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**Vertical Restraints on E-Commerce in the
Context of the Single Digital Market
Initiative of the European Commission**

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Abstract

One of the most debated topics in EU competition law is the application of Article 101 TFEU to vertical restraints concerning online distribution. In recent times, public enforcement of vertical restraints has been largely entrusted to the National Competition Authorities of the EU Member States, which has led to the adoption of heterogeneous approaches as regards this kind of vertical agreements and practices throughout the EU. The existing disparities may hinder trade, give rise to legal uncertainty for business, and it might contribute to the fragmentation of the Internal Market. In this context, the European Commission has recently conducted the e-commerce sector inquiry as part of the Digital Single Market Strategy, the final findings of which were released on May 10, 2017 after the completion of this paper. The Commission has gathered information, in order to understand the functioning of digital markets, and it has analyzed the effects of the most widespread vertical restraints on online distribution applied by companies. This sector inquiry is indicative of the European 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 analyzes the preliminary findings released by the European Commission in the context of the e-commerce sector inquiry and the most relevant decisions delivered by national and European supervisory bodies in relation to vertical restraints on e-commerce up to December 2016. Finally, it provides a general assessment of the topic at hand.

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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 Favored 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. The Internet has fueled new business models and has offered new opportunities for accessing new global markets. It has certainly become an essential distribution channel for companies to reach more customers and facilitate transactions. Overall, e-commerce is forecasted to continue on an upward trend and to remain 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 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. Such considerable disparities among NCAs add uncertainty to the already complicated debate over vertical restraints on e-commerce. In this context, the announcement of the e-commerce sector inquiry indicates the

Commission's desire to provide coherence and legal certainty in order to prevent market fragmentation that hinders achieving the goals of the European Internal Market.

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 analyzing key investigations and decisions, 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 main objectives and interim results of the aforementioned sector inquiry. Moreover, it deals with public enforcement of vertical agreements and the issues of interpreting competition laws in a digital context. Furthermore, the paper discusses frequent restraints on vertical agreements and it analyzes relevant decisions delivered by supervisory bodies at a national and European level. To that purpose, the analysis is divided into restrictions imposed by suppliers and by platforms. In addition, it discusses the use of geo-blocking in e-commerce. And finally, the paper provides a general assessment of the law concerning the topic at hand.

2. The e-commerce sector inquiry

On May 6, 2015, the Commission announced the launch of an inquiry into the electronic-commerce sector¹ as part of the completion of the Single Digital Market Strategy in the European Union. A preliminary report of the results was published in September 2016,² and a final report will be released during the first quarter of 2017.

¹ 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.

² European Commission, Commission Staff Working Document on Preliminary Report on the E-commerce Sector Inquiry SWD(2016) 312 final, September 15, 2016, <http://ec.europa.eu/competition/antitrust/sector_inquiry_preliminary_report_en.pdf> last accessed on December 6, 2016.

The Digital Single Market Strategy, which was unveiled on the same day, is one of the main priorities of the Commission for the next five years.³ This ambitious initiative aims at creating an effective Internal Market by eliminating the barriers that may hinder trade within the EU by promoting innovative digital services, and by encouraging cross-border transactions. It ultimately intends to establish favorable conditions for European companies to embrace the opportunities offered by the digital revolution and to defend their global commercial position.⁴

The Digital Strategy is structured in three main pillars: 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, including the review of copyright, telecommunications, e-privacy and data protection, cybersecurity, standards and interoperability, cloud services, value added tax (VAT), parcel delivery costs, geo-blocking, and consumer protection, and the identification of potential competition concerns affecting European e-commerce markets, the latter being the focus of this paper.⁵

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 competition⁶ could result in territorial

³ European Commission, Press release ‘Antitrust: Commission launches e-commerce sector inquiry’, (European Commission, May 6, 2015), <http://europa.eu/rapid/press-release_IP-15-4921_en.htm> last accessed on December 6, 2016.

⁴ 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.

⁵ 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.

⁶ 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.

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 focusing on payment cards, core retail banking, and business insurances.

By means of the e-commerce sector inquiry, the Commission aims to analyze the e-commerce sector as a whole, to understand the reasoning behind certain widespread business practices and to identify obstacles and barriers set up by companies that hinder competition within the Internal Market. The Commission ultimately intends to determine the main priorities for enforcing competition rules through the EU and to harmonize the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union⁷ (TFEU) to online distribution. Additionally, the Commission is concerned with the analysis of geo-blocking practices in order to determine which of those practices circumvent the rules of EU competition law. In parallel to the sector inquiry, the Commission is pursuing investigations of pay-TV services,⁸ video games, and the distribution of consumer electronics products.⁹

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.¹⁰ This could be partially explained by different

⁷ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

⁸ European Commission, Press Release, 'Antitrust: Commission accepts commitments by Paramount on cross-border pay-TV services' (European Commission, July 26, 2016) <http://europa.eu/rapid/press-release_IP-16-2645_en.htm> last accessed on December 6, 2016.

⁹ European Commission, Press release 'Antitrust: Commission confirms inspections relating to potential restrictions on online sales' (European Commission, December 5, 2013) <http://europa.eu/rapid/press-release_MEMO-13-1106_en.htm> last accessed on December 6, 2016.

¹⁰ 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> last accessed on December 6, 2016. This document reveals that 61% of users

consumer preferences and habits across the EU, as well as by the existing language barriers. Nevertheless, the Commission has also seen indications that companies could be setting up barriers to trade by means of contractual restrictions in order to maintain greater control over the distribution of their products and to obtain protection from competitors located in other MS. An increased resort to vertical restraints may affect the level of competition among companies and lead to the fragmentation of the Internal Market.

The e-commerce sector inquiry has a broader scope than previous Commission' sector inquiries as a wider variety of products are involved. The Commission is currently gathering information on the functioning of the sector and the business practices applied in the goods and services markets 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 different market players, including manufacturers, retailers, wholesalers, marketplaces, and price comparison websites (PCW), among others.

The inquiry into the sector e-commerce may have significant consequences in online distribution in years to come. The Commission's findings could crystallize into future investigations and enforcement actions, and the Commission could possibly assess the need to review the legislative framework on vertical restraints, the Vertical

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.

Block Exemption Regulation (VBER)¹¹ and into the Guidelines on Vertical Restraints (henceforward referred to as the Guidelines),¹² 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 investigation 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.¹³ The new Regulation allows undertakings to invoke the individual exemption of Article 101(3) TFEU directly before NCAs or national courts.

Over the last decade, the Commission's scrutiny into vertical agreements and e-commerce has been light, 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.¹⁴ The Commission's inactivity contrasts with the highly pro-active approach of public enforcement of competition law in digital markets, exemplified by the International Competition Network (ICN), the

¹¹ 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.

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

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

¹⁴ European Commission, *supra* note 9; European Commission, *supra* note 8.

Organization for Economic Co-operation and Development (OECD), and some of the NCAs.¹⁵

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 competition. Likewise, the NCA of the UK, the *Office of Fair Trading* (OFT, and its successor, the *Competition and Markets Authority*, CMA) and the French *Autorité de la Concurrence* (AC) have recognized online and digital markets as one of their highest priorities.¹⁶ This is evidenced by the great number of investigations opened recently. 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 the independent performance of the different NCAs without the Commission's coordination has led to the adoption of divergent, sometimes even opposing, approaches towards vertical restraints across the EU. For that reason, companies, legal advisors, and competition enforcers face extensive uncertainty when assessing the compliance with EU competition law of certain practices or behaviors. Ultimately, this insecurity ultimately results in the fragmentation of the EU into national markets, which obstructs the goals of the European Internal Market.

¹⁵ 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 December 6, 2016. OECD, *Vertical Restraints for Online Sales* (2013), <<http://www.oecd.org/competition/VerticalRestraintsForOnlineSales2013.pdf>> last accessed on December 6, 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.

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

In this respect, the e-commerce sector inquiry could be the first step towards the Commission developing 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 for assessing the functioning of fast and ever-changing markets, like 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 may already be outdated.¹⁷

There is a general consensus that traditional competition rules apply to both offline and online markets, making the creation of ad hoc rules unnecessary.¹⁸ In 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.¹⁹ Given the fact that the competition concerns in both sales channels are essentially similar, there should be a singular competition policy.

It is therefore clear that European competition rules are applicable for online and offline markets, although the interpretation of EU competition rules should be

¹⁷ F. Carloni, S. Megregian and M. Bruneau, *supra* note 15, 643.

¹⁸ 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. Peepkorn, ‘Vertical Restraints in online sales: Comments on Some Recent Developments’ (2016) 7(1) *Journal of European Competition Law & Practice* 10, 12.

¹⁹ 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 December 6, 2016.

adapted to fit 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.²⁰ Such rules include the TFEU, VBER, and the Guidelines, among the most relevant instruments.

The following section deals with the way the MS treat online sale restrictions. To that end, the most recent and relevant cases and investigations issued by the national and European competition authorities and courts are examined. It is important to note that the majority 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, there are the restraints of online sales imposed by suppliers on their distributors. On the other hand, there are the restraints imposed by platforms on traditional suppliers and distributors.²¹

4. Restrictions imposed by suppliers

Restraints are an effective way for manufacturers and retailers to reduce direct competition among competitors, especially for 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 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

²⁰ European Commission, *supra* note 9, para 574.

²¹ J. Hederström and L. Peeperkorn, *supra* note 18, 18.

nature of the product and meet objective needs,²² and if they do not limit distributors' ability to conduct passive online sales,²³ provided that their market shares are below 30%. Otherwise, those restraints are deemed hard-core restrictions on competition, and hence 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,²⁴ the CJEU delivered a preliminary ruling on whether a ban on Internet sales was 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 judgment 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.²⁵

²² Guidelines on Vertical Restraints, 54.

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

²⁴ 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.

²⁵ 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

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 held 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.²⁶ In addition, the clause precluded passive online sales to consumers located outside the physical trading area of the distributor,²⁷ which limited their freedom to shop in other geographic areas as well as to compare prices.

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

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 hard-core restriction within the meaning of Article 4 (b) and (c) VBER. Consequently, a selective distribution agreement containing such restriction could not be excluded under 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

quality and ensure its proper use and, finally, that the criteria laid down do not go beyond what is necessary".

²⁶ *Pierre Fabre* [38].

²⁷ *Pierre Fabre* [54].

²⁸ 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.

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

³⁰ *Pierre Fabre* [44] – [47].

CJEU found that the individual restraints at issue could hypothetically fall under 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.³¹

Despite the fact that CJEU's restrictive approach with regard to absolute prohibitions on online sales is consistent with the literature contained in the Guidelines, the *Pierre Fabre* 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.³²

First, 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%.³³

Second, economists have condemned the decision for not considering 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 anti-competitive.

Third, critics claim that the behavior was treated as a restriction by object. Restrictions by object are always presumed to generate adverse effects since experience has shown 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

³¹ 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 enough 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].

³² F. Carloni, S. Megregian and M. Bruneau, *supra* note 15, 645.

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

was released “lacks of sufficient distance” to conclude that the effects are always negative from a competition perspective.³⁴

Fourth, several scholars have opposed the restrictive approach adopted by the CJEU, warning that it may have a negative influence 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 sales, little justifications can be invoked by suppliers when trying to obtain individual exemption under Article 101(3) TFEU.³⁵

With 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 when overriding mandatory requirements are set by national or European legislation, justified on grounds of consumer health, safety, and public order.³⁶ 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”.³⁷

³⁴ 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, September 22, 2008, <http://ec.europa.eu/competition/sectors/media/lvmh_economic%20analysis.pdf>, para 46.

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

³⁶ L. Vogel, *supra* note 33, 769.

³⁷ 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].

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”.³⁸ 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.³⁹ 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, the OFT of the UK confirmed the *Pierre Fabre* ruling in the Roma and Price cases (discussed in the following section), which considered the online sales of mobility scooters.⁴⁰

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 hard-

³⁸ *Pierre Fabre* [46].

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

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

core restrictions because they restrain the buyer's ability to set prices.⁴¹ 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.⁴² 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.⁴³ Through 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 hard-core restriction of competition when it limits the retailers' geographic trading area, which, in turn, prevents those retailers from reaching a greater number of customers.⁴⁴ 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 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.⁴⁵

⁴¹ Guidelines on Vertical Restraints, 223.

⁴² Guidelines on Vertical Restraints, 226.

⁴³ European Commission, *supra* note 9, paras 541-544.

⁴⁴ Guidelines on Vertical Restraints, 52.

⁴⁵ Guidelines on Vertical Restraints, 64.

FCO cases: Dornbracht, Bosch Siemens, Gardena, and LEGO

The German FCO has dealt with dual pricing in online sales in the *Dornbracht* case. The manufacturer of high-quality sanitary ware Aloys F. Dornbracht GmbH & Co. KG had agreements containing a rebate scheme that favored 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 to the detriment of online sales.⁴⁶ Likewise, in the *Gardena* case, concerning garden products, the German FCO dealt with a case of discrimination of online trading. The company 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 investigation was closed when Gardena agreed to apply the same discounts for all of its retailers.⁴⁷

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.

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

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

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.⁴⁸

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

Similarly, the OFT has dealt with restrictions in the field of price restrictions in the Roma and Pride cases. In 2012, it began 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 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.⁴⁹ Roma claimed that such restrictions were necessary to provide quality customer service due to the special characteristics of its products. However, the measures were found to be a deliberate attempt to maintain a certain level of prices across its distribution network to the detriment of people with reduced mobility.⁵⁰

Subsequently, in March 2014, the OFT found that Pride and some of its retailers had engaged into contractual arrangements and concerted practices which had the object of impairing competition, with respect to certain mobility scooters, by

⁴⁸ *Bundeskartellamt*, Press release 'Bundeskartellamt fines LEGO for vertical resale price maintenance' (*Bundeskartellamt*, January 12, 2016) <http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Press%20mitteilungen/2016/12_01_2016_Lego.html> last accessed on December 6, 2016.

⁴⁹ OFT, *supra* note 40.

⁵⁰ 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, November 18, 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 December 6, 2016.

prohibiting online advertising of prices below a RRP.⁵¹ In practice such RRP, which did not match the real economic value of the products,⁵² 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-compliant suppliers with charging them higher wholesale prices or expelling them from its distribution system.⁵³

The OFT found these pricing restrictions to be hard-core restrictions within the meaning of Article 4(b) of the VBER, and therefore they did fall under the VBER, rendering Article 101(1) TFEU applicable. Roma and Pride were accused of 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 on online sales and pricing restrictions, the companies 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, and thus were exemptible under Article 101(3) TFEU. In the OFT's opinion, the claims put forward by the companies could not prevail because the companies could have implemented less restrictive measures and there was no evidence that the pricing restrictions were suitable for attaining the claimed objectives.

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

⁵² As reflected in the Pride case non-confidential decision, Pride indicated that its RRPs were arbitrary and set high to facilitate discounting. See: Non-confidential Pride decision, OFT, October 30, 2014, 24. <https://assets.publishing.service.gov.uk/media/54522051ed915d1380000007/Pride_Decision_Confidential_Version.pdf> last accessed on December 6, 2016.

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

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 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.⁵⁴ No fines were imposed due to the small size of the companies 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 for online sales of some of their products and for preventing retailer’s ability to offer discounts. Ultra Finishing threatened to charge retailers higher prices, to withdraw their rights to use suppliers’ images, and to cease supplying retailers with product if they did not apply the so-called “recommended” prices.⁵⁵ Foster Refrigerator, which operated a minimum advertised price, threatened retailers with higher prices or refusing to supply Foster-branded products if they advertised below that minimum price.⁵⁶

4.3. Restrictions on advertising or selling on third-party platforms

As a general rule, suppliers may require certain quality standards of their distributors in order to resell their products online, and 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

⁵⁴ M. O’Regan, *supra* note 50.

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

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

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".⁵⁷

The Commission has noted in its preliminary report that bans on sales on marketplaces do not constitute hard-core 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 hard-core restrictions when the suppliers and distributors exceed the market share threshold in Article 3 VBER.⁵⁸ 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 analyzed by the FCO and the CA. Its market structure is characterized for by having a high concentration in the supplier level—in 2011 ASICS, Adidas, and Nike accounted more than 75% of the market—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

⁵⁷ Guidelines on Vertical Restraints, 54.

⁵⁸ European Commission, supra note 9, para 473.

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 on its authorized retailers, consisting of preventing the use of the ASICS brand name and the ban on the use of price-comparison websites, could lead to a restriction of intra-brand competition.⁵⁹ The FCO found that these restrictions could be particularly detrimental to small and medium-sized distributors. For large retailers that could rely on their own online shop, having a presence on online marketplaces like Ebay may be unnecessary. However, for small and medium-sized retailers, a ban on online marketplaces truncates their possibilities to reach end-users.

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

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 were deemed hard-core 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 met.⁶⁰

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 requirement that 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 Adidas is visible.⁶¹

The FCO held that prohibiting approved distributors from selling on online marketplaces was not a necessary 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 of using 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.⁶²

b) France

⁶⁰ *Ibid.*

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

⁶² *Ibid.*

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.⁶³ No fines were imposed due to the fact that Adidas removed the contested clause from its selective distribution agreements.

From both investigations it can be seen that the French and German NCAs do not consider the aim of protecting a brand or luxury image as justifying a restriction on the use of online marketplaces in selective distribution systems. This position has been further upheld by the French NCA in the *Bang & Olufsen* case⁶⁴ and by the German FCO in the *Sennheiser* case,⁶⁵ 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 hard-core 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,⁶⁶ in an attempt to seek more clarity as regards whether

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

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

⁶⁵ *Bundeskartellamt*, Case Summary 'Sennheiser hebt für Händler im selektiven Vertriebssystem das Verbot des Verkaufs über "Amazon Marketplace" auf' (*Bundeskartellamt*, October 24, 2013) <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 December 6, 2016.

⁶⁶ 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 December 6, 2016.

in selective distribution systems containing online platforms bans are compatible with European law.

The dispute at issue involved 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, as the latter had sold Coty's products through Amazon Germany. The lawsuit was dismissed on the basis that Coty's terms and conditions were unenforceable because they contravened 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 limit the suppliers' legitimate reasons to restrict online sales within selective distribution systems. Presumably, the CJEU may clarify certain central and unresolved aspects stemming from the *Pierre Fabre* 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.⁶⁷

⁶⁷ M. Dietrich, M. Nuys, and M. Zedtwitz von Arnim, 'German court asks ECJ to rule on legality of online sales bans', (Lexology, May 3, 2016) <<http://www.lexology.com/library/detail.aspx?g=810a9237-4922-4b7f-9caa-7e69e9128182>> last accessed on December 6, 2016.

4.4. Restrictions on the use of price comparison websites

Price Comparison Websites (PCW) are one type of online platform that facilitates 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.⁶⁸

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.⁶⁹ Despite the fact that PCWs may contribute to increased sales in the short-term due 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.⁷⁰

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

⁶⁸ European Commission, *supra* note 9, para 482.

⁶⁹ *Ibid.*, para. 495.

⁷⁰ *Ibid.*, para. 496.

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 should be highlighted: restrictions to advertise on PCWs, restrictions to provide price or product information to PCWs, restrictions on using PCWs to target customers located in other territories, restrictions on using 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.⁷¹

These restrictions could be generally understood as restrictions on advertising 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 limits retailers' ability to promote suppliers' products on certain websites, but they are not prevented from advertising on any other website other than PCWs. In this sense, the prohibition to advertise on PCWs should not be considered a hard-core restriction under Article 4(b) and (c) of the VBER. On the other hand, it can be argued that a prohibition on advertising on PCWs entails a restriction on the territory or the consumers to which distributors can sell manufacturers' products. In this case, the prohibition on advertising on PCWs would not be deemed as a necessary qualitative criterion to

⁷¹ European Commission, *supra* note 9, paras 477-488.

ensuring the quality of the products; and on the contrary, it would amount to a hard-core restriction under Article 4(b) and (c) of the VBER.⁷²

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.⁷³

4.5. Restrictions on online advertising other than price

The previous section dealt with some of the most frequent vertical restrictions. However, many other restrictions can occur, and they may not be limited to price. On the contrary, as e-commerce and digital market evolve, new restrictions may arise.⁷⁴

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 the trademark of certain suppliers or manufacturers may be limited. Due to trademark rights, retailers may be prevented from using a suppliers' trademark as a keyword to advertise their 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 from achieving a privileged position on search engines by using manufacturers' trademarks as keywords.

Josefine Hederström and Luc Peeperkorn offer some meaningful insight into this topic. Following the line of reasoning in *Pierre Fabre*, they maintain that where

⁷² This analysis is expressed by J. Hederström and L. Peeperkorn, *supra* note 18, 20.

⁷³ 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' (CMA, September 29, 2016) <<https://www.gov.uk/government/news/cma-launches-study-into-digital-comparison-tools>> last accessed on December 6, 2016.

⁷⁴ European Commission, *supra* note 9, para 179.

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 analyzed other circumstances under which these kinds of restrictions are imposed. Where the prohibition relates to the distributor's own website, the result could impair the effectiveness thereof, and, consequently, amount to a restriction on online sales. Similarly, 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.⁷⁵

In conclusion, the authors argue that in either case a prohibition on the online use of the supplier's logo or commercial brand online should be deemed as a hard-core 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.

Conversely, the preliminary results of the Commission's sector inquiry maintain a less pragmatic approach than the one mentioned above. Despite the Commission's holding 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.⁷⁶ This implies that restrictions on the use of manufacturers' trademarks and commercial names should not be considered hard-core restrictions of competition, and that such restrictions may generate pro-competitive effects.

⁷⁵ J. Hederström and L. Peeperkorn, *supra* note 18, 20.

⁷⁶ European Commission, *supra* note 9, para 181.

5. Restrictions imposed by platforms

Online platforms have radically changed the digital economy. The use of online platforms has grown steadily and this 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 seeking to reach potential consumers. This explains the coining of the term of "platformization"⁷⁷ of the markets. Such platforms are particularly important for small and medium-sized retailers that lack the resources to create their own online shop because these platforms offer 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 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.⁷⁸

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

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

⁷⁸ Vertical Guidelines, 14 – 15.

agreements would inevitably mean that those agreements would be exempted from the application of Article 101 TFEU.⁷⁹ 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.⁸⁰

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

For retail, the use of retail most favored nation clauses, or MFN clauses (often referred to as most favored 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 favorable than the conditions granted to competing distributors.⁸³ As a result, that distributor shall be extended any better condition offered to competing distributors. In contrast, price parity clauses are commitments in which suppliers agree not to offer the products available for sale on a platform at a lower prices on any other sales channel.⁸⁴ Price

⁷⁹ L. Kjølbj, A. Aresu and S. Stephanou, 469 – 470.

⁸⁰ J. Hederström and L. Peeperkorn, *supra* note 18, 17.

⁸¹ 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.

⁸² 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.

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

⁸⁴ L. Kjølbj, A. Aresu and S. Stephanou, *supra* note 79, 470.

parity clauses are not to be confused with “best price guarantees,” whereby a retailer guarantees to match the best price offered by its competitors to end-users.⁸⁵

There are two types of MFN clauses: the so called “narrow MFN” clauses, whereby the supplier agrees not to grant less favorable 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 favorable 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 protect the investment the platform owner has undertaken from free-riding.⁸⁶ 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.⁸⁷ The assessment

⁸⁵ 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.kramerlevin.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 December 6, 2016.

⁸⁶ 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.

⁸⁷ 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%98Fair%E2%80%99-Prices-Be-Unfair_-A-Review-of-Price-Relationship-Agreements.pdf> Executive Summary, 0.24, 9, last accessed on December 6, 2016.

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.⁸⁸

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.⁸⁹ Consequently, MFN clauses require a case-by-case analysis.

Nonetheless, if openly employed as a means of performing an anti-competitive practice, such as facilitating collusion or facilitating RPM,⁹⁰ MFN clauses amount to object restrictions of competition and will be deemed hard-core restrictions pursuant to Article 4(a) of the VBER.⁹¹ 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 are able to demonstrate that the conditions of Article 101(3) TFEU are met, meaning that the positive effects outweigh the negative effects stemming from the agreement, which is difficult to prove, the agreement will be null and void.

⁸⁸ Ibid, 0.24, 9.

⁸⁹ 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 December, 6, 2016;

A. Ezrahi, '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 December 6, 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> last accessed on December 6, 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.

⁹⁰ Guidelines on Vertical Restraints, 48.

⁹¹ N. Lenoir, M. Plankensteiner and E. Créquer, *supra* note 85, 4.

MFN and price parity clauses may generate efficiencies

First, 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.⁹² MFN clauses provide the guarantee that, in this case, the platforms will be able to recoup the costs incurred in the development of creating or improving the platform.⁹³

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.⁹⁴ MFN clauses ensure that sellers cannot offer their products or services on other platforms or channels at lower prices or worse conditions than the ones offered on the platform.

Second, they can mitigate the so called “hold-up problem”.⁹⁵ 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

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

⁹³ 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> last accessed on December 6, 2016.

⁹⁴ 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 December 6, 2016.

⁹⁵ 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 costs and might also lead to underinvestment.

start selling its products to a competing buyer at a lower price.⁹⁶ The MFN clause might allow the buyer to recoup sunk costs, incentivizing future investments.⁹⁷

Third, MFN clauses may reduce transaction and negotiation costs. Consumers can obtain the best price and the most favorable conditions from a seller without carrying out a far-reaching research.⁹⁸ At the same time, the customer is automatically protected from price increases.⁹⁹ 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.¹⁰⁰

Fourth, MFN clauses may reduce contractual negotiation delays by discouraging the parties to the agreement from delaying the negotiations until more favorable conditions are met.¹⁰¹ 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 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

First, the inclusion of MFN clauses may raise barriers to entry and foreclosure the part of the market where the platform operates. These clauses reduce the ability of small players and potential competitors to implement low-price strategies in order to attract buyers and sellers, which in turn discourages them from entering the market.¹⁰²

⁹⁶ 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> last accessed December 6, 2016.

⁹⁷ N. Lenoir, M. Plankensteiner and E. Créquer, *supra* note 85, 5.

⁹⁸ J. B. Baker and J. A. Chevalier, *supra* note 96, 21.

⁹⁹ J. P. van der Veer, *supra* note 89, 502.

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

¹⁰¹ J. B. Baker and J. A. Chevalier, *supra* note 96, 21.

¹⁰² J. P. van der Veer, *supra* note 89, 504.

Second, 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.¹⁰³

Third, 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.¹⁰⁴ Therefore, the market in which the platforms compete would settle on a less competitive equilibrium.¹⁰⁵

Fourth, a widespread 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.¹⁰⁶ 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.¹⁰⁷

Fifth, 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 that benefits from an MFN clause maintains a dominant position in the market, it would not only profit from the terms and conditions it has managed to

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

¹⁰⁴ N. Lenoir, M. Plankensteiner and E. Créquer, *supra* note 85, 4.

¹⁰⁵ P. Buccirosi, *supra* note 94, 24.

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

¹⁰⁷ As Apple did in the context of the e-books case.

negotiate, but also from any better terms that competitors would obtain.¹⁰⁸ This ultimately may contribute to strengthening 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 the attention of some NCAs. National case law settled by these NCAs is quite abundant. Nevertheless, enormous disparities in the approaches and conclusions reached by the NCAs exist. The Commission's recent activity has evidenced the increasing attention paid 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, which are examined below.

Hotel online booking investigations

The hotel online booking sector has attracted significant interest throughout the EU and in the U.S. The analysis is focused on the investigations carried out in the EU; thus, the U.S. 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

¹⁰⁸ I. Vandenborre 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> last accessed on December 6, 2016.

consumers to easily search, compare, read other users' reviews, and book the OTAs' services.

a) United Kingdom

After pursuing 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 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".¹⁰⁹ The OFT held that such discounting restrictions constituted a form of RPM¹¹⁰ 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, to allow OTAs to offer discounts of room rates, but these discounts could be exclusively offered 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.¹¹¹

In September 2014, the British Competition Appeal Tribunal upheld the appeal presented by Skyscanner, a PCW, against the OFT's decision of January 2014.

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

¹¹⁰ See CMA, Case Closure Summary 'Hotel Online Booking Investigation' (CMA, September 16, 2015) <https://assets.publishing.service.gov.uk/media/55f8404aed915d14f1000014/Hotel_online_booking_-_case_closure_summary.pdf> last accessed on December 6, 2016.

¹¹¹ *Ibid.*

Skyscanner claimed that the OFT had failed to assess the impact of the decision on inter-brand competition, and it questioned the accepted commitments.¹¹² 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 judgment, in September 2015, the CMA closed its investigations alleging "administrative priority grounds".¹¹³

MFN clauses were not the target of the investigation in itself. Nonetheless, the OFT analyzed the impact of retail rate MFN clauses on the OTAs' ability to offer discounts, whereby an OTA precludes hotels from offering room prices on their own websites that are lower than the prices advertised on the OTA website, 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 to amend, remove, and forebear from imposing any new 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,¹¹⁴ should be taken as a sign of a new attitude towards RPM, or whether it was specific to the facts of the case.¹¹⁵

b) Germany

¹¹² 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> last accessed on December 6, 2016.

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

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

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

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. In December 2013, the FCO prohibited HRS from enforcing MFN clauses¹¹⁶ 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 with 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.¹¹⁷ 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 since MFN clauses prevent them from offering hotel rooms at lower prices. Moreover, the FCO did not see any benefits for consumers.

In January 2015, the FCO's decision against HRS was upheld on appeal by the Düsseldorf Higher Regional Court.¹¹⁸ In December 2015, the FCO decided that not

¹¹⁶ 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 favorable booking and cancellation conditions available.
¹¹⁷ *Bundeskartellamt*, Press release 'Online hotel portal HRS's 'best price' clause violates competition law – Proceedings also initiated against other hotel portals' (*Bundeskartellamt*, December 20, 2013) <http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/20_12_2013_HRS.html> last accessed on December 6, 2016.

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

only Booking's MFN clause should be removed from its website by January 31, 2016, but also that such clause could not be replaced with a "narrow MFN" clause.¹¹⁹

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 found 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.¹²⁰ Neither can 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,¹²¹ 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.¹²² The AGCM concluded that the use of such clauses could lead

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

¹²⁰ 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.

¹²¹ 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, December 15, 2014) <http://europa.eu/rapid/press-release_IP-14-2661_en.htm> last accessed on December 6, 2016.

¹²² Press Release of the Autorità Garante della Concorrenza e del mercato (May 7, 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 December 6, 2016.

to increased fees demanded from hotels and, thereupon, hotels would pass on the resulting price increases to 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, which consisted of replacing the “wide MFN” clause for a “narrow MFN”.¹²³ 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 the fact that wide MFN clauses are to be considered anti-competitive, narrow MFN clauses may generate positive effects on competition.¹²⁴

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.¹²⁵ In order to understand the competition concerns implicated, 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, while the retailers decide retail prices. Alternatively, there is a less popular channel known as the agency model, whereby publishers set retail prices and retailers receive a percentage of the price.

¹²³ Other NCAs such as the Irish, Danish, and Austrian have also accepted Booking’s commitments.

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

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

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 publishers¹²⁶ entered into an agreement with Apple under which they would set the retail prices and Apple would keep a 30% margin on sold books.

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 caused them to 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.¹²⁷ 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 of aligning the publishers' incentives to compel Amazon to change its business model from a

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

¹²⁷ 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> last accessed on December 6, 2016, para 10.

wholesale model to an agency model. Nevertheless, in December 2012, the Commission's investigation was closed after four of the publishers and Apple offered commitments¹²⁸ that the publishers would terminate their agency agreements and abandon the use of MFN clauses in their agreements for a period of five years.¹²⁹ The US Department of Justice and some US states also brought a civil action concerning the same practices.¹³⁰

The Amazon Marketplace investigation

In addition to being a leading online retailer, 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.

In 2010, the contracts Amazon signed with retailers contained an MFN clause under which retailers agreed 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.

¹²⁸ *Ibid.*, para 128.

¹²⁹ 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 December 6, 2016, paras 4, 16 – 23.

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

The proceedings were closed in November 2013, when Amazon agreed to refrain from imposing MFN clauses and its price parity policy to its retailers in the UK and across the European Union.¹³¹

b) Germany

In February 2013, the FCO opened proceedings against Amazon Germany in relation to the MFN clause applied to retailers offering their products on the Amazon Marketplace. The FCO found that the clause could potentially constitute a violation of Section 1 of the *Gesetz gegen Wettbewerbsbeschränkungen*¹³² (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 agreed to no longer include the contested clauses across Europe and to inform its retailers in clear terms that its conditions and price parity strategy had changed.¹³³

PCWs: private motor insurance investigation

In September 2014, the United Kingdom's CMA published a report on the private motor insurance market.¹³⁴ The investigation was focused on whether MFNs

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

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

¹³³ *Bundeskartellamt*, Press release 'Amazon abandons price parity clauses for good' (*Bundeskartellamt*, November 26, 2013) <http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Meldungen%20News%20Karussell/26_11_2013_Amazon.html> last accessed on December 6, 2016.

¹³⁴ See CMA, Final Report on the 'Private Motor Insurance Market' (CMA, September 24, 2016) <https://assets.publishing.service.gov.uk/media/5421c2ade5274a131400001/Final_report.pdf> last accessed on December 6, 2016.

clauses contained in agreements between private motor insurance providers and car insurance PCWs are likely to generate anti-competitive concerns.¹³⁵

The assessment of the CMA distinguished between two types of MFN clauses in favor of PCWs: firstly, the “narrow MFN” clauses, in 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 constrain the provider’s ability to set prices against the PCW. The CMA weighed the negative and positive effects brought about by these clauses and concluded that in many cases they may generate positive effects on competition. In particular, the CMA found that MFN clauses could be used as an instrumental tool for PCWs to build consumer trust and 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 benefits 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 concluded that wide MFN clauses were likely to harm competition between PCWs in two ways: by increasing barriers to entry, commission

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

fees and policy premiums, and by reducing innovation.¹³⁶ This, in turn, increases prices for private motor insurances to the injury of consumers. In March 2015, the CMA banned 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 to the ones offered to its competitors.¹³⁷

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 to the detriment of consumers. Although the opening of these proceedings does not imply that EU competition has been violated, in case antitrust concerns were confirmed, such behavior 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 hard-core restrictions of competition pursuant to the VBER and, therefore, fall

¹³⁶ Press Release of the CMA of June 11, 2015, 8.34.

¹³⁷ Press Release of the European Commission of June 11, 2015, <http://europa.eu/rapid/press-release_IP-15-5166_en.htm> last accessed on December 6, 2016.

under the scope of the prohibition laid down in Article 101 (1) TFEU. However, there is currently no harmony with regard to narrow MFN clauses.

On the one hand, Germany and France have concluded that narrow MFN clauses should also be treated as hard-core restrictions of competition. This approach, which assimilates the effects of broad MFN clauses to RPM, limits suppliers' freedom more than the Guidelines.¹³⁸ On the other hand, France, Sweden, and Italy—and also Ireland, 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, including Lars Kjølbbye, Alessio Aresu, and Sophia Stephanou, find the restrictive German approach to the hotel online booking case—prohibiting every MFN clause without taking into consideration any market effects—to be prejudicial to businesses. Relying on the CJEU's *Groupement des Cartes Bancaires* case,¹³⁹ they maintain that the assessment of these clauses cannot be dissociated from the economic, legal, and factual contexts, since 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 be evidence that it does not intend to qualify MFN and price parity clauses as restrictions of competition by object.¹⁴⁰

¹³⁸ 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 hard-core restriction. S. Heinz, 'The FCO prohibits booking.com's "narrow" best-price clause', (Kluwer Competition Law Blog, January 20, 2016) <<http://kluwercompetitionlawblog.com/2016/01/20/the-fco-prohibits-booking-coms-narrow-best-price-clause>> last accessed on December 6, 2016.

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

¹⁴⁰ European Commission, *supra* note 121.

6. Geo-blocking restrictions

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

Geo-blocking should be distinguished from geo-filtering, which is the commercial practice 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 offer different terms and conditions to those consumers.¹⁴³ 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.¹⁴⁴

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.¹⁴⁵ These decisions may give rise to competition concerns in respect to Article 102 TFEU, but they cannot be challenged under Article 101 TFEU.

¹⁴¹ L. Kjølbye, A. Aresu and S. Stephanou, *supra* note 79, 466.

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

¹⁴³ 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, March 18, 2016 [33].

¹⁴⁴ *Ibid.* [137]-[140].

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

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 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 to eradicate 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.¹⁴⁶ 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.¹⁴⁷ In this respect, the e-commerce sector inquiry is analyzing geo-blocking restrictions to understand their use and prevalence in the EU.

An issues paper published in March 2015 presented the initial findings of the e-commerce sector inquiry and showed that geo-blocking is quite widespread. Although the use of geo-blocking remains moderate in online sales of tangible goods—where it is mostly used for clothing and consumer electronics— it is a common practice for the online distribution of digital content—such as in audio-visual or musical works.¹⁴⁸ Thirty-eight percent of consumer goods retailers related that they applied measures to geo-block access to users from other MS,¹⁴⁹ whereas roughly 68% of the digital-service providers admitted doing so. Of the digital-service providers, 60% declared being contractually bound to geo-block by rightsholders.¹⁵⁰

6.2 Geo-blocking in the field of copyrighted works

This outstanding difference can be explained by the different IP protections that tangible goods and digital content are granted. Copyrighted works lack a unified legal

¹⁴⁶ 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> last accessed on December 6, 2016.

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

¹⁴⁸ 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.

¹⁴⁹ European Commission, *supra* note 9, 29.

¹⁵⁰ *Ibid.*, 11.

framework within the EU.¹⁵¹ 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.¹⁵²

In this discussion, a rough outline of the principle of exhaustion is needed. This principle is laid down in Article 4(2) of the InfoSoc Directive¹⁵³ and Article 4(2) of the Software Directive¹⁵⁴. It clarifies that as long as a work or a copy thereof is put on the market within the EU by the IP rightsholder or with its consent, the rightsholder can no longer claim control over the work on the grounds of IP protection.¹⁵⁵ 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 medium. Therefore, services and online services are not subject to exhaustion,¹⁵⁶ which is confirmed by the issues paper. The rightsholder of media content has the right to make the content available and to communicate it to the public instead. For example, copies of digital content may be made available to the public by

¹⁵¹ Although there is a certain level of harmonization via EU Directives, (such as the Directive 91/250/EEC of May 14, 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 December 12, 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.

¹⁵² European Commission, *supra* note 143, para 121.

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

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

¹⁵⁵ L. Kjølbye, A. Aresu and S. Stephanou, *supra* note 79, 476.

¹⁵⁶ See recitals 28 and 29 of InfoSoc Directive.

means of content streaming or downloading.¹⁵⁷ Despite the Commission's refusal to geo-block, such practice may be justified in order to avoid IP infringement,¹⁵⁸ especially in relation to content distribution.

Frequently, 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.¹⁵⁹ 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.¹⁶⁰

With regard to the foregoing, under EU copyright law the rightsholder 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.¹⁶¹ Therefore, the use of exclusive licenses would not be 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.¹⁶² For that reason, some authors opine that the Commission may reconsider the extent to which inter-state trade can be limited,¹⁶³ especially after the *Murphy* case, discussed below.

¹⁵⁷ European Commission, *supra* note 143, paras 120-123.

¹⁵⁸ B. Batchelor, *supra* note 142.

¹⁵⁹ European Commission, *supra* note 143, paras 137-140, Figure 32.

¹⁶⁰ B. Batchelor, *supra* note 142.

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

¹⁶² 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 December 6, 2016.

¹⁶³ L. Kjølbbye, A. Aresu and S. Stephanou, *supra* note 79, 477.

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 *Murphy*.¹⁶⁴ 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 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, 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 residing in Greece. The prices of the imported devices and the subscription fee in Greece were lower than those charged by the holder of the

¹⁶⁴ 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.

transmission rights in the UK. The High Court of Justice of England and Wales referred the matter to the CJEU for preliminary ruling.

First, 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,¹⁶⁵ unless it is justified on grounds of overriding reasons of public interest.¹⁶⁶ 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.¹⁶⁷ 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.¹⁶⁸ 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.

Second, the CJEU confirmed the doctrine set in *Coditel II* and reiterated that exclusive license agreements concluded between an IP rightsholder 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 distort competition. In those cases, the agreement would be subject to the prohibition of Article 101(1) TFEU.¹⁶⁹ The Court clarified in *Murphy* that contractual clauses requiring broadcasters to prevent its satellite decoding devices from being used outside their licensed territory must be

¹⁶⁵ *Murphy*, para 125 and *Coditel I* [15]-[17].

¹⁶⁶ *Ibid.* [9].

¹⁶⁷ *Ibid.* [96]-[99].

¹⁶⁸ *Ibid.* [122]-[124].

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

regarded as agreements which object is to restrict competition within the meaning of Article 101(1) TFEU.¹⁷⁰

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.¹⁷¹ 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 restrictions under Article 101(1) TFEU.¹⁷²

Currently, 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 to the concept of the “portability” of subscriptions across the EU.¹⁷³ 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.¹⁷⁴ Moreover, the *Murphy* case seems to be upheld by the Commission in the pay-TV investigation.

Pay-TV case

After the *Murphy* case, in January 2014, the Commission opened an investigation against six major Hollywood film studios¹⁷⁵ and Sky, a broadcaster from the UK, for certain clauses contained in their license agreements. The film studios

¹⁷⁰ *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].

¹⁷¹ *Murphy* [134]-[146].

¹⁷² *Murphy* [141]-[144].

¹⁷³ L. Kjølbye, A. Aresu and S. Stephanou, *supra* note 79, 478.

¹⁷⁴ European Parliament, *supra* note 162.

¹⁷⁵ 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.

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.¹⁷⁶

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.¹⁷⁷ 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.¹⁷⁸ 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

¹⁷⁶ 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 agreed to withdraw their MFN clauses.

¹⁷⁷ 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, July 23, 2015) <http://europa.eu/rapid/press-release_IP-15-5432_en.htm> last accessed on December 6, 2016.

¹⁷⁸ European Commission, *supra* note 8.

customers located outside of the EEA. The commitments will apply for a five-year period and they will concern both online services and satellite online services. The antitrust investigation continues in the case of the other studios and Sky UK.¹⁷⁹

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 rules¹⁸⁰ 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.¹⁸¹ 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 is inclined to conclude that contractual restrictions requiring geo-blocking should be prohibited in every case, even in relation to content distribution, where in principle the use of geo-blocking could be reasonably justified.

¹⁷⁹ *Ibid.*

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

¹⁸¹ 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, December 9, 2015) <http://europa.eu/rapid/press-release_IP-15-6261_en.htm> last accessed on December 6, 2016.

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 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 an incentive to respond to unsolicited requests from 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.¹⁸²

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.¹⁸³ Therefore, geo-blocking restrictions should be assessed on more economic-based discussions on a case-by-case basis.

7. Conclusions

The cases analyzed 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

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

¹⁸³ 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.

reveals the existing tensions in the assessment of this controversial area. 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 think that online sales are given excessive protection and that this threatens the functioning of distribution systems. 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 sales. What is more, they maintain that such restrictions amount to hard-core restrictions of competition.¹⁸⁴

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.¹⁸⁵ In terms of deterring anticompetitive practices and providing legal certainty, categorizing practices as restrictions by object may have positive effects. Likewise, it could be favorable on a procedural economy basis, as it saves 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.

¹⁸⁴ J. Hederström and L. Peepkorn, *supra* note 18, 11.

¹⁸⁵ 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.

Likewise, some NCAs favor distributors' commercial freedom over the freedom of manufacturers and suppliers to arrange their distribution systems by considering any online vertical restraint as a hard-core restriction of competition. E-commerce is in 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.¹⁸⁶

A recent report commanded to Oxera and Accent, two leading European consultancies, 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 comes at the expense of adverse effects on quality, service, and availability in the long-term.¹⁸⁷ Furthermore, this report suggests that removing vertical restrictions “bring about lower retail service standards and a poorer quality experience of the underlying product” or service, which, in turn, could be harmful for manufacturers, retailers, and consumers.¹⁸⁸ Additionally, it noted that some businesses may be applying restrictions to reduce competition without any positive effect on consumers.¹⁸⁹ 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

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

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

¹⁸⁸ *Ibid.*, 2.

¹⁸⁹ *Ibid.*, 3.

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 expansive 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 hard-core 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 curbed, which would be to the detriment of consumers. For the sake of business activity, the concept of hard-core 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 unfavorable investment climate in the EU. Companies cannot rely on unified criteria to comply with competition rules and are forced to adapt their activity and business models to every MS where they intend to operate, which is highly inefficient. This, in effect, acts to the detriment of companies, legal advisors, and, ultimately, consumers.

Despite not offering many conclusive answers to the most-debated topics concerning vertical restraints on e-commerce and competition law, the Commission's 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, will 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 analyze 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 behavior which intends to impair or distort competition in traditional and digital markets. This requires coherence, flexibility, and adaptability to changes.¹⁹⁰ Therefore, a strong cooperation among the European Competition Network (ECN) members is necessary to ensure fair and robust competition.

¹⁹⁰ 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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