibility to directly sell their products or services on the platforms or online marketplaces they manage. One key problem these agreements pose is whether they should be qualified as distribution agreements or as agency agreements. This is a key issue, as the legal implications stemming from it are substantial. Agency agreements do not fall under the scope of Article 101 TFEU because

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<sup>76</sup> European Commission, *supra* note 9, para 181.

<sup>77</sup> Term used in J. Hederström and L. Peeperkorn, *supra* note 18, 15.

as they are considered single economic entities, whereby the agent sells the products on behalf of the principal without undergoing any financial or commercial risk.<sup>78</sup>

It is difficult to identify the existence of genuine agency contracts involving platforms in the digital world. Admitting that suppliers and platforms act as agency agreements would inevitably mean that those agreements would be exempted from the application of Article 101 TFEU.<sup>79</sup> At this moment, only the German FCO has expressly tackled this issue through the HRS case, which does not seem to provide a fully satisfactory solution. Besides this issue, online platforms such as eBay, Amazon or Booking have gathered great power in their respective markets, which enables them to impose restrictive conditions on the suppliers' commercial freedom.<sup>80</sup>

Due to these issues, two-sided markets' activity has come under increased competition law scrutiny, both in the EU and the USA,<sup>81</sup> which is confirmed by the Commission's report on online platforms, delivered as part of the Digital Single Market Strategy.<sup>82</sup>

With regard to retail, the use of retail most favoured nation clauses, or MFN clauses (often referred to as most favoured customer clauses) and price parity clauses has been especially debated. Although such clauses could initially seem similar, they are fundamentally different. MFN clauses represent a commitment under which a supplier grants a distributor that conditions offered will not be less favourable than the conditions granted to competing distributors.<sup>83</sup> As a result, that distributor shall be extended any better condition offered to competing distributors. Whereas price parity clauses are commitments by which suppliers agree not to offer the products available for sale on a platform at a lower prices on any other sales channel.<sup>84</sup> Not to be confused with "best

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<sup>78</sup> Vertical Guidelines, 14 – 15.

<sup>79</sup> L. Kjølbbye, A. Aresu and S. Stephanou, *supra* note 79, 469 – 470.

<sup>80</sup> J. Hederström and L. Peepkorn, *supra* note 18, 17.

<sup>81</sup> Two leading cases in the EU are the Case C-67/13 P *Groupement des cartes bancaires v BNP Paribas, BPCE and Société Générale SA* [2014] ECLI:EU:C:2014:2204; and Case C-382/12 P *MasterCard and Others v Commission* [2014] EU:C:2014:220.

<sup>82</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Online platforms and the digital single market. Opportunities and challenges for Europe' COM(2016) 288/2.

<sup>83</sup> The definition can be found in the European Commission, Hollywood film studios and digitalisation of European cinemas, IP/11/257.

<sup>84</sup> L. Kjølbbye, A. Aresu and S. Stephanou, *supra* note 79, 470.

price guarantees”, whereby a retailer guarantees to match the best price offered by its competitors to end-users.<sup>85</sup>

There are two types of MFN clauses: the so called “narrow MFN” clauses, whereby the supplier agrees not to grant less favourable conditions than those available on the supplier’s website; and the so called “wide MFN” clauses, whereby the supplier ensures that the conditions offered to the distributor will not be less favourable than the conditions granted to any competing distributor for any other sales channel.

### **5.1 Effects on competition of MFN and price parity clauses**

MFN clauses, which are typically contained within business to business (B2B) long-term agreements, may constitute an effective tool for protecting the platform’s interests. Their aim is to recoup the investment the platform owner has undergone from free-riding.<sup>86</sup> That is to say, their purpose is to avoid incurring the risk of losing clients if suppliers offer their products at a higher price than the one offered in competing platforms.

Depending on the context in which the commitments are implemented, they can be either potentially harmful for competition, or can generate efficiencies. It is therefore impossible to offer a general assumption as to whether they are beneficial or prejudicial for competition and for consumers without conducting a deeper analysis, as it has been acknowledged by the OFT (now CMA) in a recent report.<sup>87</sup> The assessment is essentially dependent on the characteristics of the market in question, the market structure, the state of competition in the upstream and downstream, the conditions of the clause, and the nature of the players involved.<sup>88</sup>

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<sup>85</sup> N. Lenoir, M. Plankensteiner and E. Créquer, ‘Increased Scrutiny of Most Favoured Nation Clauses in Vertical Agreements’ (2014) Getting the deal through – Law Business Research Ltd. 3 <[http://www.kramervin.com/files/Publication/df2b4f0c-3367-40d0-86c1-00008ba6d2ca/Presentation/PublicationAttachment/8226c124-c4f5-4f90-be1f-01fa9e35239b/140410\\_GTDT\\_Vertical%20Agreements\\_French%20chapter\\_MFN%20Clauses\\_Article.pdf](http://www.kramervin.com/files/Publication/df2b4f0c-3367-40d0-86c1-00008ba6d2ca/Presentation/PublicationAttachment/8226c124-c4f5-4f90-be1f-01fa9e35239b/140410_GTDT_Vertical%20Agreements_French%20chapter_MFN%20Clauses_Article.pdf)> last accessed on the 6th of December 2016.

<sup>86</sup> B. Guérin and A. Wolf-Posch, ‘Special Report of the German Monopolies Commission: Can Competition Law Address Challenges Raised by Digital Markets?’ (2016) 7(1) Journal of European Competition Law & Practice 30, 38.

<sup>87</sup> LEAR’s Report for the Office of Fair Trading, “Can ‘Fair’ Prices be Unfair? A Review of Price Relationship Agreements” (2012) OFT1438, <[http://www.learlab.com/wp-content/uploads/2016/04/Can-%E2%80%99Fair%E2%80%99-Prices-Be-Unfair\\_-A-Review-of-Price-Relationship-Agreements.pdf](http://www.learlab.com/wp-content/uploads/2016/04/Can-%E2%80%99Fair%E2%80%99-Prices-Be-Unfair_-A-Review-of-Price-Relationship-Agreements.pdf)> Executive Summary, 0.24, 9, last accessed on the 6th of December 2016.

<sup>88</sup> Ibid, 0.24, 9.

For that reason, there is no presumption under EU competition law that in any case MFN clauses amount to restrictions by object. On the contrary, it is generally admitted that MFN arrangements may generate both pro-competitive and anti-competitive effects.<sup>89</sup> Consequently, MFN clauses require a case-by-case analysis.

Nonetheless, if openly employed as a means to perform an anti-competitive practice, such as facilitating collusion or facilitating RPM,<sup>90</sup> MFN clauses amount to object restrictions of competition and will be deemed as hardcore restrictions pursuant to Article 4(a) of the VBER.<sup>91</sup> Consequently, the companies entering into such agreements, regardless of their market share, would not be exempted under the VBER and their agreement would fall within the scope of Article 101(1) TFEU. Unless the parties demonstrate that the conditions of Article 101(3) TFEU are met as the positive effects outweigh the negative effects stemming from the agreement, which is highly unprovable, the agreement would be null and void.

### ***MFN and price parity clauses may generate efficiencies***

Firstly, MFNs can be a legitimate way to minimize externalities and protect investments that would otherwise not be possible. Retailers would like to use the platform to reach the consumers, but then complete the transaction on their own website to avoid paying a commission to the platform.<sup>92</sup> MFN clauses provide the guarantee that, in this case, the platforms will be able to recoup the costs incurred in the development of an investment to create or improve the platform.<sup>93</sup>

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<sup>89</sup> For further reading on the negative and positive effects of MFN clauses, see: P. Buccirossi, *Handbook of Antitrust Economics* (MIT Press, 2008); P. Akman, 'A Competition Law Assessment of Platform Most-Favoured-Nation Clauses' (2015, September) Centre for Competition Policy CCP (Working Paper 15 – 12), 8 – 13 <<http://competitionpolicy.ac.uk/documents/8158338/8368036/CCP+Working+Paper+15-12/c6a8d985-0ad4-4f7b-bcc4-8dc8fcfdbb62>> last accessed on the 6th of December 2016;

A. Ezrachi, 'The Competitive Effects of Parity Clauses on Online Commerce' (2015) 11, 2 - 3 *European Competition Journal* 488, 519 <<http://dx.doi.org/10.1080/17441056.2016.1148870>> last accessed on the 6th of December 2016; F. E. González-Díaz and M. Bennet, 'The law and economics of most-favoured nation clauses' (2015) 1(3) *Competition Law & Policy Debate*, Symposium: parity clauses, 34 - 38 <[https://awards.concurrences.com/IMG/pdf/the\\_law\\_and\\_economics\\_of\\_most-favoured\\_nation\\_clauses.pdf](https://awards.concurrences.com/IMG/pdf/the_law_and_economics_of_most-favoured_nation_clauses.pdf)> last accessed on the 6th of December 2016; N. Lenoir, M. Plankensteiner and E. Créquer, *supra* note 85, 3; J. P. van der Veer, 'Antitrust Scrutiny of Most-Favoured-Customer Clauses: An Economic Analysis' (2013) 4(6) *Journal of European Competition Law & Practice* 501, 502.

<sup>90</sup> Guidelines on Vertical Restraints, 48.

<sup>91</sup> N. Lenoir, M. Plankensteiner and E. Créquer, *supra* note 85, 4.

<sup>92</sup> F. E. González-Díaz and M. Bennet, *supra* note 89, 34.

<sup>93</sup> S. C. Salop and F. Scott Morton, 'Developing an Administrable MFN Enforcement Policy' (2013) 27(2) *Antitrust – American Bar Association*, 15 <[http://www.crai.com/sites/default/files/publications/Developing\\_An\\_Administrable\\_MFN\\_Enforcement\\_Policy\\_Salop\\_ScottMorton\\_Antitrust\\_Spring\\_2013.pdf](http://www.crai.com/sites/default/files/publications/Developing_An_Administrable_MFN_Enforcement_Policy_Salop_ScottMorton_Antitrust_Spring_2013.pdf)> last accessed on the 6th of December 2016.

This is especially relevant when the success of the trading platform relies on “network effects”: the greater the number of buyers and sellers, the higher the value of the platform. If buyers stop using the platform, it automatically becomes less attractive to sellers, which consecutively makes it less valuable for buyers.<sup>94</sup> MFN clauses ensure that sellers cannot offer their products or services on other platforms or channel at lower prices or worse conditions than the ones offered on the platform.

Secondly, they can mitigate the so called “hold-up problem”.<sup>95</sup> Certain transactions require buyers or sellers to carry out relationship-specific investments that are only valuable in the context of that particular relationship. In this case, there is every likelihood that once the buyer has carried out such investments, the seller will start selling its products to a competing buyer at a lower price.<sup>96</sup> The MFN clause might allow the buyer to recoup sunk costs, incentivizing future investments.<sup>97</sup>

Thirdly, MFN clauses may reduce transaction and negotiation costs. Consumers can obtain the best price and the most favourable conditions from a seller without carrying out a far-reaching research.<sup>98</sup> At the same time, the customer is automatically protected from price increases.<sup>99</sup> Additionally, the buyer will not have to renegotiate the conditions of the agreements as it will automatically benefit from price reductions granted by the seller to other competitors.<sup>100</sup>

Fourthly, MFN clauses may reduce contractual negotiations delays by discouraging the parties to the agreement from delaying the negotiations over time until more favourable conditions are met.<sup>101</sup> The MFN clause may be used to guarantee that if the prices or conditions of the agreements change, the party who is benefited by the new

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<sup>94</sup> P. Buccirossi, ‘Background Note’ (2013) DAF/COMP(2013)13 OECD Policy Roundtable on Vertical Restraints for Online Sales 9, 23 <<http://www.oecd.org/competition/VerticalRestraintsForOnlineSales2013.pdf>> last accessed on the 6th of December 2016.

<sup>95</sup> The “hold up” problem is a situation where the parties to a contract, agreement or relationship could be better off by cooperating but refrain from doing so because of concerns that they may give the other party increased bargaining power, and thereby reduce their own profits. The “hold-up” problem leads to severe economic cost and might also lead to underinvestment.

<sup>96</sup> J. B. Baker and J. A. Chevalier, ‘The Competitive Consequences of Most-Favoured-Nation Provisions’ (2013) 27(2) Antitrust – American Bar Association 21, 21 <[http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1280&context=facsch\\_lawrev](http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1280&context=facsch_lawrev)> last accessed Day Month 2016

<sup>97</sup> N. Lenoir, M. Plankensteiner and E. Créquer, *supra* note 85, 5.

<sup>98</sup> J. B. Baker and J. A. Chevalier, *supra* note 96, 21.

<sup>99</sup> J. P. van der Veer, *supra* note 89, 502.

<sup>100</sup> F. E. González-Díaz and M. Bennet, *supra* note 89, 35.

<sup>101</sup> J. B. Baker and J. A. Chevalier, *supra* note 96, 21.



conditions will receive the difference between the conditions initially agreed upon as well as the new conditions.

***MFN and price parity clauses may also generate anti-competitive effects***

Firstly, the inclusion of MFN clauses may raise barriers to entry and cause foreclosure of the market where the platform operates. These clauses reduce the ability of small players and potential competitors to implement low-prices strategies in order to attract buyers and sellers, which in term discourages them from entering the market.<sup>102</sup>

Secondly, MFN clauses may restrict competition in so far as they may make resale price maintenance more effective and they may transform a recommended or maximum resale price into a minimum price.<sup>103</sup>

Thirdly, they may facilitate coordination or dampen competition between platforms. A general application of MFN clauses in a sector may have the effect of unifying prices offered to all platforms because sellers might lose the incentives to offer lower prices, as they are restricted in their freedom to offer selective discounts and discriminate between platforms. Platforms might opt for increasing prices charged to sellers instead.<sup>104</sup> Therefore, the market in which the platforms competes would settle on a less competitive equilibrium.<sup>105</sup>

Fourthly, a wide-spread application of MFN clauses may facilitate collusion due to the increased price transparency. If companies are aware that most of their competitors have entered into MFN agreements, they might lose incentives to cut prices, as the new prices would be automatically replicated to other competitors.<sup>106</sup> In other words, competitors would set similar prices, which would reduce rivalry, especially when the party imposing the MFN clause communicates that other competitors have also signed similar clauses.<sup>107</sup>

Fifthly, when MFN clauses are imposed by dominant firms or market players that gather a significant amount of market power, several competition concerns can take place. If the company benefited from an MFN clause maintains a dominant position in the

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<sup>102</sup> J. P. van der Veer, *supra* note 89, 504.

<sup>103</sup> R. Whish and D. Bailey, *Competition Law* (eighth edition, Oxford University Press, 2015) 688.

<sup>104</sup> N. Lenoir, M. Plankensteiner and E. Créquer, *supra* note 85, 4.

<sup>105</sup> P. Buccirossi, *supra* note 94, 24.

<sup>106</sup> F. E. González-Díaz and M. Bennet, *supra* note 89, 37.

<sup>107</sup> As Apple did in the context of the e-books case.

market, it would not only profit from the terms and conditions it has managed to negotiate, but also from any better terms that competitors would obtain.<sup>108</sup> This ultimately may contribute to strengthen the market position of the dominant firm. Competitors may be foreclosed from the market and the dominant firm may set monopoly prices.

## **5.2 Cases and investigations involving MFN and price parity arrangements**

In recent years, the use of MFN arrangements in digital markets has drawn some of the NCAs' attention. National case-law settled by these NCAs is quite abundant. Nevertheless, enormous disparities in the approaches and conclusions reached by the NCAs exist in this field. The Commission's recent activity has evidenced the swift towards an increasing attention to these clauses, and the launch of the e-commerce sector inquiry is expected to raise the number of investigations in this field. Currently, the most relevant case-law in the EU are the e-books case, the motor insurance investigation, the hotel online booking investigation, the Amazon case and the Amazon Marketplace investigation, that are dealt with below.

### ***Hotel online booking investigations***

The hotel online booking sector has attracted significant interest throughout the EU and in the US. The analysis is focused on the investigations carried out in the EU; thus, the US investigation is not dealt with in this paper. The outcomes of the decisions taken by the NCAs are a reflection of the breadth of opinions and approaches both at national and EU level. The investigations questioned certain clauses and business practices of some of the leading Online Travel Agents (OTAs). OTAs are companies that provide tourist-services suppliers with an online platform for the commercial promotion of flight, hotel and car deals, enabling a larger number of consumers to easily search, compare, read other users' reviews and book the OTAs' services.

#### ***a) United Kingdom***

After having pursued a formal investigation into the issue of whether certain arrangements between hotels and online travel agents (OTAs) infringed the Chapter I prohibition of the Competition Act 1998 and Article 101(1) TFEU, the OFT announced in July 2012 that it had opened a statement of objections against Booking, Expedia and the InterContinental Hotels Group (IHG). The OFT sustained that Booking and Expedia

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<sup>108</sup> I. Vandendorpe and J. Frese, 'Most Favoured Nation Clauses Revisited: The Future Does Not Look Bright' (2013) Competition Policy International, Inc. 588, 590 <[https://www.skadden.com/sites/default/files/publications/Frese\\_2014\\_35\\_ECLR\\_Issue\\_12\\_Print.pdf](https://www.skadden.com/sites/default/files/publications/Frese_2014_35_ECLR_Issue_12_Print.pdf)> last accessed on the 6th of December 2016.

had “each entered into separate agreements with IHG that restricted the OTAs’ ability to discount the headline rate at which room-only hotel accommodation bookings were offered to consumers”.<sup>109</sup> The OFT considered that such discounting restrictions constituted a form of RPM<sup>110</sup> that could limit price competition and also increase barriers to entry and prevent the expansion for other OTAs.

The OFT accepted formal commitments from IHG, Booking and Expedia in January 2014. The parties agreed, among other things, on allowing OTAs to offer discounts of room rates but exclusively to certain groups of consumers that were members of the OTA in question and who had previously booked a room once on that platform. Irrespective of the removal of all the discounting restrictions, the OFT recognized that enabling hotels to have certain control over the headline rate for their hotel rooms generated efficiencies.<sup>111</sup>

In September 2014, the British Competition Appeal Tribunal upheld the appeal presented by Skyscanner, a PCW, against the OFT’s decision of January 2014. Skyscanner claimed that the OFT had failed to assess the impact of the decision on inter-brand competition, and it questioned the accepted commitments.<sup>112</sup> The Tribunal remitted the case back to the OFT’s successor, the CMA, in order for it to reconsider the matter. In light of this judgement, in September 2015, the CMA closed its investigations alleging administrative priority grounds.<sup>113</sup>

MFN clauses were not the target of the investigation in itself. Nonetheless, the OFT analysed the impact of retail rate MFN clauses on the OTAs’ ability to offer discounts, whereby an OTA imposes the hotels that the room prices offered on the OTA’s website are the same or not higher than the prices the hotels offer via other OTAs or their own websites, for instance. The OFT did not assess whether rate parity and MFN arrangements could constitute an infringement of Article 101(1) TFEU, but the CAM announced its intention to monitor their effects closely. In any case, the parties committed

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<sup>109</sup> F. E. González-Díaz and M. Bennet, *supra* note 89, 29.

<sup>110</sup> See CMA, Case Closure Summary ‘Hotel Online Booking Investigation’ (CMA, 16 September 2015) <[https://assets.publishing.service.gov.uk/media/55f8404aed915d14f1000014/Hotel\\_online\\_booking\\_-\\_case\\_closure\\_summary.pdf](https://assets.publishing.service.gov.uk/media/55f8404aed915d14f1000014/Hotel_online_booking_-_case_closure_summary.pdf)> last accessed on the 6th of December 2016.

<sup>111</sup> *Ibid.*

<sup>112</sup> Case 1226/2/12/14 *Skyscanner Ltd v CMA* (2014) CAT 16, <[http://www.catribunal.org.uk/files/1226\\_Skyscanner\\_Judgment\\_CAT\\_16\\_260914.pdf](http://www.catribunal.org.uk/files/1226_Skyscanner_Judgment_CAT_16_260914.pdf)> last accessed on the 6th of December 2016.

<sup>113</sup> See CMA, Press release ‘CMA closes hotel online booking investigation’ (CMA, 16 December 2015) <<https://www.gov.uk/government/news/cma-closes-hotel-online-booking-investigation>> last accessed on the 6th of December 2016.

to amend, remove and not impose any provision within the agreements that could limit discounting freedoms, which clearly includes MFN.

The OFT's approach in the online booking case is in line with the approach developed by the French, Swedish and Italian NCAs. It has been questioned whether the more flexible approach in the online booking case, which is similar to the UK motor insurance decision that will be discussed below,<sup>114</sup> should be taken as a sign of a new attitude towards RPM, or whether it was conditioned by the facts of the case.<sup>115</sup>

#### ***b) Germany***

The FCO has adopted a stricter approach. In 2012, the FCO initiated an action against Hotel Reservation Service (HRS), a hotel online booking platform, alleging that HRS's MFN clauses restricted competition between hotel online booking platforms and foreclosed the market. On December 2013, the FCO prohibited HRS from enforcing MFN clauses<sup>116</sup> and ordered the company to delete them from its contracts with hotel partners. Proceedings were also initiated against Booking and Expedia for similar reasons.

HRS had justified the use of MFN clauses on the intention to prevent free-riding from hotels and to protect its investment on the platform. The FCO ignored this argument and concluded that MFN clauses have an equivalent effect to a price-fixing agreement. Such clauses remove the hotel portals' incentives to offer lower prices on other OTAs.<sup>117</sup> Considering the market structure of the hotel online booking sector, the FCO put forward that MFN clauses imposed by the market leaders, Booking, Expedia and HRS, had the effect of consolidating their market position. The market entry of new platforms or the expansion of smaller competitors is considerably more difficult as MFN clauses prevent them from offering hotel rooms at lower prices. Moreover, the FCO did not see any benefits for consumers.

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<sup>114</sup> See <https://www.gov.uk/cma-cases/private-motor-insurance-market-investigation>.

<sup>115</sup> P. Malone, 'Hotel Online Booking: The OFT announces its intention to accept binding commitment' (Kluwer Competition Law Blog, 30 September 2013) <<http://kluwercompetitionlawblog.com/2013/09/30/hotel-online-booking-the-oft-announces-its-intention-to-accept-binding-commitments>> last accessed on the 6th of December 2016

<sup>116</sup> Best price clauses are MFN clauses under which the hotels are obliged to offer the OTA their lowest room price, maximum room capacity and most favourable booking and cancellation conditions available.

<sup>117</sup> *Bundeskartellamt*, Press release 'Online hotel portal HRS's 'best price' clause violates competition law – Proceedings also initiated against other hotel portals' (*Bundeskartellamt*, 20 December 2013) <[http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/20\\_12\\_2013\\_HRS.html](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/20_12_2013_HRS.html)> last accessed on the 6th of December 2016.

In January 2015, the FCO's decision against HRS was upheld on appeal by the Düsseldorf Higher Regional Court.<sup>118</sup> In December 2015, the FCO decided that not only Booking's MFN clause should be removed from its website by 31 January 2016, but also that such clause could not be replaced with a "narrow MFN" clause.<sup>119</sup>

After its appeal being rejected, Booking offered to modify the clause so that hotels would only be obliged not to offer better prices on their own websites than the ones displayed on Booking's portal, but they could offer their rooms cheaper on other OTAs or other sales channels. The FCO considered that reducing the scope of the MFN clause was "insufficient to allay competition concerns". It follows that the FCO is of the opinion that "wide" and "narrow" MFN clauses have the same restrictive effects.<sup>120</sup> Both cannot benefit from an exemption of Article 2(1) VBER infringe Article 101 TFEU and Section 1 of the German Act.

**c) *France, Italy and Sweden***

The NCAs of these Member States, which have collaborated with the Commission,<sup>121</sup> have adopted a more flexible approach than the one held by the FCO. In May 2014, the Italian AGCM opened an investigation into Booking and Expedia, two of the market leaders in Italy, for the use of "wide MFN" clauses in their distribution systems whereby hotels were charged a considerably high fee, and they were forced to set the lowest price offered on any sales channel on the investigated companies' platforms.<sup>122</sup> The AGCM concluded that the use of such clauses could lead to increased fees demanded from hotels and, thereupon, hotels would pass on the resulting price increases to

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<sup>118</sup> *Bundeskartellamt*, Press release 'HRS's "best price" clauses violate German and European competition law – Düsseldorf Higher Regional Court confirms Bundeskartellamt's prohibition decision' (*Bundeskartellamt*, 9 January 2015) <[http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/09\\_01\\_2015\\_hrs.html](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/09_01_2015_hrs.html)> last accessed on the 6th of December 2016; see OLG Düsseldorf HRS v *Bundeskartellamt* [2015] AZ.VI – Kart. 1/14 (V).

<sup>119</sup> *Bundeskartellamt*, Press release 'Narrow "best price" clauses of Booking also anticompetitive' (*Bundeskartellamt*, 23 December 2015) <[http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/23\\_12\\_2015\\_Booking.com.html](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/23_12_2015_Booking.com.html)> last accessed on the 6th of December 2016; the proceedings against Expedia are still pending.

<sup>120</sup> S. Heinz, 'Online Booking Platforms and EU Competition Law in the Wake of the German Bundeskartellamt's Booking.com Infringements Decision' (2016) 7 (8) *Journal of European Competition Law & Practice* 530, 535.

<sup>121</sup> European Commission, Press release 'Antitrust: Commission announces the launch of market tests in investigations in the online hotel booking sector by the French, Swedish and Italian competition authorities' (European Commission, 15 December 2014) <[http://europa.eu/rapid/press-release\\_IP-14-2661\\_en.htm](http://europa.eu/rapid/press-release_IP-14-2661_en.htm)> last accessed on the 6th of December 2016.

<sup>122</sup> Press Release of the Autorità Garante della Concorrenza e del mercato (7 May 2014) No. I/779 <<http://www.agcm.it/stampa/comunicati/6942-i779-agenzie-turistiche-online-avviata-istruttoria-nei-confronti-di-booking-ed-expedia-per-verificare-l'esistenza-di-violazioni-concorrenziali.html>> last accessed on the 6th of December 2016.

consumers to maintain their profit margins. This ultimately restricts competition and reduces consumer welfare. The same concerns were raised by the Swedish and French NCAs.

Unlike the German FCO, these NCAs accepted the commitments offered by Booking, consisting in replacing the “wide MFN” clause for a “narrow MFN”.<sup>123</sup> Booking consented to allow hotels to set prices and conditions with other OTAs and on their direct offline channel, but they would still be forced not to offer their services on their own websites at prices lower than the ones offered on Booking’s platform. Hence, these NCAs admitted that despite wide MFN clauses are to be considered anti-competitive, narrow MFN clauses may generate positive effects on competition.<sup>124</sup>

### ***Apple e-books investigations***

A relevant case involving the use of MFN clauses in two-sided markets, among other competition issues, has been the Apple e-books case.<sup>125</sup> In order to understand the raised competition concerns, it is necessary to give some insights into the books and e-books sectors. The traditional channel to sell books and e-books has been the wholesale model by which publishers sell the books to retailers and retailers resale them to consumers, being the latter the ones who fix retail prices. Alternatively, there is a less popular channel known as the agency model, where publishers set retail prices and retailers receive a percentage of the price.

Amazon—the online retailer of books, electronic devices and other items—sold its e-books under the traditional wholesale model. In order to promote sales of its Kindle devices Amazon reduced the prices of the e-books, sometimes even accepting a loss per unit sold because the prices were lower than the wholesale prices that Amazon paid to publishers. Apple decided to enter the e-books market adopting the agency model that it also used to sell on its so-called App Store. Five publishers<sup>126</sup> entered into an agreement with Apple under which they would set the retail prices and Apple would keep a 30% margin on sold books.

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<sup>123</sup> Other NCAs such as the Irish, Danish or Austrian have also accepted Booking’s commitments.

<sup>124</sup> The proceeding against Expedia is still pending in Italy, which did not offer commitments. The outcome of this case might be of interest.

<sup>125</sup> E-books (Case COMP/39.847) Commission Decision (notified under document C(2013) 4750) [2013] OJ C378/25.

<sup>126</sup> The publishers involved were Penguin, Simon and Shuster, HarperCollins, Hachette, and Holtzbrinck/Macmillan.

The contracts included an MFN clause pursuant to which publishers were prevented from setting higher prices than the prices offered at competing platforms. Apple communicated each publisher that the others had also signed their respective agreements. In this circumstances, publishers could not set prices higher than the ones offered to Amazon, which made them incur losses. The publishers decided to compel Amazon to adopt the agency model and increase prices encouraged by the conviction that the other publishers were in the same situation.

In December 2011, the Commission opened formal proceedings against the referred publishers and Apple.<sup>127</sup> The Commission was of the opinion that the operation resulted from a concerted practice embedded in a global strategy with the aim of raising the e-books retail prices in the EU or preventing the emergence of other publishers offering their e-books at lower prices.

Apple would have allegedly exchanged information regarding the fact that the other publishers had also agreed to similar MFN clauses with the intention to align the publishers' incentives to compel Amazon to change its business model from a wholesale model to an agency model. Nevertheless, in December 2012, the Commission's investigation was closed after four of the publishers and Apple offered commitments,<sup>128</sup> providing that the publishers would terminate their agency agreements and abandon the use of MFC clauses in their agreements for five years.<sup>129</sup> The US Department of Justice and some US states brought a civil action concerning the same practices.<sup>130</sup>

### ***The Amazon Marketplace investigation***

Besides being one of the leading online retailers, Amazon offers an online trading platform that enables third-party sellers to offer new and used items for sale in exchange for a percentage of the sales price, known as "Amazon Marketplace". With this platform, Amazon is no longer involved in a vertical relationship, but it acts as a two-sided platform connecting sellers and purchasers.

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<sup>127</sup> European Commission, E-books (Case COMP/39.847) Commission Decision (notified under document C(2012) 9288) [2012], <[http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39847/39847\\_26804\\_4.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39847/39847_26804_4.pdf)> last accessed on the 6th of December 2016, para 10.

<sup>128</sup> *Ibid.*, para 128.

<sup>129</sup> The proceedings against Penguin were closed in April 2013, when the publisher offered commitments. See European Commission, E-books (Case COMP/39.847) Commission Decision, (notified under document C(2013) 4750) [2013] OJ C378/25, <[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013XC1224\(04\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013XC1224(04)&from=EN)> last accessed on the 6th of December 2016, paras 4, 16 – 23.

<sup>130</sup> See *United States v Apple Inc.* No. 13-3741 (2d Cir. 2015).

In 2010, the contracts Amazon signed with retailers contained an MFN clause under which retailers accepted to offer their products at the lowest price via the Amazon Marketplace in comparison with their offers on competing platforms, such as eBay or Play, or in their own online shops. This clause was contested by the United Kingdom's OFT and the German FCO, which carried out a parallel investigation and cooperated closely. More recently, the case has been dealt with by the Commission.

**a) United Kingdom**

In October 2012, the OFT launched an investigation under Chapter I of the UK Competition Act from 1998 and Article 101 TFEU, regarding the allegedly anti-competitive arrangement applied by the Amazon Marketplace to its online retailers. The proceedings were closed in November 2013, when Amazon refrained from imposing MFN clauses and its price parity policy to its retailers in the UK and across the European Union.<sup>131</sup>

**b) Germany**

In February 2013, the FCO opened proceedings against Amazon Germany in relation to the MFN clause applied to retailers offering their products via the Amazon Marketplace. The FCO considered that the clause could potentially constitute a violation of Section 1 of the *Gesetz gegen Wettbewerbsbeschränkungen*<sup>132</sup> (GWB) and of Article 101 TFEU. High Amazon Marketplace fees charged by the company in combination with the MFN clause could jeopardize free competition between OTAs by creating barriers to entry for competing platforms and increasing prices paid by consumers.

In November 2013, the FCO terminated its proceedings against the Amazon Marketplace after the company acquiesced to no longer include the contested clauses across Europe and to inform its retailers in no vague terms that its conditions and price parity strategy had changed.<sup>133</sup>

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<sup>131</sup> OFT, Press release 'Amazon online retailer: investigation into anti-competitive practices' (CMA, 1 November 2013) <<https://www.gov.uk/cma-cases/amazon-online-retailer-investigation-into-anti-competitive-practices>> last accessed on the 6th of December 2016.

<sup>132</sup> Act against Restrictions of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB) [1998].

<sup>133</sup> Bundeskartellamt, Press release 'Amazon abandons price parity clauses for good' (Bundeskartellamt, 26 November 2013) <[http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Meldungen%20News%20Karussell/26\\_11\\_2013\\_Amazon.html](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Meldungen%20News%20Karussell/26_11_2013_Amazon.html)> last accessed on the 6th of December 2016.



### ***PCWs: private motor insurance investigation***

In September 2014, the United Kingdom's CMA published a report on the private motor insurance market.<sup>134</sup> The investigation was focused on whether MFNs clauses contained in agreements between private motor insurance providers and car insurance PCWs are likely to generate anti-competitive concerns.<sup>135</sup>

The assessment of the CMA distinguished between two types of MFN clauses in favour of PCWs: firstly, the "narrow MFN" clauses, by which the price offered on the website of the private motor insurance provider could never be lower than the price offered on the PCW; and secondly, the so-called wide MFN clauses, whereby the price offered through other sales channels apart from the provider's own website could never be lower than the price offered on any PCW.

The CMA concluded that narrow MFN clauses were less likely to give rise to significant anti-competitive effects as they only constraint the provider's ability to set prices against the PCW. The CMA outweighed the negative and positive effects brought about by these clauses and concluded that in many cases they may generate pro-competitive effects on competition. In particular, when used as an instrumental tool for PCWs to build consumer trust and when they contribute to promote inter-brand competition by reducing search costs.

In opposition to narrow MFN clauses, the CMA determined that wide MFN clauses were more likely to generate anti-competitive effects both in the upstream and the downstream market. When a PCW is benefited from a wide MFN clause, other PCWs will have little incentives to pursue lower prices, as every price reduction will be automatically passed on to the former.

As a result, the CMA considered that wide MFN clauses were likely to harm competition between PCWs in two ways: by increasing barriers to entry, commission fees and policy premiums, and by reducing innovation.<sup>136</sup> This, in term, increases prices for private motor insurances to the prejudice of consumers. In March 2015, the CMA banned

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<sup>134</sup> See CMA, Final Report on the 'Private Motor Insurance Market' (CMA, 24 September 2014) <[https://assets.publishing.service.gov.uk/media/5421c2ade5274a1314000001/Final\\_report.pdf](https://assets.publishing.service.gov.uk/media/5421c2ade5274a1314000001/Final_report.pdf)> last accessed on the 6th of December 2016.

<sup>135</sup> CMA, Press release 'CMA publishes final motor insurance order' (CMA, 11 June 2015) <<https://www.gov.uk/government/news/cma-publishes-final-motor-insurance-order>> last accessed on the 6th of December 2016.

<sup>136</sup> Press Release of the CMA of 11 June 2015, 8.34.

the use of wide MFN by PCWs and insurer providers, which prevented the latter from making their products available at a lower price on other online platforms.

### *Amazon investigation*

The European Commission has also initiated a formal antitrust investigation into certain business price parity practices implemented by Amazon in the distribution of e-books. The investigation particularly focuses on certain clauses that allegedly protect Amazon against its competitors, such as clauses that grant Amazon the right to be informed of any more advantageous or alternative terms offered to its competitors and to ensure that Amazon is offered equal or superior conditions than the ones offered to its competitors.<sup>137</sup>

The Commission is investigating whether such clauses may prevent other e-book distributors from developing new and innovative products and services to compete with Amazon, and thus whether they are bound to limit competition between the e-book distributors in detriment to consumers. Although the opening of these proceedings does not imply that EU competition has been violated, in case antitrust concerns were confirmed, such behaviour could constitute an abuse of a dominant market position prohibited by Article 102 TFEU and/or restrictive business practices banned by Article 101 TFEU.

In a nutshell, it seems like there is a unanimous acceptance that wide MFN clauses are hardcore restrictions of competition pursuant to the VBER and, therefore, fall under the scope of the prohibition laid down in Article 101 (1) TFEU. However, there is currently no harmony as regards narrow MFN clauses.

On the one hand, Germany and France have concluded that narrow MFN clauses should also be treated as hardcore restrictions of competition. This approach, which assimilates the effects of broad MFN clauses to RPM, limits suppliers' freedom more than the Guidelines.<sup>138</sup> On the other hand, France, Sweden and Italy—and also Ireland,

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<sup>137</sup> Press Release of the European Commission of 11 June 2015, <[http://europa.eu/rapid/press-release\\_IP-15-5166\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5166_en.htm)> last accessed on the 6th of December 2016.

<sup>138</sup> Silke Heinz maintains that the FCO's stricter approach may be explained primarily on the basis of the former Section 14 of the German Act Against Restraints of Competition, which prohibited any restriction of an undertaking's pricing freedom. Although the provision is no longer in force, the FCO might still be influenced by this provision to conclude that MFN clauses have similar effects to RPM and amount to hardcore restriction. S. Heinz, 'The FCO prohibits booking.com's "narrow" best-price clause', (Kluwer Competition Law Blog, 20 January 2016) <<http://kluwercompetitionlawblog.com/2016/01/20/the-fco-prohibits-booking-coms-narrow-best-price-clause>> last accessed on the 6th of December 2016.

Austria and Denmark—have advocated that the narrow MFN clauses’ assessment cannot be dissociated from the economic circumstances where the clauses are applied. The Commission welcomed this idea, which could indicate that a similar position might be upheld in the sector inquiry.

Some analysts, among whom Lars Kjølbbye, Alessio Aresu and Sophia Stephanou can be found, consider that the German restrictive approach into the hotel online booking case, consisting in prohibiting every MFN clause without taking into consideration any market effects, is prejudicial for businesses. Relying on the CJEU’s *Groupement des Cartes Bancaires* case,<sup>139</sup> they maintain that the assessment of these clauses cannot be dissociated from the economic, legal, and factual context, as depending on the circumstances, these clauses can give rise to positive or negative effects. The Commission’s approval of the French, Swedish and Italian procedures could evidence that it does not intend to qualify MFN and price parity clauses as restrictions of competition by object.<sup>140</sup>

## 6. Geo-blocking restrictions

The practice of geo-blocking consists of the implementation of technical measures to restrict access to e-commerce sites on the basis of the users’ nationality or residence.<sup>141</sup> Geo-blocking includes those practices whereby companies decide to block access to their websites to users located in another MS, or may reroute users to local websites in order to discriminate prices depending on their location, or may restrict the delivery of goods or services to customers who do not reside in the territory where the former intend to sell their products or services.<sup>142</sup>

Geo-blocking should be distinguished from geo-filtering, which are commercial practices whereby online providers allow users to access and purchase goods or services when they are located in a MS different from that of the provider, but offering different

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<sup>139</sup> Case C-67/13 *Groupement des cartes bancaires v BNP Paribas, BNP Paribas, BPCE, Société Générale SA* [2013] ECL I-2204.

<sup>140</sup> European Commission, *supra* note 121.

<sup>141</sup> L. Kjølbbye, A. Aresu and S. Stephanou, *supra* note 79, 466.

<sup>142</sup> B. Batchelor, ‘Commission Publishes First Issues Paper into EU Geo-blocking’, (Kluwer Competition Law Blog, 25 March 2016) <<http://kluwercompetitionlawblog.com/2016/03/25/commission-publishes-first-issues-paper-eu-geo-blocking>> and (14 April 2016) <<http://www.lexology.com/library/detail.aspx?g=9f3d49cf-0db3-47ca-8e03-a8d6a91d5da7>> last accessed on the 6th of December 2016.

terms and conditions.<sup>143</sup> Among the varied technical measures used to implement geo-blocking, checking or blacklisting of IP addresses, and checking the nationality or the credit card address of the users are the most widespread.<sup>144</sup>

In principle, the VBER allows non-dominant retailers to voluntarily and unilaterally decide to re-route customers to local websites, or to sell goods at different prices in different MS.<sup>145</sup> These decisions may give rise to competition concerns in respect to Article 102 TFEU, but they cannot be challenged under Article 101 TFEU.

Article 101 will be applicable in those cases where geo-blocking results from contractual obligations between independent undertakings. Determining whether geo-blocking measures stem from merely unilateral conducts or from vertical arrangements is therefore the first step. The preliminary report shows that most geo-blocking measures concerning consumer goods originate from unilateral decisions, whereas geo-blocking in relation to online digital content is mostly based on contractual arrangements.

Suppliers may pursue rather different objectives when imposing a territorial restriction on their distributors. Some of the objectives may be justifiable under EU competition law, such as guaranteeing the proper functioning of the pre- and post-sale service of the goods or services, or ensuring a certain level of quality of the product, for instance. However, geo-blocking restrictions may be used to limit the number of distributors, with the purpose or effect of maintaining higher prices, or discriminating customers. This unjustified geo-blocking ultimately has the effect of discriminating consumers and setting up barriers to cross-border trade, which leads to the fragmentation of the Internal Market.

## **6.1 Geo-blocking and the Digital Single Market**

As mentioned above, one of the main priorities of the Single Digital Market Strategy is to abolish the use of discriminatory and unjustified geo-blocking. Geo-blocking is of major concern in the EU as it interferes with the achievement of the Single

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<sup>143</sup> European Commission, Commission Staff Working Document on Geo-blocking practices in e-commerce. Issues paper presenting initial findings of the e-commerce sector inquiry conducted by the Directorate-General for Competition, SWD(2016) 70 final, 18 March 2016, [33].

<sup>144</sup> *Ibid.* [137]-[140].

<sup>145</sup> Following the interpretation made by L Kjølbbye, A. Aresu and S. Stephanou in regards Article 4(b) VBER. Nonetheless, contractual restrictions cannot prevent online retailers' ability to engage in passive sales.

Market. The Commission is firmly determined to tackle different treatment of customers on the basis of their residence or nationality.

For that purpose, the Commission aims at eradicating every geo-blocking measure not grounded on objective and verifiable factors. Additionally, the Commission intends to increase transparency to let consumers and consumer associations identify forms of discrimination. And intrinsically linked to these objectives, improving enforcement by national authorities through the reform of the Consumer Protection Cooperation Regulation.<sup>146</sup> The Digital Single Market Strategy includes a legislative proposal to prevent unjustified geo-blocking as a form of discrimination on the grounds of nationality, residence and establishment in the EU.<sup>147</sup> In this respect, the e-commerce sector inquiry is analysing geo-blocking restrictions to understand their use and extent in the EU.

An issues paper published in March 2015, presenting the initial findings of the e-commerce sector inquiry, showed that geo-blocking is quite widespread. Despite the use of geo-blocking remains moderate in online sales of tangible goods—being mostly used in the case of clothing and consumer electronics—, it is a prominent practice in the field of online distribution of digital content—such as in the case of audio-visual or musical works—. <sup>148</sup> 38% of consumer goods retailers recognized applying measures to geo-block access to users from other MS, <sup>149</sup> whereas roughly 68% of the digital-service providers admitted doing so. From the latter, 60% declared being contractually bound by right holders to geo-block. <sup>150</sup>

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<sup>146</sup> European Commission, Inception Impact Assessment: Proposal to address unjustified geo-blocking and other discrimination based on consumers' place of residence or nationality <[http://ec.europa.eu/smart-regulation/roadmaps/docs/2016\\_cnect\\_002\\_geo-blocking\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_cnect_002_geo-blocking_en.pdf)> last accessed on the 6th of December 2016.

<sup>147</sup> European Commission, Press release 'Commission proposes new e-commerce rules to help consumers and companies reap full benefit of Single Market' (European Commission, 25 May 2016) <[http://europa.eu/rapid/press-release\\_IP-16-1887\\_en.htm](http://europa.eu/rapid/press-release_IP-16-1887_en.htm)> last accessed on the 6th of December 2016.

<sup>148</sup> European Commission, *supra* note 143, para 127; after a public consultation on the use of geo-blocking practices opened in September 2015, in March 2016 an issues paper was released with the initial findings of the Commission. Although the issues paper is not a required step in the competition Sector Inquiry, it has been suggested that it evidences the Commission's intention to carry out different investigations and initiatives in the context of the Digital Single Market Strategy.

<sup>149</sup> European Commission, *supra* note 9, 29.

<sup>150</sup> *Ibid.*, 11.

## 6.2 Geo-blocking in the field of copyrighted works

This outstanding difference can be explained by the different IP protection that tangible goods and digital content are granted. Copyrighted works lack a unified legal framework within the EU.<sup>151</sup> On the contrary, they are subject to the principle of territoriality, which means that national law applies and the enforcement of the exclusive rights are limited to the jurisdiction of the territory where they have been granted.<sup>152</sup>

In this context, a rough outline of the principle of exhaustion is needed. This principle is laid down in Article 4(2) of the InfoSoc Directive<sup>153</sup> and Article 4(2) of the Software Directive<sup>154</sup>. It clarifies that as long as a work or a copy thereof is put on the market within the EU by the IP right holder or with its consent, the right holder can no longer claim control over the work on the grounds of IP protection.<sup>155</sup> This principle prevents the right holder from controlling the copies of its work after it receives equitable remuneration therefrom.

According to the recitals of the InfoSoc Directive, the principle of exhaustion is circumscribed to exploitation and distribution rights in the case of digital content on physical supports. Therefore, services and online services are not subject to exhaustion,<sup>156</sup> which is confirmed by the issues paper. The right holder of media content has the right of making available and of communication to the public instead. For example, copies of digital content may be made available to the public by means of content streaming or downloading.<sup>157</sup> Despite the Commission's refusal to geo-blocking, such practice may be justified in order to avoid IP infringement,<sup>158</sup> especially in relation to content distribution.

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<sup>151</sup> Although there is a certain level of harmonization via EU Directives, (such as the Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, the Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, the Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, or the Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society, for instance), national copyright laws apply.

<sup>152</sup> European Commission, *supra* note 143, para 121.

<sup>153</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L 167/19 (InfoSoc Directive).

<sup>154</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the Legal Protection of Computer Programs [2009] OJ L 111/16 (Software Directive).

<sup>155</sup> L. Kjølbye, A. Aresu and S. Stephanou, *supra* note 79, 476.

<sup>156</sup> See recitals 28 and 29 of InfoSoc Directive.

<sup>157</sup> European Commission, *supra* note 143, paras 120-123.

<sup>158</sup> B. Batchelor, *supra* note 142.

It is frequent that distribution rights are granted to online-service providers through exclusive distribution or license agreements, which impose territorial restrictions and contractual geo-blocking requirements to prevent access from users located in MS outside the licensed area.<sup>159</sup> That way online-service providers are granted protection only in the territories covered by the license, while access to territories excluded from the licensed area is denied.<sup>160</sup>

Having regard to the foregoing, under EU copyright law the right holder is allowed to limit inter-state trade through exclusive territorial licenses. This precedent was first set in *Coditel I*, where the CJEU resolved that the freedom to provide services, laid down in Article 56 TFEU, does not preclude the parties to a contract from establishing geographical limits in order to protect intellectual property rights.<sup>161</sup> Therefore, the use of exclusive licenses would not be, as such, contrary to Article 56 TFEU. The same idea could be extended to distribution agreements for online trade of tangible goods. Nevertheless, the Commission has shown concerns regarding the compatibility of such geo-blocking and territorial restriction with EU competition law.<sup>162</sup> For that reason, some authors opine that the Commission may reconsider the extent to which inter-state trade can be limited,<sup>163</sup> especially after the *Murphy* case, which is discussed below.

### **6.3 Cases and investigations involving geo-blocking restrictions**

#### ***Murphy case***

A leading case involving a cross-border distribution of audio-visual and digital content online is the *Murphy case*.<sup>164</sup> In 2011, the CJEU dealt with an exclusive territorial licensing of satellite decoder cards to provide online content. The case arose from the dispute between the Football Association Premier League (FAPL), the entity that administers the system of licenses for the retransmission of football matches in the UK, and the owner of a pub in the UK. The FAPL granted broadcasters an exclusive

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<sup>159</sup> European Commission, *supra* note 143, paras 137-140, Figure 32.

<sup>160</sup> B. Batchelor, *supra* note 142.

<sup>161</sup> Case C-62/79 *Coditel v Ciné-Vog Films* [1980] ECR I-88 (*Coditel I*) [15]-[17].

<sup>162</sup> European Parliament, Briefing of the Research Service 'At a glance. Digital Single Market and geoblocking' (European Parliament May 2015) <[http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/557002/EPRS\\_ATA\(2015\)557002\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/557002/EPRS_ATA(2015)557002_EN.pdf)> last accessed on the 6th of December 2016.

<sup>163</sup> L. Kjølbye, A. Aresu and S. Stephanou, *supra* note 79, 477.

<sup>164</sup> Joined Cases C-403/08 and 429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others*; and *Karen Murphy v Media Protection Services Ltd* [2011] ECR I-9083.

broadcasting right for the live transmission of Premier League football matches in the UK for a three-year term.

For the purpose of protecting the territorial exclusivity of each broadcaster, all licensees agreed to prevent consumers from having access to their services and decoding devices outside the licensed area. By virtue of this exclusivity system, viewers could watch only the matches retransmitted by broadcasters established in the territory where they resided, whereas the access to decoding devices from other MS was reserved to the residents thereof. In effect, broadcasters were granted absolute territorial protection in the licensed territory.

Several restaurants and pubs in the UK attempted to circumvent the exclusivity rights of the FAPL by using foreign decoding devices to access the Premier League matches. In particular, the owner of a pub, called Murphy, bought a decoder card and a box to receive a satellite channel from a Greek broadcaster, which was meant to provide its services only to subscribers resident in Greece. The prices of the imported devices and the subscription fee in Greece were lower than those charged by the holder of the transmission rights in the UK. The High Court of Justice of England and Wales referred the matter to the CJEU for preliminary ruling.

Firstly, the CJEU reiterated the *Coditel I* doctrine establishing that national legislation which prohibits the import, sale and/or use of satellite decoder cards in another MS outside the licensed territory constitutes a restriction of the free movement of services of Article 56 TFEU,<sup>165</sup> unless it is justified on grounds of overriding reasons of public interest.<sup>166</sup> In principle, such overriding reasons could cover the protection of IP rights, as claimed by FAPL, but the Court ruled that the referred claim could not succeed as football matches are not copyrighted works.<sup>167</sup> Likewise, the Court also rejected that the prohibition could be substantiated on the public interest objective of encouraging the public to attend football matches in the stadium, as FAPL had put forward.<sup>168</sup> The Court concluded that national legislation—and contractual provisions—that prevent users from importing satellite decoding devices from another MS with the purpose of watching content of a broadcaster from that MS infringes EU law.

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<sup>165</sup> *Murphy*, para 125 and *Coditel I* [15]-[17].

<sup>166</sup> *Ibid.* [9].

<sup>167</sup> *Ibid.* [96]-[99].

<sup>168</sup> *Ibid.* [122]-[124].



Secondly, the CJEU confirmed the doctrine set in *Coditel II* and reiterated that exclusive license agreements concluded between an IP right holder and a broadcaster are not, as such, contrary to Article 101(1) TFEU. However, in *Coditel II* the CJEU had recognized that there may be circumstances whereby the object or effect of employing an exclusive license is to restrict or to distort competition. In those cases, the agreement would be subject to the prohibition of Article 101(1) TFEU.<sup>169</sup> The Court clarified in *Murphy* that contractual clauses that require broadcasters to prevent its satellite decoding devices from being used outside their licensed territory must be regarded as agreements which object is to restrict competition within the meaning of Article 101(1) TFEU.<sup>170</sup>

In effect, such clauses are aimed at partitioning national markets, banning cross-border transactions and granting absolute territorial exclusivity to broadcasters in the area covered by the license. Subsequently, all competition and rivalry between broadcasters is eliminated.<sup>171</sup> In the absence of any legal or economic circumstance that would justify the restriction at issue, the contested clauses in the exclusive license agreements were declared prohibited restriction under Article 101(1) TFEU.<sup>172</sup>

By the moment, the *Murphy* doctrine applies to physical goods but it does not apply to online services. Nevertheless, some academics consider the *Murphy* case to introduce some form of exhaustion in the case of copyrighted online services and the concept of “portability” of subscriptions across the EU.<sup>173</sup> The *Murphy* case is therefore a ground-breaking case as it is believed it could trigger the modification of the current system of cross-border distribution of audio-visual and media content within the EU.<sup>174</sup> Moreover, the *Murphy* case seems to be upheld by the Commission in the pay-TV investigation.

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<sup>169</sup> Case C-262/81 *Coditel v Ciné-Vog Films* [1982] ECR I-3381 (*Coditel II*) [16]-[17].

<sup>170</sup> *Murphy* [139]; this opinion concurs the approach suggested by the AG Kokott in Cases C-404/08 and C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd* [2011] ECR I-9083, Opinion of AG Kokott [243]-[251].

<sup>171</sup> *Murphy* [134]-[146].

<sup>172</sup> *Murphy* [141]-[144].

<sup>173</sup> L. Kjølbbye, A. Aresu and S. Stephanou, *supra* note 79, 478.

<sup>174</sup> European Parliament, *supra* note 162.

### ***Pay-TV case***

After the *Murphy* case, in January 2014, the Commission opened an investigation against six major Hollywood film studios<sup>175</sup> and Sky, a broadcaster from the UK, for certain clauses contained in their license agreements. The film studios required Sky to geo-block access to films distributed through satellite and online pay-TV to users located outside the UK and Ireland, and guaranteed that no other broadcaster apart from Sky could make its pay-TV services available in the UK and Ireland.<sup>176</sup>

Relying on the *Murphy* ruling, in July 2015, the Commission sent a statement of objections to the concerned parties indicating that such clauses granted absolute territorial protection to Sky, they restricted cross-border trade by limiting passive sales from consumers located outside the UK and Ireland, and they resulted in the partitioning of the internal market along national borders. In fact, they were deemed to limit Sky's ability to carry out passive sales.<sup>177</sup> In view of this, the Commission's preliminary conclusion was that such clauses amounted to a serious restriction of competition. Given the fact that no convincing argument was put forward to justify the restriction and no individual exemption under 101(3) TFEU was substantiated, the clauses would be prohibited pursuant to 101(1) TFEU.

In July 2016, the Commission accepted the commitments offered by Paramount.<sup>178</sup> The company committed that it will not enforce the contested clauses with any broadcaster in the European Economic Area (EEA) and that it will refrain from including them in future contracts. Broadcasters will thus not be prevented from responding to unsolicited requests from consumers located in other MS. Nevertheless, Paramount may still include restrictions in active sales in its license agreements, as it is generally admitted under EU law, and it may possibly restrict passive sales to customers located outside of the EEA. The commitments will apply for a five-year period and they

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<sup>175</sup> The film studios investigated were: NBC Universal, Paramount Pictures Corp. Inc. (subsidiary of Viacom), Buena Vista international Inc. (subsidiary of the Walt Disney Company), Warner Bros Entertainment Inc., MGM Studios Inc., and Dreamworks LLC.

<sup>176</sup> It should be noted that another investigation was conducted from May 2002 until October 2004 regarding a number of MFN clauses contained in the referred Hollywood film studios with European pay-TV service providers. The investigation was closed when the studios accepted to withdraw their MFN clauses.

<sup>177</sup> European Commission, Press release 'Antitrust: Commission sends Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland' (European Commission, 23 July 2015) <[http://europa.eu/rapid/press-release\\_IP-15-5432\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5432_en.htm)> last accessed on the 6th of December 2016.

<sup>178</sup> European Commission, *supra* note 7.

will concern both online services and satellite online services. The antitrust investigation continues in the case of the other studios and Sky UK.<sup>179</sup>

The CJEU's case law and the Commission's investigations appear to confirm the illegality of absolute territorial protection and its will to achieve regional integration across the EU. However, such investigations highlight the conflicting interests of competition law and copyright law. Whereas competition law aims at creating a single and competitive market, right holders often rely on national copyright law to justify geo-blocking and restriction on sales of their content. Due to this tension, there are still many issues that need to be addressed.

Although the Commission's e-commerce final report is not yet released, the findings of the preliminary report could indicate that geo-blocking, digital content and the modernization of EU copyright rules<sup>180</sup> will be some of the Commission's future main concerns. This is also illustrated by the Commission's proposal to pass a Regulation on the cross-border portability of online content services.<sup>181</sup> By means of this initiative, the Commission intends to enable consumers who have subscribed to online-content services or acquired content in their country of residence to access those services when they are temporarily in another MS. The conclusions of the final report will probably lead to further investigations in this field.

The Commission inclines to conclude that contractual restrictions requiring geo-blocking should be prohibited in any case, even in relation to content distribution, where in principle the use of geo-blocking could be reasonably justified. Nonetheless, the Commission cannot stop companies from unilaterally deciding not to provide their goods or services to customers located outside their area of interest, unless by doing so the companies abuse of their dominant position in the market.

In this sense, the commitments offered by Paramount might not have any effect on customers' experience, unless other studios which offer their movies through Sky's channels allow Sky to offer their movies in other countries on a passive sales basis. In other words, Sky will not have incentives to respond to unsolicited requests from

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<sup>179</sup> *Ibid.*

<sup>180</sup> The Commission intends to review the EU Satellite and Cable Directive, as part of the plan to modernize EU copyright laws.

<sup>181</sup> European Commission, Press release 'Commission takes first steps to broaden access to online content and outlines its vision to modernise EU copyright rules' (European Commission, 9 December 2015) <[http://europa.eu/rapid/press-release\\_IP-15-6261\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6261_en.htm)> last accessed on the 6th of December 2016.

customers located outside its licensed territory when it cannot do so for other movies on its channel, and the same argument could be extended to other broadcasters.<sup>182</sup>

Nevertheless, I agree with Carel Maske in the sense that a general prohibition of geo-blocking might not be the most beneficial solution for consumers. Although customers would have access to more markets, banning geo-blocking would not necessarily be positive for them. Businesses would have to adapt their conditions, products, services, or discount policies intended to be sold or applied locally to the whole EU territory. Logically, the costs incurred would be passed on to consumers in the form of higher prices.<sup>183</sup> Therefore, geo-blocking restrictions should be rather assessed on more economic-based discussions on a case-by-case basis.

## **7. Conclusions**

The cases analysed above reflect the prevailing heterogeneity and the existing discrepancies in the interpretation of vertical restraints on e-commerce across the EU. Cases related to the same facts have resulted in enormously different outcomes, which reveals the existing tensions in the assessment of this controversial. In essence, the cases show the ongoing debate concerning to the extent at which suppliers may restrict online sales within their distribution systems, which revives the debate initiated in the drafting of the VBER and the Guidelines in 2000.

On the one hand, some National Competition Authorities, academics and stakeholders maintain that the freedom of suppliers to arrange their distribution networks should prevail, and hence they should be allowed to impose qualitative criteria on their distributors. The supporters of this theory consider that online sales are given excessive protection and that the functioning of distribution systems is threatened. On the other hand, others, headed by the German FCO and the French CA, argue that the commercial freedom of distributors should prevail and they oppose every restriction affecting online

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<sup>182</sup> B. McGrath, 'European Commission Closes Pay-TV Antitrust Investigation of Paramount Following Acceptance Commitments' (Cooley, 5 August 2016) <<https://www.cooley.com/news/insight/2016/2016-08-05-ec-closes-pay-tv-antitrust-investigation-of-paramount>> last accessed on the 6th of December 2016.

<sup>183</sup> C. Maske, 'Competition Policy and the Digital Single Market Strategy in the Wake of Brexit: Is Geoblocking Always as Evil as Most Consumers Believe?' (2016) 7(8) *Journal of European Competition Law & Practice* 509, 510.

sales. What is more, they maintain that such restrictions amount to hardcore restrictions of competition.<sup>184</sup>

As Louis Vogel highlights, a tendency to overuse the concept of restriction by object “beyond its natural limits” when assessing vertical restraints on e-commerce has been demonstrated.<sup>185</sup> In terms of deterring anticompetitive practices and providing legal certainty, categorizing practices as restrictions by object may have positive effects. Likewise, it could be favourable on the grounds of considerations of procedural economy, as it allows for saving resources. However, it entails substantial risks by assuming that vertical restraints are anticompetitive as a rule, disregarding the pro-competitive effects they might imply. In view of that, companies may be discouraged from engaging in practices that could increase consumer welfare.

Likewise, some NCAs are favouring distributors’ commercial freedom over the freedom of manufacturers and suppliers to arrange their distribution systems by considering any online vertical restraint as hardcore restrictions of competition. E-commerce is on a continuous development process. At this stage, it is not possible to determine how the adverse effects on competition counterbalance the positive effects in the digital context. As Chris Fonteijn, Chairman of the Netherlands Authority for Consumers and Markets highlights, a better understanding of the interaction between consumers and companies, and between online and offline distribution is needed.<sup>186</sup>

A recent report commissioned to Oxera and Accent by the CMA offers valuable insights into the short-term and long-term consequences of businesses applying vertical restraints. According to the report, removing vertical restraints may lower prices and increase availability for consumers in the short-term; but that would come at the expense of adverse effects on quality, service, and availability in the long-term.<sup>187</sup> Furthermore, suggests that removing vertical restrictions “bring about lower retail service standards and a poorer quality experience of the underlying product” or service, which, in term, could be harmful for manufacturers, retailers and consumers.<sup>188</sup> Additionally, it noted that

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<sup>184</sup> J. Hederström and L. Peeperkorn, *supra* note 18, 11.

<sup>185</sup> L. Vogel, ‘The Recent Application of European Competition Law to Distribution Agreements: A Return to Formalism?’ (2015) 6(6) *Journal of European Competition Law & Practice* 454, 455-456.

<sup>186</sup> C. Fonteijn, ‘Multichannel Distribution and the Impact of “Footloose” Consumers (2016) 0(0) *Editorial Journal of European Competition Law & Practice* 1,2.

<sup>187</sup> Oxera Consulting LLP and Accent, Vertical restraints: new evidence from a business survey. Prepared for the Competition and Markets Authority (24 March 2016), 3.

<sup>188</sup> *Ibid.*, 2.

some businesses may be applying restrictions to reduce competition without any positive effect on consumers.<sup>189</sup> Consequently, the effects of vertical restraints on competition are still not fully understood.

Competition authorities should only conclude that certain practices amount to restrictions by object if they have strong empirical arguments and economic evidence that such practices typically generate negative effects on competition. Although in the *Pierre Fabre* case the CJEU concluded that absolute and total bans on online sales raise anti-competitive effects, there is not enough empirical and past evidence to extend that doctrine to any restriction on online sales. In view of this, the *Coty* case is expected to be a leading case, where the CJEU might have the opportunity to either confirm the extensive application of the concept of restrictions by object set out by the *Pierre Fabre* doctrine, or limit its application in the field of online vertical restraints.

Similarly, classifying vertical restrictions as hardcore and, thus, assuming net negative effects without conducting an in-depth economic analysis, might be counter-productive. A general application of this approach would lead to excessive enforcement, lack of innovation, and competition would be curved to the detriment of consumers. For the sake of business activity, the concept of hardcore restrictions should also be interpreted restrictively and be reserved to those circumstances where no pro-competitive effects are probable. In any event, the analysis should not be dissociated from the economic and legal circumstances where the clauses or practices are applied.

Undoubtedly, vertical restraints on the e-commerce sector have become a highly controversial subject with fundamental practical implications. The Commission's decision to launch a sector inquiry into e-commerce might be partly driven by the Commission's objective to align the competition public enforcement policy of all the MS. The plurality of opinions creates an unfavourable investment climate in the EU. Companies cannot rely on unified criteria to comply with competition rules and they are forced to adapt their activity and business models to every MS where they intend to operate, which is highly ineffective. This, in effect, acts to the detriment of companies, legal advisors and ultimately of consumer welfare.

Despite not offering many conclusive answers to the most-debated topics concerning vertical restraints on e-commerce and competition law, the Commission's

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<sup>189</sup> *Ibid.*, 3.

preliminary report could be interpreted as anticipating substantial issues that might be the focus of future investigations and enforcement actions. Hopefully, the final report, expected in 2017, might evaluate the relative impacts of widespread practices and it might disclose problems where the Commission's intervention is potentially needed.

What is clear is that the Commission is determined to analyse the effects of vertical restraints further in order to establish a coherent application of Article 101 TFEU within the EU. Providing legal certainty and removing unjustified barriers to trade is necessary in order to create a conducive business environment in the EU and to subsequently boost economic growth and consumer welfare. European competition law should be able to address, promptly and effectively, any conduct or behaviour which intends to impair or distort competition in traditional and digital markets. This requires coherence, flexibility and adaptability to changes.<sup>190</sup> Therefore, a strong cooperation among the European Competition Network members is necessary to ensure fair and robust competition.

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<sup>190</sup> B. Lasserre, 'Competition Authorities and Digital Markets: The Need for an All-Around Resolute Action' (2016) 7(7) *Journal of European Competition Law & Practice* 429, 430.

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## **Abstract**

In the upcoming months the European Commission is expected to release the findings of the E-Commerce Sector Inquiry, which has been launched in the context of the Digital Single Market Strategy. The Commission is gathering information on the functioning of digital markets and it is analysing the effects of the most widespread vertical restraints on e-commerce. At the present time, the public enforcement of vertical restraints has been entrusted to the National Competition Authorities, leading to the adoption of heterogeneous approaches in this field. The existing disparities in relation to the treatment of vertical restraints on e-commerce create legal uncertainty for business and contribute to the fragmentation of the Internal Market. The launch of the Sector Inquiry could indicate the Commission's determination to focus on vertical agreements in the future and to provide for a consistent and uniform application of competition rules on digital markets across the EU. This paper analyses the most relevant decisions delivered by supervisory bodies at a national and European level in the EU in relation to vertical restraints and geo-blocking on e-commerce, and it finally provides a general assessment of the law concerning the topic at hand, taking those cases into consideration.

## **Keywords**

European Union, Digital Single Market, competition law, vertical restraints, Internet, electronic commerce, e-commerce

## **Kurzfassung**

In den kommenden Monaten wird die Europäische Kommission die Ergebnisse der im Rahmen der digitalen Binnenmarktstrategie eingeleiteten E-Commerce-Sektoruntersuchung veröffentlichen. Die Kommission sammelt Informationen über die Funktionsweise der digitalen Märkte und analysiert die Auswirkungen der am weitesten verbreiteten vertikalen Wettbewerbsbeschränkungen in Bezug auf E-Commerce. Derzeit ist die staatliche Durchsetzung vertikaler Wettbewerbsbeschränkungen den nationalen Wettbewerbsbehörden übertragen worden, was zu der Annahme heterogener Ansätze in diesem Bereich führt. Die bestehenden Unterschiede in Bezug auf die Behandlung vertikaler Wettbewerbsbeschränkungen des elektronischen Geschäftsverkehrs schaffen Rechtsunsicherheit für Unternehmen und tragen zur Fragmentierung des Binnenmarkts bei. Die Lancierung der Sektoruntersuchung könnte auf die Entschlossenheit der Kommission hinweisen, sich in Zukunft auf vertikale Wettbewerbsvereinbarungen zu konzentrieren und eine konsequente und einheitliche Anwendung der Wettbewerbsregeln für digitale Märkte in der gesamten EU zu gewährleisten. Diese Arbeit analysiert die wichtigsten Entscheidungen, die von Aufsichtsbehörden auf nationaler und europäischer Ebene in der EU im Hinblick auf vertikale Wettbewerbsbeschränkungen und Geo-Blocking-Maßnahmen im E-Commerce getroffen werden, und stellt abschließend eine allgemeine Bewertung der Gesetze über das vorliegende Thema, unter Berücksichtigung der Rechtsfälle, dar.

## **Schlüsselwörter**

Europäische Union, Digitaler Binnenmarkt, Wettbewerbsrecht, vertikale Wettbewerbsbeschränkungen, Internet, elektronischer Geschäftsverkehr, E-Commerce