Vertical Restraints in On-line Sales: Comments on Some Recent Developments

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I. Introduction

Vertical agreements are agreements for the sale and purchase of goods or services entered into between undertakings operating at different levels of the production or distribution chain. *Vertical restraints* are restrictions of competition in a vertical agreement (such as non-compete and single branding obligations). The Vertical Agreements Block Exemption Regulation[1] ('the VABER') provides a safe harbour for most vertical agreements, to the extent that such agreements contain vertical restraints. The VABER provides that the prohibition in Article 101 of the Treaty on the Functioning of the European Union ('TFEU') does not apply to vertical agreements between undertakings with market shares not exceeding 30 per cent. The Commission considered it unlikely that net negative effects result for the consumer if both parties' market shares are below this level. However, if a vertical agreement contains any of the so-called hardcore restrictions listed in the VABER, the entire agreement ceases to benefit from the VABER and Article 101 TFEU applies directly to the agreement. The hardcore list contains restrictions that, by their very nature, are generally likely to produce (net) negative effects on the market, irrespective of the product or sector concerned.[2] The most important examples of hardcore restrictions are resale price maintenance ('RPM') and restrictions on the territory into which or the customers to whom a distributor may sell. The Guidelines on Vertical Restraints[3] adopted in 2010 ('the Guidelines') provide explanations and examples of these hardcore restrictions, including as regards on-line sales restrictions.

In the following sections, this article assesses whether certain specific characteristics of on-line sales create particular challenges for the assessment of vertical restraints. Thereafter, the article looks at certain practices used in on-line vertical relationships and asks whether some of these should be considered hardcore restrictions. But first, the article provides an outline of the legal framework applicable to vertical restraints in the on-line world and describes certain recent developments in the policy and enforcement activity of European competition authorities. It should be noted that this article focusses on the general legal classification of on-line restrictions and does not deal with the assessment of such restrictions in individual cases nor with the economic aspects or efficiency arguments, which are important for a complete assessment on substance.

Key Points

- This article provides an outline of the legal framework applicable to vertical restraints in the on-line world and describes certain recent developments in the policy and enforcement activity of European competition authorities as regards on-line vertical restraints.
- Subsequently, it asks whether certain specific characteristics of on-line sales create particular challenges for the assessment of vertical restraints and looks at certain practices used in on-line vertical relationships.
- The main question is whether some of these practices should be considered hardcore restrictions.
- The article focusses on the general legal classification of on-line restrictions and does not deal with the assessment of such restrictions in individual cases nor with the economic aspects or efficiency arguments, which are important for a complete assessment on substance.

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1 Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23 April 2010, p. 1.

2 Guidelines on Vertical Restraints, OJ C 130, 19 May 2010, p. 1, in particular paragraph 47.

3 Guidelines on Vertical Restraints, OJ C 130, 19 May 2010, p. 1.

II. Legal framework applicable to on-line vertical restraints and recent policy and enforcement activity by competition authorities

A. Provisions of the VABER and the Guidelines relating to restrictions of on-line sales

Article 4 of the VABER contains a list of hardcore restrictions, in particular restraints on the buyer's ability to determine its sale price ('RPM') and certain other types of (re)sale restrictions. The Guidelines expand on this list with guidance and examples. This subsection focusses on hardcore restrictions and the rationale underlying the provisions of the VABER and the Guidelines relating to hardcore restrictions, as applied to on-line sales.

The fact that a restraint is classified as a hardcore restriction is a strong indication of illegality, but it does not mean that the practice automatically infringes Article 101 TFEU. The categorisation as hardcore is just a first—but important—step in the assessment. If a vertical agreement contains one or more hardcore restriction(s), the entire agreement ceases to benefit from the block exemption and Article 101 TFEU applies directly to the entire agreement, even if the parties' market shares do not exceed 30 per cent.

More importantly, restrictions that are classified as hardcore by the VABER will generally be found to be 'by object' restrictions in an individual assessment under Article 101 TFEU.[4] By object restrictions are restrictions that, in the light of the objectives pursued by the Union competition rules, are so likely to have negative effects on competition, in particular on the price, quantity, or quality of goods or services, that it is unnecessary to demonstrate any actual or likely anticompetitive effects on the market.[5]

Once a particular (type of) restriction is classified as a by object restriction, there are a number of consequences.[6] Most importantly, it is presumed (i) that the agreement containing a by object restriction will have negative effects and (ii) that it is unlikely that there are any (net) positive effects. In practice, this means that the agreement falls within Article 101(1) TFEU without the competition authority having to show anticompetitive effects. Instead of the competition authority first having to show that the agreement has actual or likely negative effects, the burden is now on the parties to the agreement to show, under Article 101(3) TFEU, that the agreement will have, or has had, actual or likely positive effects for consumers and that the restriction is/was indispensable to achieve these effects. Only if the undertakings do show such positive effects, is the authority required to effectively assess the likely negative effects and make an ultimate assessment of whether the conditions of Article 101(3) TFEU are fulfilled. As a result, agreements containing a by object restriction are almost always null and void and, if found, are, as a rule, prohibited, with a high likelihood that the authority will impose a fine.

In recent years, there has been debate about whether the VABER and the Guidelines adequately cover on-line sales. In particular, there has been discussion about the extent to which suppliers may restrict on-line sales within their (selective) distribution systems and whether such restrictions should be classified as hardcore. On the one hand, some stakeholders argue[7] that the Commission's rules are excessively protective of on-line sales and that they jeopardise the equilibrium and correct functioning of distribution networks. This position tends to defend the interest and alleged efficiencies of selective distribution systems. Others (seem to) argue[8] that no restrictions on on-line sales should be permitted and that all such restrictions should be classified as hardcore.

This debate is not novel. The classification of restrictions of on-line sales was discussed already at the time of adoption of the 2010 VABER and the Guidelines and, in somewhat less detail, also when the 1999 VABER and the 2000 Guidelines were adopted. Some stakeholders, in particular some smaller distributors and on-line-only distributors and on-line platforms tended to argue in the run-up to the 2010 adoption that restrictions of on-line sales should not be allowed, as the Internet is now an essential means to reach customers; it reduces costs, enhances competition, and facilitates cross-border trade. On the other hand, manufacturers in particular argued that it is important that they should be allowed, within

4 See Commission Staff Working Document—Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD(2014) 198 final, revised version of 3 June 2015, section 1, p. 5, found at <http://ec.europa.eu/competition/antitrust/legislation/deminimis.html>. On the relationship between by object and hardcore restrictions, see also Luc Peeperkorn, Defining 'by object' restrictions, Concurrences No. 3, September 2015, section V.

5 Case C-67/13 P *Groupement des Cartes Bancaires v Commission*, paragraph 51; Case C-286/13 P *Dole v Commission*, paragraph 115. See also Commission Staff Working Document—Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD(2014) 198 final, revised version of 3 June 2015, section 1.

6 The Guidelines, in particular paragraph 47. See also Commission Staff Working Document, n 5. See also Luc Peeperkorn, n 4, section III.

7 See, for instance, Louis Vogel, 'The Recent Application of European Competition Law to Distribution Agreements: A Return to Formalism?' (2015) 6:6: 454–461 Journal of European Competition Law and Practice. See also Joseph Vogel, 'Les restrictions verticales dans la vente en ligne', found at <http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Reden/Joseph%20Vogel%20-%20Les%20restrictions%20verticales%20dans%20la%20vente%20en%20ligne.pdf?__blob=publicationFile&v=2>.

8 See, for instance, the association Bundesverband Onlinehandel, found at <http://www.bvoh.de/>.

their (selective) distribution systems, to set rules for the use of the Internet. They emphasised that competition can take place on parameters other than price, such as after-sales services, quality, and brand. Unrestricted on-line sales may increase the risk of counterfeiting and free-riding on certain distributors' sales efforts and may dampen suppliers' incentives to innovate, invest, and increase productivity, which could harm the EU's competitiveness.[9]

The Commission assessed and evaluated both sets of arguments and drew conclusions with the aim to protect competition and consumers. On the one hand, it made clear in the Guidelines that on-line sales are very important to reach (certain) customers; '*[t]he [I]nternet is a powerful tool to reach a greater number and variety of customers than by more traditional sales methods*'.[10] Therefore, the Commission found that certain—but not all—restrictions on the use of the Internet should be considered hardcore (re)sale restrictions under Article 4(b) and/or (c) of the VABER.[11] On the other hand, the Commission recognised the potential problems of free-riding and the potential of (most) vertical restraints to help achieve efficiencies in the interest of consumers. Lastly, the VABER and the Guidelines are based on the principle that the same rules should apply, irrespective of whether sales take place offline or on-line, not least because many transactions are in practice a mix of on-line and offline sales and purchase activities. This means that to the extent that suppliers are allowed under the VABER and the Guidelines to give instructions to their distributors on how their products are to be sold offline, the same approach should apply for on-line sales. For instance, in the VABER, the legislator decided to exempt selective distribution systems. Such systems allow a supplier to choose its distributors on the basis of specified criteria and to prohibit the authorised distributors from selling to unauthorised distributors, no matter whether it concerns offline or on-line distribution (Article 1.1(e) in conjunction with Article 2 of the VABER). The Guidelines explain that the VABER exempts selective distribution regardless of the nature of the product concerned and regardless of the nature of the selection criteria.[12]

As regards the hardcore (re)sale restrictions listed in Article 4(b) and (c) of the VABER, the position of the Commission means that certain restrictions on the distributor's use of the Internet are considered to be hardcore (re)sale restrictions, whereas other such restrictions are not. In short, restrictions on the distributor's freedom to decide '*where* and *to whom*' it may sell will generally be hardcore (re)sale restrictions. On the other hand, the supplier should have and does have under the VABER the possibility to agree with the distributor '*how*' its products are sold (both offline and on-line). This fundamental distinction between *where* and *to whom* versus *how* follows from the actual wording of Article 4(b) and (c). Article 4(b) speaks of agreements that have as their object the restriction of the territory into which or the customers to whom the distributor may sell the contract products. Similarly, Article 4(c) speaks of agreements that have as their object the restriction of active or passive sales to end-users by selected retailers. The Guidelines provide further background, explanations, and examples on restraints that have as their object to restrict *where* and *to whom* products may be sold.[13] At the same time, the VABER block exempts every vertical restraint that is not explicitly excluded from its coverage. Restrictions that determine *how* a distributor should (re)sell the manufacturer's product are thus generally capable of benefitting from coverage by the VABER.[14]

This raises the question of how to determine whether a particular restraint has as its object to control *how* a product is sold or to restrict *where* and *to whom* it may be sold. Intrinsically, restrictions on *how* a product is sold may have an impact on *where* and *to whom* it may be sold. It is, therefore, important that there should be clarity as to how specific restraints will be assessed. This is particularly important for stakeholders, in view of their duty to self-assess whether their practices comply with the competition rules. Recent debate seems to have focussed mainly on this issue, ie whether certain on-line restraints are, or should be, hardcore restrictions. This issue is discussed in Section IV of this article.

B. The policy and enforcement activity of competition authorities in the field of on-line vertical restraints

On-line sales have increased in recent years and can be expected to increase further.[15] This subsection focusses on how this increase is reflected in the policy and en-

9 For both views, see the contributions received during the public consultation in 2009 on the current VABER and Guidelines, which can be found at: <http://ec.europa.eu/competition/consultations/2009_vertical_agreements/index.html>.

10 Paragraph 52 of the Guidelines.

11 Paragraph 52 of the Guidelines.

12 Paragraph 176 of the Guidelines.

13 See in particular paragraphs 50–58 of the Guidelines on how online sales restrictions can hinder distributors from reaching more and different customers, ie *where* and *to whom* to sell.

14 See, for instance, paragraphs 54, 176, 190, and 209 of the Guidelines. On the distinction between *where* and *to whom* versus *how* to sell, see also Keine Neuigkeiten für Drittplattformverbote, Luc Peeperkorn and Martha Heimann, GRUR, December 2014, pp. 1175–1178.

15 E-Commerce is growing rapidly in the EU at an average annual growth rate of 22 per cent, surpassing EUR 200 billion in 2014 and reaching a share of 7

forcement activities of European competition authorities. For instance, various authorities have recently launched broad investigations into e-commerce and have held discussions on Internet-related policy issues. Examples include the Commission's Sector Inquiry into e-commerce,[16] the ICN 2015 on-line Vertical Restraints Special Project,[17] and actions by national competition authorities ('NCAs'), such as the UK NCA, which has indicated that it intends to focus on on-line markets,[18] as well as priority-setting papers and guidelines by other NCAs relating to vertical restraints.[19] Earlier examples of policy discussions include the OECD's 2013 policy roundtable on vertical restraints for on-line sales,[20] the Working Group on Competition Law session on e-commerce organised by the German NCA in 2013,[21] and the French NCA's 2012 sector inquiry into e-commerce.[22]

The number of case-specific investigations into vertical practices in e-commerce is also increasing. An example is the Commission's investigation into the on-line sale of consumer electronics, where inspections were carried out in December 2013.[23] Also, in June 2015, the Commission opened proceedings in its investigation of Amazon's distribution agreements with e-book publishers.[24] It appears that these agreements may oblige e-book publishers to inform Amazon about any more favourable or alternative terms that the publishers offer to Amazon's competitors and/or to offer Amazon similar terms and conditions as those they offer to Amazon's competitors. Should the investigation confirm the existence of these practices, the Commission considers that they could constitute infringements of either Article 101 TFEU and/or Article 102 TFEU. Lastly, the Commission is investigating the cross-border provision of pay TV services. In July 2015, it sent a Statement of Objections to several undertakings.[25] In this case, the Commission is investigating whether licensing agreements between major US film studios and European pay TV broadcasters may prevent the broadcasters from providing their services across borders, including on-line.

Examples of national investigations[26] include the German NCA's Dornbracht,[27] Gardena,[28] Bosch Siemens,[29] Adidas,[30] and Asics[31] cases, the UK NCA's Pride and Roma cases[32], as well as its investigation into the private motor insurance market.[33] These cases concern a number of different vertical restraints of on-line sales, some of which are dealt with later in this article.

Another example that has attracted quite some attention is the various NCA investigations into vertical restraints in the on-line hotel booking sector. This article does not focus on the substance of the hotel booking cases but merely uses them to illustrate particular challenges created by vertical restraints in the on-line

per cent of total retail sales. On 6 May 2015, the Commission adopted the Digital Single Market ('DSM') Strategy, which includes a set of targeted actions to be delivered by the end of 2016. The aim is to ensure better access for consumers to digital goods and services across Europe, create the right conditions and a level playing field for digital networks and innovative services to flourish, and to maximise the digital economy's growth potential. Information can be found at <http://ec.europa.eu/priorities/digital-single-market/>.

16 The Commission's sector inquiry is not limited to vertical issues; rather, it is intended to enable the Commission to gather data on the functioning of e-commerce markets, so as to identify possible competition concerns. Information can be found at <http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html>.

17 Found at <http://www.icn2015.com.au/download/ICN2015-special-project-online-vertical-restraints.pdf>.

18 UK NCA Annual Plan, found at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/416433/Annual_Plan_2015-16.pdf>, as well as its Strategic Assessment, found at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/378855/Strategic_Assessment.pdf>.

19 Recent examples are the Dutch NCA's paper on its strategy and enforcement priorities, found at <https://www.acm.nl/en/publications/publication/14226/ACMs-strategy-and-enforcement-priorities-with-regard-to-vertical-agreements/>, and the document published by the Slovak NCA, found at <http://www.antimon.gov.sk/data/files/422_cielove-vertikalne-dohody-pohlad-pmu-sr.pdf>. In 2014, the Austrian NCA also issued guidelines on vertical agreements, found at <http://www.en.bwb.gv.at/Documents/BWB-Leitfaden%20-%20Standpunkt%20zu%20vertikalen%20Preisbindungen.pdf>.

20 Found at <http://www.oecd.org/competition/VerticalRestraintsForOnlineSales2013.pdf>.

21 Found at <http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/Vertical%20Restraints%20in%20the%20Internet%20Economy.pdf?__blob=publicationFile&v=2>.

22 Found at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=418&id_article=1969.

23 European Commission, press release no. MEMO/13/1106 of 5 December 2013.

24 European Commission, press release no. IP/15/5166 of 11 June 2015.

25 European Commission, press release no. IP/15/5432 of 23 July 2015.

26 Since the introduction of decentralised enforcement of the EU competition rules in 2004, most enforcement, at least in the area of vertical restraints, now takes place at national level, by the NCAs and national courts. In the period of 2004–2014, the NCAs informed the Commission of 135 envisaged decisions relating to vertical agreements.

27 Referred to on p. 20 in the Background paper for the Working Group on Competition Law session on e-commerce in 2013, found at <http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/Vertical%20Restraints%20in%20the%20Internet%20Economy.pdf?__blob=publicationFile&v=2>.

28 Press release found at <http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/28_11_2013_GARDENA.html>.

29 Press release found at <http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/23_12_2013_Bosch-Siemens-Haushaltsger%C3%A4te.html?nn=3591568>.

30 Press release on closure of proceedings found at <http://www.GermanNCA.de/SharedDocs/Meldung/EN/Meldungen%20News%20Karussell/02_07_2014_adidas.html>.

31 Press release found at <http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/27_08_2015_ASICS.html?nn=3591568>.

32 UK NCA, decisions of 27 March 2014 and 5 August 2013.

33 UK NCA, The Private Motor Insurance Market Investigation Order 2015. There are a number of other NCA investigations. The ones indicated here are mentioned only as examples.

domain. For that purpose, the article will first summarise the NCA cases in the hotel booking sector to date.

In the on-line hotel booking sector, a series of NCAs are examining or have examined certain clauses in standard contracts between hotels and on-line travel agents ('OTAs'), such as Booking.com. On OTA websites, consumers may search for, compare, and book hotel rooms. Most of the investigating NCAs have looked at the same form of restraint, that is the Retail Most Favoured Nation ('Retail MFN') or retail price parity clauses. These clauses oblige the hotel to offer the OTA the same or better room prices as the hotel makes available on all other on-line and offline distribution channels.[34] Investigating NCAs generally consider that these clauses may harm competition, in breach of their respective national competition laws, as well as Article 101 TFEU and/or Article 102 TFEU.

Several NCAs have expressed concerns that standard parity clauses in this sector may restrict competition between OTAs and hinder new OTAs from entering the market. However, the NCAs have adopted different measures to address their competition concerns. In 2013, the German NCA adopted a prohibition decision against the German OTA Hotel Reservation Service (HRS).[35] This prohibited HRS's entire Retail MFN clause. The decision was upheld on appeal, and the German NCA is continuing its investigations against Booking.com and Expedia.[36] In April 2015, the French, Italian, and Swedish NCAs accepted commitments from Booking.com.[37] In short, the commitments require Booking.com to reduce the scope of its Retail MFN clause. The reduced or 'narrow' Retail MFN clause means that the hotels may now market their rooms at lower prices on OTAs other than Booking.com, for instance, reflecting lower commission rates charged by these other OTAs. Hotels may also now offer lower prices on their offline sales channels. However, prices which the hotel makes publicly available on its own website will continue to be subject to the Retail MFN clause.[38] Booking.com has unilaterally extended its implementation of the commitments to its hotel contracts throughout the EU.[39] Booking.com's main competitor, Expedia, also under investigation by several NCAs, announced that it too would similarly narrow the scope of its MFN clause throughout the EU, with effect from August 2015.[40]

The focus of the UK NCA's investigation in this sector was different. It looked at restrictions on the ability of OTAs to offer discounts on room prices to consumers. The restrictions were contained in contracts between the UK-based hotel chain, IHG and the two major OTAs, Booking.com and Expedia. Restrictions on discounting the retail price can amount to RPM. The case was concluded with commitments in January 2014. The commitments stipulated that the two OTAs would be allowed to offer discounted room prices to members of closed user groups (consumers belonging to the OTA's loyalty scheme). The hotel chain was similarly allowed to undercut the OTA and offer discounted room prices to members of its own closed user group. In September 2014, the commitment decision was annulled on procedural grounds by the UK Competition Appeals Tribunal, which remitted it to the UK NCA with a direction to reconsider the matter. On 16 September 2015, the UK NCA decided to close the investigation on administrative priority grounds.[41]

The above-mentioned cases show that European competition authorities have been increasingly active in pursuing vertical restraints in the field of on-line sales. The following sections highlight possible challenges for antitrust law in this area, resulting, on the one hand, from certain characteristics specific to on-line selling (Section III) and, on the other, from certain practices adopted by on-line sellers (Section IV).

III. Three specific characteristics of on-line sales

This section presents some general developments in the field of on-line sales and discusses whether three particular characteristics of on-line selling may create

34 Parity clauses generally also cover two other parameters: room availability and booking conditions, such as cancellation conditions. These clauses are called Retail MFN clauses because they differ from more traditional MFN clauses. The latter require the supplier not to offer better purchase conditions to other buyers. If the buyer is a retailer, this means that the supplier must not offer a better wholesale price, etc. to other retailers. By contrast, a Retail MFN clause ensures that the buyer, ie the platform, will have the best sales price etc. downstream, on the retail market.

35 Decision of the German NCA in Case B 9-66/10.

36 Press release found at <http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/02_04_2015_Booking.html>.

37 Press releases found at <http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=606&id_article=2534> (France), <http://www.agcm.it/en/newsroom/press-releases/2207-commitments-offeresd-by-bookingcom-closed-the-investigation-in-italy-france-and-sweden.html> (Italy), and <http://www.konkurrensverket.se/nyheter/battre-for-konsumenterna-efter-atagande-fran-booking-com/> (Sweden).

38 This is a simplified description of Booking.com's commitments. The full version is available on the websites of the French, Italian, and Swedish NCAs.

39 Press release found at <http://news.booking.com/en-us/bookingcom-to-amend-parity-provisions-throughout-europeus/>.

40 Press release found at <http://www.expediainc.com/news-release/?aid=123242&fid=99&yy=2015>.

41 Information found at <https://www.gov.uk/cma-cases/hotel-online-booking-sector-investigation>.

new challenges for antitrust enforcement, in particular as regards vertical restraints. For the purposes of this article, these characteristics may be called 'service-isation', 'de-passivisation', and 'platformisation'.

A. Service-isation

Traditionally, legislation distinguishes between goods and services. One characteristic of on-line selling is that it tends to promote a shift from the '*proprietary economy*' (where goods change ownership) towards an '*access economy*' (where consumers buy access to services).

This service-isation does not necessarily create the need for new competition rules, as the rules are generally flexible enough to apply to both goods and services. This is the case of the VABER and the Guidelines, which apply equally to the sale of goods and services. However, service-isation may give rise to new questions when it comes to applying the existing rules. For instance, investigations of vertical restraints generally require some assessment of the *good/service and market concerned*. Indeed, for effects-based cases, the relevant product market usually needs to be defined, not least for the purpose of calculating the parties' market shares. The differing approaches in the on-line hotel booking cases are a good illustration. Although all the investigating NCAs looked at similar hotel–OTA contracts, they approached the relevant product market in different ways. *In limine*, it should be noted that—with the exception of the German NCA's HRS decision—all the NCA investigations in this sector have so far concluded with commitments. Commitment decisions contain no definitive findings on either the existence of an infringement or on market definition.

As stated above, the UK case focussed on contractual restrictions on the OTAs' ability to offer discounts on room prices to consumers. Possibly as a result of this focus, the UK NCA described the service concerned as the supply of room-only hotel accommodation. The UK NCA posited a traditional chain of supply, where the hotel is a supplier of room-only accommodation to consumers, via an intermediary (the OTA). Under this approach, a restriction on discounting could amount to RPM.[42]

Other NCAs, including the German, French, Italian, and Swedish NCAs,[43] focussed on the parity clauses in the OTAs' standard contracts with hotels and on how these clauses might restrict competition between OTAs and hinder new OTAs from entering the market. These NCAs focussed more on hotels as being buyers of on-line marketing and booking services from OTAs, which are the supplier of such services.

It should be noted that assessing the OTAs as suppliers of services to hotels instead of as distributors of hotel room accommodation to end-users has important consequences for the legal assessment. The question of who is the supplier or buyer of what product is important, because under the VABER, the market shares of suppliers and of buyers are calculated differently.[44] If an OTA is considered as a distributor of hotel room accommodations, the question is what its share is as a buyer/agent on the wholesale market of hotel room accommodations. If the OTA is considered to be a supplier of platform access (possibly specialised hotel platform access), the question is what its share is as a supplier on that market. Moreover, under the approach where the OTA is assessed as a supplier of on-line marketing and booking services to the hotels and not as a distributor of hotel room accommodation, there cannot be an issue of RPM as regards hotel accommodation distributed by the OTA as there is no resale.

Generally speaking, for the purpose of assessing who is the supplier and who is the buyer in a given relationship, one may apply a relatively simple rule. Traditionally, the distinction between upstream and downstream is determined by the rule that the product goes down the supply and distribution chain and the money (the payment) goes up the chain. This rule works unambiguously for a traditional supply chain, for instance, where a steel tube producer sells its tubes to a bicycle producer, who sells its bicycles to a wholesaler, who in turn sells them to a retailer. At each level, it is clear who is the supplier and who is the buyer. The rule also works for more complex situations, such as the two-sided market of publishing newspapers, where the newspaper publisher sells, on different markets, advertising space and newspaper copies. On both markets, the publisher is the supplier, respectively of advertising space to those who want to advertise and of newspapers to those who want to read the news. This rule also works well in the case of services. For instance, the traditional travel agent that books a number of hotel rooms for the summer period and subsequently sells holiday travel to tourists

42 Pursuant to Article 4(a) of the VABER, RPM is a restriction of the buyer's ability to determine its sale price. The concept of buyer includes agents who sell on behalf of a principal (see Article 1.1(h) of the VABER). As explained in paragraph 49 of the Guidelines, an obligation preventing a non-genuine agent from sharing its commission with its customers would be caught as RPM under Article 4(a) of the VABER.

43 See, for example, the decision of the French NCA, Case 15-D-06, and of the Swedish NCA, Case 596/2013.

44 Article 3 of the VABER, paragraphs 86–95 of the Guidelines.

is a distributor/intermediary, which buys hotel room accommodation from the hotels and resells them, usually in a package, including for instance a flight, to tourists.

Possible confusion about the question of supplier versus buyer derives not so much from the service-isation itself, but from the increased possibilities for the use of agency-type contracts where the on-line sale of services and the use of on-line platforms are concerned. The increased use of agency-type contracts may be due to the fact, amongst other things, that stocking risks are absent for e-products (such as e-books) and because in the on-line world the sales and delivery functions are more easily separated. In agency-type contracts, the money does not necessarily 'go up' through the chain: even though an agent may act as a distributor, the payment by the customer may be made directly to the principal, which subsequently pays the agent a commission, instead of the customer paying the agent, which passes the payment on to the principal after deducting its commission. OTAs are a good example: some use a model where the customer pays the OTA for the hotel room, while others have the customers pay directly to the hotel. In such situations, it will be necessary to go beyond the simple rule and assess the role and function of the agent in question in more depth. Does the agent function as a distributor, which in essence means the activity of finding customers and selling to these *individual* customers the product in question, or does the agent act as an input provider higher up the chain? To use a parallel from the brick-and-mortar world: does the agent act like a retail shop, attracting individual customers and selling to these customers the product in question, or does it rather act like a shopping mall, which rents out space where retailers can operate, without real involvement in the *individual* customer transactions?

B. De-passivisation

Under the Guidelines, it is considered a form of passive selling where a distributor simply uses a website to sell its products, a customer visits this website and that contact leads to a sale. This may have given the impression, certainly under the previous Guidelines of 2000, that on-line sales were mainly to be categorised as passive sales and restrictions of on-line sales as restrictions of passive sales. Over time, it has become clear that, in the on-line world, just as in the offline world, often specific investments are required to reach certain customers or territories. The current 2010 Guidelines, therefore, explain in more detail how the distinction between active and passive sales is made, both through providing a refined definition and through examples.[45]

However, marketing over the Internet continues to develop rapidly and now features techniques that may have been unknown or at least less frequently used in 2010, when the Guidelines were adopted. These techniques include retargeting,[46] behavioural targeting,[47] and fingerprinting.[48] All of them aim to enhance the possibilities to identify and target particular customers or customer groups and could thus be said to increase the possibilities of on-line active sales.

If a supplier were to restrict its distributor from using such marketing techniques (and possible variants), the question arises whether such restrictions should be classified as a restriction of active or passive selling. This classification is relevant in cases where an exclusive distribution system is used.[49] *Prima facie*, such a restriction—should it occur—seems to be aimed at preventing the distributor from reaching certain specific customer groups, and therefore, such a restriction could be considered a restriction of active sales. Future cases may clarify this question and over time lead to new examples in the Guidelines.

45 Paragraphs 51–53 of the Guidelines. Active sales mean actively approaching individual customers by for instance direct mail or visits; or actively approaching a specific customer group or customers in a specific territory through targeted advertisement. Advertisement or promotion that is only attractive for the buyer if it (also) reaches a specific group of customers or customers in a specific territory is considered active selling to that customer group or customers in that territory. Passive sales mean responding to unsolicited requests from individual customers including delivery of goods or services to such customers. General advertising or promotion that reaches customers in other territories/customer groups but which is a reasonable way to reach customers in one's own territory/customer group are considered passive selling to these former customers. General advertising or promotion is considered a reasonable way to reach the latter customers if it would be attractive for the buyer to undertake these investments also if they would not reach the customers in other territories/customer groups.

46 Retargeting (or behavioural remarketing) is targeting techniques that are used to target online behavioural advertising to consumers based on preferences inferred from their online behaviour, in situations where those previous actions did not result in a sale.

47 Behavioural targeting is similar to retargeting. Under this technique, online advertisers use information from an individual's browsing history to display specific advertisements to that individual. In addition to past online history, targeting factors may include geography, demographics, etc.

48 Fingerprinting can be seen as a successor to 'cookies' (cookies allow websites to track users' activities over time, but can be blocked or deleted). Fingerprinting allows a website to look at the characteristics of a computer such as what plugins and software are installed, the size of the screen, the time zone, fonts, and other features of a particular machine. That way, information can be collected about a remote computing device for the purpose of identification. Fingerprints can be used to fully or partially identify individual users or devices even when cookies are turned off.

49 See Article 4(b)(i) of the VABER.

C. Platformisation

The Internet has brought a host of new players onto the market, in particular on-line trading platforms, such as eBay, Amazon and Booking.com. The trading platforms referred to in this article use several different business models, ranging from players which merely offer the service of a marketplace to suppliers or their retailers, where the latter sell their products to consumers, to players which act as on-line distributors or intermediaries, selling suppliers' products to consumers. The platform's activities may be limited to the on-line world (selling e-goods via the Internet with no physical delivery), or it may also provide more traditional distribution services, for example linking the on-line purchase to the offline sphere (physically delivering a purchase that was made on-line, eg Amazon). They may also combine several business models.[50]

To the extent that platformisation gives rise to vertical agreements and restrictions, these are already covered by the current antitrust rules. The VABER and the Guidelines cover any supply and distribution agreement, irrespective of the type of parties involved or the type of product being sold. What matters under these rules are the undertakings' market shares and the content of their agreement. When it comes to applying these rules in the on-line world however, platformisation can raise several issues.

First, and linked to the market share threshold, is that platformisation often shifts *market power* from suppliers to the platform. This shift in power may enable platforms to impose restrictions on suppliers and thus one sees an increase in cases of restraints being imposed by platforms. Examples of recent cases where restrictions are allegedly imposed by platforms include Booking.com[51] and Amazon.[52] The shift in market power to the platform may also trigger restraints from suppliers on their distributors governing the latters' use of platforms. Examples of recent cases where restrictions were imposed by suppliers include the German NCA's Adidas[53] and Asics[54] investigations.

Second, as already indicated in Section III.A, platformisation raises the question whether a particular platform acts as a distributor, in the same way as a traditional distributor in a vertical relationship, reselling the goods/service of one or more suppliers, or whether it is better described as an (upstream) supplier of marketing services to one or more distributors which operate on the platform. In other words, should platforms rather be compared with supermarkets or with shopping malls? As indicated in Section III.A, the answer will depend on the facts of a particular platform's role and function: it will be necessary to assess whether the platform is engaged in and paid for the activity of finding customers and selling to these individual customers the product in question, or whether it acts as an input provider higher up the supply chain, leaving the actual distribution function to others.

A third issue, also already referred to in Section III.A, is that on-line platforms appear to provide increased possibilities for the use of agency-type contracts. This raises the question whether such platforms, which may be agents for the purposes of commercial law, should be considered as agents for the purposes of applying Article 101 TFEU. If a platform can be considered to be a 'genuine' agent, the obligations imposed on it in relation to the contracts which it negotiates and/or concludes on behalf of the principal fall outside Article 101(1) TFEU.[55]

Pursuant to the Guidelines and the most recent case law,[56] the determining factor for deciding whether a platform is a genuine agent is the degree of financial or commercial risk borne by the platform in relation to the activities for which it has been appointed as an agent by the principal. While the question of risk must be assessed on a case-by-case basis, with regard to the economic reality of the situation, *prima facie* it would seem difficult to see how such on-line platforms/distributors could constitute genuine agents for the purposes of Article 101 TFEU. On-line selling of certain products, in particular intangible products such as e-books or services such as hotel accommodation, may involve less contract-specific costs as, for instance, stocking may not be an issue for the on-line distributor. However, market-specific investments will generally be significant for on-line platforms, such as investments to create, maintain and update their specialized website to be active on a particular market. It is, in particular, difficult to imagine how these market-specific investment costs and risks can be transferred to the supplier, if other suppliers' products are also sold on the same distributor's website. While in principle the number of suppliers for whom the platform sells is not material for the agency assessment under Article 101 TFEU, an agent working for several principals will rarely qualify as an agent under

50 For the purposes of this article, mere comparison sites, such as pure price comparison sites, are not covered by the term trading platform.

51 See the NCA investigations described in Section II.B.

52 See the Commission investigation into Amazon's distribution agreements described in Section II.B.

53 Referred to in n 30.

54 Referred to in n 31.

55 See the Guidelines, paragraph 18.

56 Paragraphs 12–21 and in particular paragraph 13 of the Guidelines, Case C-217/05 *CEES*, paragraphs 51–61, and Case C-279/06, *CEPSA* paragraph 36.

EU competition law, given that in such a scenario it will be difficult to show that each principal bears the risks and costs related to the activity for which it has appointed the agent.[57]

More generally, these platforms seem very different from the classic agency model where a principal determines the commercial conditions under which an agent can sell its products because the principal takes responsibility for all relevant costs and risks. Often, in the platform cases, the 'agent' is a large multinational, whose size and scope of activity may exceed those of its 'principal(s)'. This may explain why some authors have argued[58] that, in view of the emergence of powerful platforms, more emphasis should be given to the question of whether the agent acts as an auxiliary organ, forming an integral part of the principal's undertaking.[59] Restrictions imposed by the agent (the platform) on the sales activity of the principal (usually the supplier) may suggest that it is the platform that determines the overall commercial strategy. This would be inconsistent with the platform being considered as an auxiliary of the principal. This argument also features in the German NCA's HRS decision.[60]

There are nonetheless two reasons why such a return to the auxiliary organ test is not necessary. First, as indicated, also under the financial and commercial risk test it is highly unlikely that such platforms will qualify as 'genuine' agents. Second, if a platform imposes restrictions on its principal regarding the principal's relationship with other undertakings (eg the room prices it may give to other platforms), such restrictions would in any event be subject to Article 101(1) TFEU. Pursuant to case law and as set out in the Guidelines,[61] the only restraints in genuine agency agreements that fall outside Article 101(1) TFEU are those that are imposed on the agent in relation to the contracts concluded and/or negotiated on behalf of the principal. In the reverse scenario of a restriction on the principal relating to other sales activities, the financial and commercial risk test is thus irrelevant and the restriction may fall under Article 101(1) TFEU.

57 Andrei Gurin and Luc Peeperkorn, Vertical Agreements, chapter 9 and in particular points 9.46 and 9.57–9.58 thereof, in The EU Law of Competition, Faull & Nikpay, third edition, 2014.

58 P Goffinet and F Puel, 'Impact of the Internet on the Qualification of Agency Agreements' (2015) 6:4 Journal of European Competition Law & Practice 242–49.

59 This element of the 'genuine agent' test featured more prominently in earlier case law, see Case 311/85 *Vlaamse Reisbureaus*, paragraph 20.

60 Paragraph 149 of the decision of the German NCA against HRS, Case B9-66/10.

61 Paragraphs 18–21 of the Guidelines. Cases C-279/06, *CEPSA*, paragraph 41 and C-217/05, *CEES*, paragraph 62.

62 Decision of the UK NCA of 5 August 2013.

IV. Vertical restraints in on-line sales

This section looks at two scenarios in which on-line vertical restraints are regularly found. First, it discusses restraints of on-line sales that a traditional supplier might want to impose on its distributors, in particular in a selective distribution system. Here, the most relevant question is to what extent such restraints may constitute hardcore (re)sale restrictions. The answer will depend on whether a restraint is considered to be a restriction of *where* or *to whom* the distributor may sell on-line, or rather a restriction of *how* the distributor may sell on-line. Second, the section looks at restraints imposed by platforms on traditional suppliers and distributors, in particular Retail MFN clauses.

A. Restrictions of on-line sales imposed by suppliers

This section outlines a series of on-line restrictions, in a more or less descending order of severity, ie from total bans of on-line selling to less severe restrictions. Some of these restrictions are already mentioned as examples in the Guidelines while others are not.

First, the most far-reaching on-line restraint is a total ban on marketing via the Internet. Such bans were present for instance in the UK NCA's Roma case[62] and in the Pierre Fabre case, which was the subject of a preliminary ruling by the Court of Justice of the European Union.[63] A total ban on on-line sales is considered to be a hardcore restriction. On-line sales allow a distributor to reach more and different customers and a total ban on on-line sales is thus considered a restriction of the territory into which, or of the customers to whom, a distributor may sell the contract goods or services and/or as a restriction on sales to end-users by members of a selective distribution system. It would therefore fall within the category of hardcore clauses listed in Article 4(b) and/or (c) of the VABER.

Second, less far-reaching than a total ban, are certain restrictions of on-line pricing.[64] A first example is the Pride case,[65] in which the UK NCA found that Pride, a

63 C-439/09 *Pierre Fabre*. In that case, the Court of Justice ruled that a contractual clause, which *de facto* prohibited the use of the internet as a method of marketing, is a restriction by object within the meaning of Article 101 TFEU. It also ruled that such a clause is a hardcore restriction under Article 4(c) of the vertical agreements block exemption applicable at the time (maintained in Article 4(c) of the current VABER).

64 This article does not deal with RPM. RPM was the issue, for instance, in the German NCA's mattress case, where the authority fined Metzeler Schaum for having agreed with its retailers that they should sell mattresses (both in brick-and-mortar stores and online) at the price set by the manufacturer. Decision of the German NCA of 6 February 2015, press release found at <http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/06_02_2015_Matratze.html?nn=3591568>.

65 Decision of the UK NCA of 27 March 2014.

manufacturer of mobility scooters, had prevented its dealers from advertising prices on-line other than at its recommended retail price. While the UK NCA, in view of a lack of effect on trade between Member States, applied the UK Competition Act and not Article 101 TFEU to this case, it also addressed a possible exemption under the rules of the VABER.[66] It concluded that the restriction on advertising prices on-line had as its object to restrict the territories into which and the customers to whom the retailers could sell and as a result constituted a hardcore restriction within the meaning of Article 4(b) of the VABER.[67]

Another form of on-line pricing restriction relating to *where* and *to whom* a distributor can sell mentioned in the Guidelines is dual pricing. Dual pricing is when the same distributor is charged a different price depending on whether the distributor will sell the product on-line or offline.[68] An example of a dual pricing case is the Bosch Siemens case, in which the German NCA found that Bosch Siemens' system of rebates created incentives for dealers to limit their on-line sales.[69] The Guidelines (paragraph 52(d)) state that dual pricing is a hardcore restriction under Article 4(b) and/or (c).

Third, another form of on-line restraint is a prohibition on advertising or selling on third-party platforms. This restraint is also covered by the Guidelines (paragraph 54).[70] According to the Guidelines, this would not normally be a hardcore restriction. Although the Guidelines start from the principle that every distributor must be free to use the Internet to sell its products[71], this does not mean that limits and conditions on *how* the distributor may use the Internet are hardcore restrictions. Paragraph 54 of the Guidelines states that a supplier may, in general, require its distributors to use third-party platforms to distribute the contract goods '*in accordance with the standards and conditions agreed*', just as the supplier may require its distributors to market the products in a certain way offline. The rationale of paragraph 54 is that a condition not to sell or advertise on a platform that carries the platform's logo can be considered similar to an obligation not to carry other names or logos in a brick-and-mortar shop or not to locate the shop in a particular street or shopping mall. Examples of cases involving a platform ban include the German NCA's Adidas and Asics investigations. The Adidas investigation was closed after Adidas had amended its conditions for on-line sales.[72] In its decision in the Asics case[73], the German NCA criticised the fact that Asics distributors were prohibited from using trading platforms, but the authority refrained from taking a decision on that ban. In Germany, there are diverging court judgments on this issue. Some courts have judged that platform bans should be treated as hardcore restrictions, while other courts have come to the opposite conclusion.[74] The rationale for the first position, which deviates from the position expressed in the Guidelines, is probably that in particular for SMEs platforms could be must-have sales channels, without which consumers would not be able to find these distributors on the Internet. In that light, a platform ban could be tantamount to a total ban on on-line selling for certain distributors. However, according to a study commissioned by the Commission,[75] the importance of trading platforms seems to be case-specific and to depend on several factors, notably the product concerned and the undertakings involved (their size and/or whether they are established players on the market). The survey was not carried out for competition law purposes but rather to assess the scale of cross-border on-line selling and purchasing and the type of obstacles that might prevent undertakings from trading across borders on-line. According to the survey results, 80 per cent of undertakings that sell on-line use their own websites or apps, 35 per cent use small and 33 per cent use large trading platforms, and 22 per cent use

66 Pursuant to section 10 of the UK Competition Act, an agreement is exempted from its Chapter I prohibition if it is covered by an (EU) block exemption regulation.

67 See in particular paragraphs 3.244–3.256 of the decision. The UK NCA could also have addressed the restriction as a hardcore RPM restriction. Some might want to argue that restrictions on advertising do not amount to a restriction on the buyer's 'ability' to determine its sales price as stipulated by Article 4(a) of the VABER, but if a buyer cannot advertise its price, it cannot compete using that price and it is therefore restricted in its ability to set the prices at which it competes.

68 It is not dual pricing where a supplier charges different prices to different distributors. This could possibly constitute discriminatory pricing under Article 102 TFEU, provided that the supplier is dominant.

69 Case referred to in n 29.

70 Last sentence of paragraph 54 states that '*where the distributor's website is hosted by a third party platform, the supplier may require that customers do not visit the distributor's website through a site carrying the name or the logo of the third party platform*'.

71 Paragraph 52 of the Guidelines.

72 Referred to in n 30.

73 Referred to in n 31.

74 The Court of Appeals München (judgment of 2 July 2009, Case U(K)4842/08) and Court of Appeals Karlsruhe (judgment of 25 November 2009, Case 6U47/08 Kart) ruled that general platform bans are not a hardcore restriction. The Court of Appeals Berlin (judgment of 19 September 2013, Case 2U8/09 Kart) came to the same conclusion, unless the platform ban is applied in a discriminatory way (some distributors or the manufacturer itself being allowed to use such platforms while others are not). The Court of Appeals Schleswig (judgment of 5 June 2014, Case 16U(Kart)154/13) and the Regional Court Frankfurt (judgment of 18 June 2014, Case 2-03 O 158/13) ruled that a general platform ban should be considered a hardcore restriction.

75 Flash Eurobarometer 413, found at <http://ec.europa.eu/public_opinion/flash/fl_413_sum_en.pdf>.

EDI-type[76] transactions. The survey included undertakings that already sell on-line cross-border, undertakings that already sell on-line (but not cross-border) and undertakings that do not (yet) sell on-line. As regards platform bans, of the respondents that already sold cross-border on-line, 17 per cent stated that such bans are a (major or minor) problem, whereas 69 per cent considered that such bans are not a problem. Among the respondents that sold on-line, but did not yet sell cross-border, and the respondents that did not yet sell on-line, the proportion that considered a platform ban to be a problem was higher (30 and 31 per cent, respectively). The share of respondents that did not see it as a problem at all was lower (58 and 52 per cent, respectively). Based only on this study, it appears that a majority of undertakings do not see platform bans as problematic for the purpose of selling (cross-border) on-line. More case experience and the Commission's sector inquiry into e-commerce may shed further light on this issue.

Fourth, distribution agreements may contain restrictions on on-line advertising (not limited to price). This type of restraint is not specifically mentioned in the Guidelines. One example is restraints on the use of the supplier's logo on the Internet. In practice, a supplier may want to prohibit the on-line use of its logo and/or ban advertising for on-line shops, for instance on Google, using the supplier's logo/brand name. At first sight, this may seem similar to a ban on selling on third-party platforms (which is not a hardcore restriction). However, a prohibition on using the supplier's logo/brand is different. If a prohibition on using the supplier's logo/brand name applies to the distributor's own website, that prohibition could undermine the website's entire effectiveness and be tantamount to a prohibition to sell on-line. If the prohibition concerns the use of the logo/brand name in advertising on websites such as Google, that would prevent the distributor from advertising the product. In general, for either of those restrictions, there would appear to be no obvious efficiency justification. On the contrary, once a distributor is allowed to sell a certain product, it is efficient for the distribution of that product if the distributor can use the logo and brand name in its sales activities. If such use is restricted only for on-line sales activities, this indicates that the object of the restriction is to restrict on-line sales. Such restrictions also appear to contravene the equivalence principle set out in paragraph 56 of the Guidelines, to the extent that a distributor is allowed to use the logo/brand for offline sales activities, including advertising. This means that a prohibition on using the supplier's logo/brand on-line would constitute a hardcore restriction under Article 4(b) and/or (c) of the VABER.[77]

Fifth, another form of restraint not explicitly mentioned in the Guidelines is restrictions on advertising via price comparison sites. Prima facie, price comparison websites can serve two purposes. On the one hand, they can be seen as essentially a form of advertising, comparing products mainly on price. It may be that some suppliers (especially of branded products) wish their selective distributors to advertise the product in a certain way, that is with a focus on parameters other than (just) price (quality, brand, after-sales services, etc.). If, in practice, the main function of price comparison sites is to advertise products to customers, then an obligation not to actively feed price comparison sites should not be a hardcore restriction under Article 4(b) and/or (c) of the VABER. Contrary to the UK Pride case described above, in which the distributor was restricted as to the level of the price at which it could advertise (anywhere) on-line, a restriction on the use of price comparison sites would only restrict the context in which a distributor can advertise its price on-line. On the other hand, it can be argued that price comparison sites fulfil a function more like that of the yellow pages: customers may use them primarily to find the distributors carrying a certain product. If that is the case, which is a factual question, it may not be appropriate to view the use of comparison sites in terms of *how* the product is sold. Rather, as with the yellow pages, their use may concern *where* and *to whom* products are sold, in which case restrictions on their use could be caught by Article 4(b) and/or (c) of the VABER.[78]

B. Restrictions imposed by platforms

This section focusses on restraints imposed on traditional suppliers/distributors by platforms and other Internet-based undertakings, in particular Retail MFN or retail price parity clauses. Such clauses are used in a variety of sectors. They are not specifically mentioned in the Guidelines and therefore there may be a need for more clarity and guidance through enforcement decisions.

76 Electronic data interchange (EDI) is an electronic communication method that provides standards for exchanging data via any electronic means. By adhering to the same standard, companies located in different countries can exchange documents electronically (eg purchase orders, invoices, shipping notices, and many others).

77 This seems to be the approach of the German NCA in the Asics case, referred to in n 31.

78 This seems to be the approach of the German NCA in the Asics case referred to in n 31.

There are various possible forms of Retail MFN clauses, relating to price and/or other terms and conditions. In short, the MFN clauses imposed by platforms mean that suppliers are obliged to offer to or on the platform retail prices and/or other terms and conditions as regards sales to end-users that are better than or at least equal to the prices or terms and conditions that the supplier offers elsewhere (be it through other platforms or on the supplier's own sales channels). These clauses raise several questions. It could be argued that retail price parity clauses should be added to the list of hardcore restrictions, because they may require the supplier to apply some form of RPM. For instance, using the hotel booking cases as an example, a hotel can only commit to give one OTA the best retail price for its rooms (retail price parity) if it is able to control the retail price on all the other OTAs which it uses. On the other hand, the current list of hardcore restrictions in Article 4 of the VABER is limited to restrictions which by their nature are likely to produce (net) negative effects, irrespective of the sector concerned. It may be argued that this is not true for Retail MFN clauses in all cases and for all sectors. For example, there may be instances where such clauses or modified (narrow) versions of such clauses are justified as a means to prevent free-riding.

There have been several recent cases involving Retail MFN/price parity clauses, but most of them have been closed either without any formal decision or with commitment decisions. The latter have made no finding of an infringement or any assessment of efficiency claims. In its 2013 prohibition decision against the parity clause of HRS, the German NCA suggested that the Retail MFN clause could be seen as a form of RPM.[79] However, at the same time it argued that the hotels could be considered to be buyers of the OTA's service. It ultimately left open the issue of whether or not the MFN clause constituted a hardcore restriction and dealt with it as a restriction by effect and undertook an effects analysis. Since HRS's market share exceeded the 30 per cent market share threshold, it was not necessary to withdraw the benefit of the VABER and an effects analysis could be applied directly under Article 101(1) and (3) TFEU. Other examples of Retail MFN cases are the investigations by the German and UK NCAs into Amazon's price parity policy on its marketplace platform. These cases were closed after Amazon decided to cease using the parity clauses.[80] Finally, in its private motor insurance investigation, the UK NCA investigated clauses under which the supplier (the insurer) and a price comparison website agreed that the insurance products that the supplier marketed through the comparison site should not be sold at a lower price elsewhere (a Retail MFN clause). The investigation was closed in March 2015 with an order prohibiting the use of such wide Retail MFN clauses but permitting the use of a more narrow Retail MFN clause, whereby the insurer is restricted from undercutting the price comparison site on the insurer's own website.[81]

V. Conclusion

In recent years, there has been debate about whether the VABER and the Guidelines adequately cover on-line sales. This debate is not novel. The classification of restrictions of on-line sales was already discussed at the time of adoption of the 2010 VABER and the Guidelines and, in somewhat less detail, when the 1999 VABER and the 2000 Guidelines were adopted. The discussion focusses on the extent to which suppliers should be allowed to restrict on-line sales within their (selective) distribution systems and in particular whether and which restrictions of on-line sales should be classified as hardcore restrictions.

The hardcore (re)sale restrictions listed in Article 4(b) and (c) of the VABER imply that certain restrictions on the distributor's use of the Internet are considered to be hardcore (re)sale restrictions, whereas other such restrictions are not. Under these provisions, restrictions on the distributor's freedom to decide *where* and *to whom* it may sell will generally be hardcore (re)sale restrictions. On the other hand, the supplier should have and does have under the VABER the possibility to agree with the distributor *how* its products are sold.

This raises the question of how to determine whether a particular restraint has as its object to control *how* a product is sold or whether its object is to restrict *where* and *to whom* a product is sold. It is important that there is clarity as to how specific restraints will be assessed, in view of the duty on undertakings to self-assess whether their practices comply with the competition rules. This debate is all the more important as on-line sales have increased in recent years and can be expected to increase further.

Three characteristics of on-line selling may create new challenges for antitrust enforcement: 'service-isation', 'de-passivisation', and 'platformisation'.

79 Section 4.2 of the decision by the German NCA against HRS, Case B9-66/10.

80 German NCA, Case B6-46/12 and UK NCA, Case CE/9692/12.

81 See the page on the UK NCA's website concerning the private motor insurance market investigation at: <https://www.gov.uk/cma-cases/private-motor-insurance-market-investigation>.

Service-isation concerns the shift from a 'proprietary economy', where the focus is on goods changing ownership, towards an 'access economy', where customers buy access to services. While this development does not necessarily create the need for new competition rules, it gives rise to new questions when it comes to applying the existing rules, as for instance shown by the differing approaches in the on-line hotel booking cases. These cases raise the question whether the OTAs should be assessed as suppliers of services to hotels or as distributors of hotel room accommodation to end-users. This question is important because under the VABER, the market shares of suppliers and buyers are calculated differently. In addition, when the OTA is assessed as a supplier and not a distributor, there cannot be an issue of RPM as regards hotel accommodation distributed by the OTA. Traditionally, the distinction between upstream and downstream is determined by the rule that the product goes down the supply and distribution chain and the money (the payment) goes up the chain. Possible confusion about the question of supplier versus buyer derives from the increased use of agency-type contracts in the context of the on-line sale of services or intangible goods, in particular via on-line platforms. In agency-type contracts, the money does not necessarily 'go up' through the supply chain: even though an agent may act as a distributor, the payment by the customer may go directly to the principal, which subsequently pays the agent a commission. In these situations, it will be necessary to go beyond the simple rule and assess the role and function of the agent in greater depth.

Under the previous Guidelines of 2000, the impression may have arisen that on-line sales are mainly to be categorised as passive sales and restrictions of on-line sales as restrictions of passive sales. However, marketing over the Internet has continued to develop rapidly with new techniques such as retargeting, behavioural targeting and fingerprinting. They aim to enhance the possibilities to identify and target particular customers or customer groups and could thus be said to increase the possibilities of on-line active sales. If a supplier were to restrict its distributor from using such marketing techniques, such restrictions would seem to be aimed at preventing the distributor from reaching certain specific customer groups and such restrictions could be considered as restrictions of active sales.

The Internet has brought a host of new players onto the market, in particular on-line trading platforms. This platformisation raises several issues. First, platformisation often shifts market power from suppliers to the platform. This shift in power may enable platforms to impose restrictions on suppliers, and thus one sees an increase in cases of restraints being imposed by platforms, such as the cases concerning Retail MFNs. Second, platformisation also raises the question whether a particular platform acts as a distributor or whether it is better described as an (upstream) supplier of marketing services to one or more distributors that operate on the platform. Third, on-line platforms also provide increased possibilities to use agency-type contracts. This raises the question whether such platforms, which may be agents for the purposes of commercial law, should be considered as agents for the purposes of applying Article 101 TFEU. While this question must be assessed on a case-by-case basis, with regard to the economic reality of the situation, *prima facie* it seems difficult to find that such on-line platforms are genuine agents. On-line sales of certain products, in particular intangible products such as e-books or services such as hotel room bookings, may involve less contract-specific costs. However, market-specific investments will generally be significant for on-line platforms, such as investments to create, maintain and update their specialised website. While in principle the number of suppliers for whom the platform sells is not material for the agency assessment under Article 101 TFEU, an agent working for several principals will rarely qualify as an agent under EU competition law, given that in that scenario it will be difficult to show that each principal bears the risks and costs related to the activity for which the platform has been appointed as an agent.

The article also assesses a number of restrictions and asks in particular whether these are to be considered hardcore restrictions under the VABER:

- A total ban on on-line sales is considered to be a hardcore restriction. On-line sales allow a distributor to reach more and different customers, and a total ban on on-line sales is thus considered a restriction of the territory into which, or of the customers to whom, a distributor may sell the contract goods or services and/or as a restriction on sales to end-users by members of a selective distribution system.
- Certain restrictions of on-line pricing, such as restrictions on advertising prices on-line and dual pricing, are also deemed to restrict *where* and *to whom* the distributor may sell and are therefore considered to be hardcore restrictions.
- A prohibition on using the supplier's logo/brand on the distributor's own website is considered to undermine the website's effectiveness and be tantamount to a prohibition on selling on-line and can thus also be expected to be dealt with as a hardcore restriction.

– The assessment of restrictions on advertising via price comparison sites will depend on the actual role such sites play. Whether price comparison sites essentially provide a form of advertising, comparing products mainly on price, in which case the restriction relates to *how* the product is sold. Or, whether comparison sites fulfil a function more like that of the yellow pages, helping customers to find the distributors, in which case the restriction concerns more the *where* and *to whom*.
– Prohibitions on advertising or selling on third-party platforms are, according to the Guidelines, not a hardcore restriction. While in its recent decision in the Asics case, the German NCA criticised the fact that Asics' distributors were prohibited from using trading platforms, it refrained from taking a decision on that ban. In Germany, there are diverging court judgments on this issue. Some courts have held that platform bans should be treated as hardcore restrictions, while other courts have come to the opposite conclusion. More case experience and the Commission's sector inquiry into e-commerce may help to decide whether a change in the classification of this restriction is justified.
– Retail MFN clauses have so far been dealt with as a restriction by effect, requiring a full effects analysis. In principle, the competition concerns would appear to be stronger for the so-called wide Retail MFN clauses than for narrow Retail MFN clauses. Retail MFN in the on-line context being a new type of restriction, it is prudent to first acquire sufficient experience before classifying the (different variants of the) Retail MFN as a restriction by object or by effect.

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