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Vertical restrictions in the online commerce

Vertical Restrictions in the Online Commerce: An overview of EU and national case law

ANTICOMPETITIVE PRACTICES, VERTICAL RESTRICTIONS, FOREWORD, INTERNET, ONLINE PLATFORMS, BIG TECH

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Vertical restrictions are one of the most complex and debated themes within competition law enforcement. From an economic perspective, vertical restrictions have a variety of effects that are not always fully captured by textbook economic models. From a legal perspective, different jurisdictions have taken divergent approaches in the way they assess and treat vertical restrictions. [1] While these differences are most noticeable between the EU and the US, national competition authorities within the EU have also taken substantially different positions concerning similar or identical categories of vertical restrictions. [2]

Despite having complex effects that are hard to predict, there is generally some consensus among economists that vertical restrictions often have pro-competitive effects and pose fewer concerns than horizontal anti-competitive agreements. [3] It has long been recognised that whenever two direct competitors come together, they are usually up to no good. Yet a vertical restriction involves an agreement not between two competitors, but between two business partners who tend to have interests aligned with the interests of consumers. The number of instances in which vertical restrictions can distort competition is then relatively smaller, explaining why law enforcement in this area is also rarer.

However, in the last two decades or so, there has been a growing number of investigations in the EU regarding new forms of vertical restrictions taking place in online commerce markets. This recent focus of competition law enforcement may have altering motivations. On the one hand, scholars and enforcers have raised concerns that online markets have certain characteristics that could make them particularly prone to (vertical) anti-competitive restrictions, therefore deserving special scrutiny. [4] On the other hand, it is undeniable that competition in online commerce is increasingly important for consumers, allowing them to pay low prices for many types of commodities that are often not available in the traditional outlets of some jurisdictions.

The recent enforcement shift in the EU has led to a resurgent interest in vertical restrictions marked by a lively debate in international fora, such as at the OECD, about best enforcement practices and potential regulatory reforms in this area. [5] At the centre of the debate is the EU Vertical Block Exemption Regulation (VBER) governing vertical restraints, which was recently evaluated by the European Commission (EC) in a staff working document, [6] in anticipation of its expiry on 31 May 2022. The conclusions from the current discussions could affect whether the VBER will be renewed, revoked, or revised, with important implications for years to come.

In light of the ongoing policy debate and recent competition cases, this special edition of *Concurrences* on Vertical Restrictions in Online Commerce could not have better timing. In this foreword, we aim to provide the reader with a high-level overview of what vertical restrictions mean in a digital world, their potential economic effects on online competition, and the legal approach to addressing vertical concerns within the EU. Recognising that discussing this complex topic is a daunting task, we seek to shed light on the fundamental issues that are currently shaping the discussion, while leaving the detailed analysis of the case law to the remaining chapters of this special edition.

What are vertical restrictions in the context of online commerce?

To come up with a working definition of vertical restriction, it might be helpful to make a nuanced distinction between a vertical agreement and a restriction itself. [7]

- *Vertical agreements* are contracts between two or more firms at different levels of the supply chain, such as manufacturers, suppliers and retailers.
- *Vertical restrictions*, also commonly known as vertical restraints, are vertical agreements that impose certain limitations on how one or more parties can resell a product, with potential consequences for competition.

Traditional forms of vertical restrictions include retail price maintenance and exclusivity agreements. In turn, online commerce refers to retail over the internet or, in other words, to buying and selling online. In a broader sense, online commerce may also comprise all services that facilitate online retail, such as payment networks, data brokerage and targeted advertising. It thus follows that **vertical restrictions in online commerce are any agreements between vertically-related parties that could affect competition in online retail or in the provision of online services**. While vertical restrictions in online commerce may include more traditional practices, such as exclusivity agreements, the current debate tends to focus on relatively novel categories of behaviour that are specific to online markets.

Amongst the most common vertical restrictions observed in online markets, the imposition of restrictions to online sales within selective distribution models has attracted a great deal of attention from enforcers. [8] In a selection distribution system, the supplier of a product imposes minimum standards on the members of its distribution network, generally with a view of protecting the brand image, as well as preserving the quality of the product and sales experience. Yet, as more and more suppliers use selective distribution to somehow limit the ability of retailers to sell online, there are rising concerns that such arrangements could reduce the intensity of intra-brand competition in online outlets.

Online restrictions in selective distribution models come in all forms and shapes, of which the most evident restriction is an outright prohibition of online sales. Sometimes, suppliers do not explicitly forbid retailers from selling online, instead imposing other restrictions that have similar effects – for instance, requiring the seller to be

present at the physical point of sale. [9] On other occasions, suppliers allow online sales but restrict the use of specific online distribution channels, such as marketplaces, [10] or prevent the retailer from advertising their products on price comparison websites.

Another important class of vertical restrictions is online price restraints. A notable example is retail price maintenance (RPM), applications of which are not limited to the brick-and-mortar world and serve to enforce minimum, [11] maximum or fixed retail prices in online markets. [12] A price restriction more specific to online commerce is dual pricing, the practice of charging two distinct wholesale prices depending on whether the retailer resells the product in an online or offline channel. [13] An arguably even more important category of price restrictions entails online price parity clauses, which prevent sellers from charging different prices in alternative online channels.

Of all types of online price restrictions, online price parity clauses deserve special consideration, given that they are at the core of several big cases still under dispute. [14] Also commonly known as most-favoured-nation (MFN) clauses, online platforms frequently use price parity clauses to prevent free-riding by sellers, that could otherwise rely on the platform for advertising purposes and then sell their products for a lower price elsewhere. To avoid this problem, platforms may either impose narrow price parity clauses, which constrain sellers from cutting the price on their own websites, or wide clauses that prevent sellers from charging a lower retail price via competing platforms.

Lastly, an important category of vertical restrictions in online commerce consists of geographical restraints on online distribution, enabling suppliers to create geographical boundaries in a world without physical borders. [15] One of the most well-known ways of enforcing geographical restrictions online is through geo-blocking – that is, by restricting access to local websites or online content based on a user's location. This can be determined by tracking the user's IP address or using similar techniques. Geo-blocking practices are currently under scrutiny, in light of the EC's efforts to promote a digital single market where consumers can access online goods and services across the EU.

How do vertical restrictions affect online competition?

Vertical restrictions are often pro-competitive, potentially bringing many benefits to consumers. The main purpose of vertical restrictions is to solve a coordination problem between separate entities at different stages of the supply chain. [16] While one such widely recognised benefit is the potential to decrease prices by eliminating double marginalisation, [17] vertical restrictions may also produce positive non-price effects – such as improving quality, preserving investment incentives and promoting innovation [18] – all of which can play an important role in online markets.

The economic effects of vertical restrictions are easier to understand when directly compared to the effects of their horizontal counterparts. On the one hand, horizontal restrictions generally produce a negative externality on consumers, because direct competitors have strong incentives to negotiate terms that reduce competition – on price and non-price dimensions – to avoid “stealing business” from one another. On the other hand, vertical restrictions tend to generate a positive externality on consumers, because each of the parties involved has incentives to convince the other to provide a better service at a lower price, enabling the two complementary businesses to grow.

Despite the overall positive effects, there are three major competitive concerns typically associated with vertical restrictions. [19]

- The first concern is the risk that sellers use certain types of vertical restrictions, such as selective distribution clauses, to *foreclose* third parties, namely online retailers.
- The second concern is that vertical restrictions imposing similar conditions on multiple competitors, such as price parity agreements enforced by online platforms, could facilitate horizontal *collusion*. [20]
- A third, though relatively less frequent, concern is that, even in the absence of overt collusion, vertical restrictions that impose similar conditions on multiple competitors at the same time could lead to a *softening of competition*.

Essentially, a vertical restriction could potentially harm consumers if it indirectly facilitates foreclosure, collusion or softening of competition in the upstream or downstream market. This requires at least one of the parties involved to not only have enough market power and ability to distort competition, but also the incentive to do so – as it is not always clear why a company with substantial market power would attempt to restrict competition between its upstream or downstream business partners. It is equally necessary that any indirect anti-competitive effects from the vertical restriction(s) offset any gains from enhanced vertical coordination, resulting in a net welfare loss.

Accordingly, whether a specific vertical restriction results in any consumer harm is an empirical question. Unfortunately, few studies have attempted to quantify the welfare effects of vertical restrictions, possibly because there is limited enforcement in this area traditionally. A 2005 literature survey reviewed some published studies that attempted to quantify such effects, concluding that these studies “*have failed to find compelling evidence that these practices have harmed competition*.” [21] Since then, two other literature surveys looked instead at the effects of vertical mergers – which arguably have similar economic effects to vertical restrictions – and reached similar conclusions. [22]

In light of the growing number of EU investigations focusing on vertical restrictions in online commerce, a question that arises is whether vertical restrictions pose a greater risk of consumer harm when implemented in online markets. One argument asserts that online platforms may have a greater ability to foreclose vertically-related sellers or facilitate collusion due to their role as gatekeepers in (narrowly defined) concentrated markets. [23] Moreover, some large online businesses may have privileged access to important assets, such as intellectual property rights, consumer data, pricing algorithms and similar technologies, which could further facilitate vertical anti-competitive strategies. [24]

Nonetheless, it is also possible that most vertical restrictions in online commerce are largely motivated by the realisation of efficiency effects. In particular, vertical restrictions often serve to preserve the investment incentives of both traditional retailers and online businesses, which would not enter the market if other online players could easily appropriate their investments. The fact that online commerce is characterised by fierce dynamic competition also reduces the risk of vertical restrictions having long-lasting, harmful effects, as any temporary exclusionary or collusive effects are more likely to attract the entry of new competitors.

All things considered, one should not presume that a vertical restriction is likely to harm consumers simply because it imposes certain limitations on online commerce. From a purely economic perspective, there is a strong argument to assess such vertical restrictions on a case-by-case basis. [25] Recognising the importance of preserving competition in online commerce and considering the high costs of conducting a full economic analysis on every restriction that could pose competitive concerns, enforcers may nonetheless continue to rely on safe harbours and prescriptive rules in order to effectively deal with such a complex task.

What is the legal approach in the EU to vertical restrictions online?

The EC and national competition authorities in the EU use three main legal tools for vertical restrictions.

- The first tool is Article 101(1) of the Treaty on the Functioning of the European Union (TFEU), which prohibits anti-competitive agreements.
- The second is TFEU Article 101(3), allowing for an efficiency defence.
- The third and final tool is the VBER, [26] which defines the circumstances under which vertical restrictions are exempt from competition law and when they amount to potential infringement.
- In addition to these three main tools, competition authorities may also apply TFEU Article 102 on abuse of dominance to vertical restrictions, namely when a dominant firm imposes the restriction upon its business partners.

To some extent, the legal approach to vertical restrictions in the EU reflects the established economic evidence, recognising that these practices are often pro-competitive and benefit consumers. Despite a growing number of investigations focusing on online commerce, vertical restriction cases still account for a small fraction of competition law enforcement and tend to receive a more favourable treatment than horizontal restrictions. However, there are some categories of vertical restrictions that qualify as restrictions *by object* and are thus subject to tougher enforcement in the EU – in contrast with the US, where all vertical restrictions are assessed under a “rule of reason.” [27]

The VBER contains a blacklist of vertical restrictions that amount to hardcore violations of competition law by object, for which there is a presumption of illegality regardless of their actual economic effects. The blacklist includes restrictions such as (fixed and minimum) retail price maintenance and aftersales restrictions, due to the high risk of limiting intra-brand price competition and excluding competitors in adjacent markets. While defendants can still rely on Article 101(3) – the second tool – to provide evidence of countervailing efficiency effects, this defence is very rarely successful and involves a high burden of proof.

Among all of the hardcore infringements listed in the VBER, the ones with the greatest implications for online commerce are probably the restrictions on passive sales. The EU vertical restrictions guidelines define passive sales as “responding to unsolicited requests from individual customers including delivery of goods or services to such customers”. [28] In other words, passive sales occur when the seller makes the product available and buyers decide to purchase it without any active engagement of the seller. The case law has established that sales via the internet are a form of passive sales, [29] implying that any vertical restriction preventing retailers from selling online qualifies as a violation of competition law by object.

The VBER provisions on passive sales can also affect other categories of vertical restrictions in online commerce, such as dual pricing. By discriminating online retailers with higher wholesale prices, dual pricing may substantially raise online retailers’ costs above the costs of traditional retailers, therefore acting as a *de facto* restriction to online sales. For that reason, dual pricing currently qualifies as a restriction by object in the EU. [30] In contrast, restrictions to the use of certain online channels, such as marketplaces and price comparison websites, are less likely to receive by object treatment, [31] as these practices are not restrictions on passive sales in the sense that customers can still reach out to retailers through their own websites.

All remaining categories of vertical restrictions not explicitly listed as hardcore restrictions by the VBER can still

qualify as infringements of competition law *by effect*. In other words, the Commission and national competition authorities may assess other vertical restrictions on a case-by-case basis, having the burden of proving that such restrictions are likely to substantially lessen competition. Recognising that competitive harm typically requires a minimum level of market power, the VBER exempts (non-hardcore) vertical restrictions from competition law whenever the parties involved have less than 30% of market share each and annual turnovers below a threshold level determined by the regulation.

The effects-based assessment of vertical restrictions requires authorities to define a relevant market, both on product and geographical dimensions, which is a necessary step for calculating market shares and determining whether the exemption foreseen in the regulation applies. One of the challenges at this stage is to determine whether traditional retailers and online sellers compete in the same geographical market, [32] a decision that could have important implications for the case. The answer to this question is ultimately a matter of demand substitution, as it depends on whether consumers use traditional and online channels interchangeably or whether they use the two channels independently to satisfy different needs.

Suppose the market definition exercise suggests that the parties are not exempt under the VBER. In that case, authorities may then conduct a full economic analysis of the vertical restriction, which should account for the special characteristics of online commerce. [33] In particular, when assessing whether the parties involved have substantial market power, it is important to look beyond market shares and to assess the magnitude of entry barriers as well, which tend to be small in the context of many online markets. [34] Understanding the online business model is equally imperative, as that could help distinguish pro-competitive vertical restrictions from restrictions motivated by malicious anti-competitive intent.

The complexity of assessing the effects of vertical restrictions, combined with the relative novelty of online commerce, might explain the divergent decisional practice observed in the EU concerning certain categories of vertical restrictions. Taking the example of the price parity clauses adopted by online travel agencies, these restrictions have resulted in a wide range of enforcement decisions across jurisdictions, including similar commitments in several EU countries (reversed on appeal in the UK), [35] infringement decisions in Germany [36] and new separate legislation in France. [37] Such disparity of legal approaches to identical vertical restrictions risks creating an environment of legal uncertainty that could harm online commerce.

Concluding remarks

Online commerce has brought great benefits for consumers all over the world, as well as equally great challenges to the most experienced of competition law enforcers. Few people would dispute the importance of preserving competition in online markets. However, as far as vertical restrictions are concerned, we are still far from reaching a consensus about the best legal approach to dealing with these practices. To overcome this challenge, it is crucial to understand how online business models work and to support vertical theories of harm with solid economic evidence, guaranteeing that competition law reinforces – and does not compromise – the innovative nature of online markets.

As the number of vertical restrictions investigations in online commerce grows, this topic will attract an increasing number of researchers and practitioners who may help identify the best enforcement practices. We hope that this foreword is a small step in that direction, by providing a short overview of the fundamental issues under discussion and the recent enforcement experience in the EU. We look forward to seeing how the economic and legal thinking on vertical restrictions will evolve in the future and be shaped by today's discussions, including by the many interesting contributions within this special edition.

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

[1] OECD (2018), *Implications of E-Commerce for Competition Policy*, Background Note by the OECD Secretariat. See *OECD, The OECD holds a roundtable on e-commerce, 6 June 2018, e-Competitions June 2018, Art. N° 87511*.

[2] Akman, P. (2016), “A Competition Law Assessment of Platform Most-Favored-Customer Clause,” *Journal of Competition Law & Economics*, Vol. 12, N. 4, pp. 781-833.

[3] Oxera & Accent (2016), *Vertical Restraints: New Evidence from a Business Survey*, report prepared for the Competition and Markets Authority.

ICN (2015), *Online Vertical Restraints Special Project Report*, prepared by the Australian Competition and Consumer Commission.

Verouden, V. (2008), “Vertical Agreements: Motivation and Impact,” in *Issues in Competition Law and Policy*, Vol. 3, Chapter 72, 1813-1840.

Peeperkorn, L. (1997), *Green Paper on Vertical Restraints in EC Competition Policy*.

[4] UNCTAD (2019), *Competition Issues in the Digital Economy*, Note by the UNCTAD Secretariat. See *UNCTAD - UN Conference on Trade and Development, The UNCTAD meeting on competition law and policy adopts for consideration draft guiding policies and procedures aimed at tackling international antitrust concerns with Big Tech, 13 July 2019, e-Competitions July 2019, Art. N° 94889*.

OECD (2018), *Rethinking Antitrust Tools for Multi-Sided Platforms*. See *OECD, The OECD holds a roundtable on e-commerce, 6 June 2018, e-Competitions June 2018, Art. N° 87511*.

European Commission (2017), *Final Report on the E-Commerce Sector Inquiry*. See **Christopher Bright, Paolisa Nebbia**, *The EU Commission publishes its final report on the e-commerce sector inquiry, 10 May 2017, e-Competitions May 2017, Art. N° 84215*; **Jay Modrall**, *The EU Commission issues a final report on its e-commerce sector inquiry and updates its digital single market plans, 10 May 2017, e-Competitions May 2017, Art. N° 84193*; **André Pretorius, Susan Black, Kyriakos Fountoukakos**, *The EU Commission publishes its final report in the e-commerce sector inquiry as part of a wider digital market strategy which aims to achieve better access for consumers and business to online goods and services, 10 May 2017, e-Competitions May 2017, Art. N° 93608*.

OECD (2017), *Algorithms and Collusion: Competition Policy in the Digital Age*. See *OECD, The OECD holds a roundtable on algorithms and collusion, 1 June 2017, e-Competitions June 2017, Art. N° 85494*.

Autorité de la Concurrence and Bundeskartellamt (2016), *Competition Law and Data*. See **French Competition Authority**, *The French and German Competition Authority publish a joint study on competition law and data, 10 May 2016, e-Competitions May 2016, Art. N° 79669*.

[5] OECD (2018), *Implications of E-Commerce for Competition Policy*, Background Note by the OECD Secretariat.

ICN (2015), *Online Vertical Restraints Special Project Report*, prepared by the Australian Competition and Consumer Commission.

OECD (2013), *Vertical Restraints on Online Sales*, Competition Policy Roundtable. See **OECD**, *The OECD holds a roundtable on vertical restraints for online sales, 12 September 2013, e-Competitions MFC clause, Art. N° 85600*.

[6] European Commission (2020), *Evaluation of the Vertical Block Exemption Regulation*, Commission Staff Working Document. See **European Commission**, *The EU Commission publishes findings of the evaluation of the Vertical Block Exemption Regulation, 8 September 2020, e-Competitions September 2020, Art. N° 96665*; **Andrzej Kmiecik, Helga Gudmundsdottir**, *The EU Commission publishes a report on the evaluation of the vertical block exemption regulation, 8 September 2020, e-Competitions September 2020, Art. N° 97155*; **Michaël Cousin, Alexi Dimitriou**, *The EU Commission publishes a working document summarizing the findings of the evaluation phase of the review of the vertical block exemption regulation and its guidelines, 8 September 2020, e-Competitions September 2020, Art. N° 96955*.

[7] Other common definitions of vertical restraints include:

“Certain types of practices by manufacturers or suppliers relating to the resale of their products,” (OECD (1993), *Glossary of Industrial Organisation Economics and Competition Law*, compiled by R. S. Khemani and D. M. Shapiro, commissioned by the Directorate for Financial, Fiscal and Enterprise Affairs).

“Concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services,” (COMMISSION REGULATION (EU) No 330/2010).

[8] Recent EU cases involving restrictions to online sales within selective distribution include:

Adidas/LDC, Case S/DC/0631/18, Spanish Competition Authority decision of 06.02.2020. See **Rafael Baena, Javier Torrecilla Pérez, Pablo Velasco**, *The Spanish Competition Authority accepts commitments offered by a sports manufacturer and retailer following a complaint on the imposition of restrictions in the distribution network (Adidas / LDC), 6 February 2020, e-Competitions February 2020, Art. N° 95898*; **Miguel Orellana, Carlos Vérguez Muñoz**, *The Spanish Competition Authority ends an infringement proceeding by adopting a commitment decision following a sports brand alleged anti-competitive conduct (Adidas / LDC), 6 February 2020, e-Competitions February 2020, Art. N° 95151*; **Pedro Callol, Enrique Fayos, Jorge Manzarbeitia, Manuel Canadas Bouwen, Laura Moya**, *The Spanish Competition Authority accepts commitments by a sport brand in connection with contractual provisions applied within its selective distribution network (Adidas / LDC), 6 February 2020, e-Competitions February 2020, Art. N° 97846*.

Guess, Case AT.40428, European Commission decision of 17.12.2018. See **Jacques Buhart, Mai Muto, Philip Bentley**, *The EU Commission fines a clothing company for restricting retailers from online advertising and selling cross-border to consumers in other Member States (Guess)*, 17 December 2018, *e-Competitions December 2018*, Art. N° 89396; **Andrzej Kmiecik**, *The EU Commission fines a clothing company close to €40 million for restricting cross-border trade (Guess)*, 17 December 2018, *e-Competitions December 2018*, Art. N° 88824; **Morten Nissen, Alexander Bröchner**, *The EU Commission fines €40 million a clothing company for anticompetitive agreements to block cross-border sales (Guess)*, 17 December 2018, *e-Competitions December 2018*, Art. N° 97247.

Ping Europe Limited, Case 50230, Competition and Markets Authority decision of 24.08.2017.

Asics, Case B2-98/11, Bundeskartellamt decision of 26.08.2015. See **Gabriele Accardo**, *The German Competition Authority condemns an athletic equipment company for restricting online sales of its small and medium-sized authorized dealers (Asics)*, 26 August 2015, *e-Competitions August 2015*, Art. N° 78327; **German Competition Authority**, *The German Competition Authority condemns a manufacturer of running shoes for restricting the online sales activities of small and medium-sized authorised dealers (Asics)*, 26 August 2015, *e-Competitions August 2015*, Art. N° 75442.

[9] C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v Président de l’Autorité de la concurrence and Ministre de l’Économie, de l’Industrie et de l’Emploi* ECLI:EU:C:2011:649. See **Bernard Amory, Eric Morgan de Rivery, Johannes Zöttl**, *The EU Court of Justice Advocate General Mazak recommends that prohibition on internet sales be per se infringement (Pierre Fabre Dermo-Cosmétique)*, 3 March 2011, *e-Competitions March 2011*, Art. N° 50051; **Joseph Vogel**, *The EU Court of Justice rules that absolute bans on Internet sales are prohibited (Pierre Fabre Dermo-Cosmétique)*, 13 October 2011, *e-Competitions October 2011*, Art. N° 39725.

[10] C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH* EU:C:2017:941. See **Andrzej Kmiecik**, *The EU Court of Justice hands down an anticipated judgment on the possibility to restrict the selling on third party online platforms outside of the selective distribution network in the luxury goods sector (Coty)*, 6 December 2017, *e-Competitions December 2017*, Art. N° 85459; **Christian Ritz, Mariya Serafimova**, *The EU Court of Justice holds that suppliers of luxury goods may under certain conditions restrict authorised retailers in a selective distribution system not to sell their goods via third-party online platforms to preserve their products’ ‘luxury image’ (Coty Germany)*, 6 December 2017, *e-Competitions December 2017*, Art. N° 85410; **Peter Alexiadis, Jens-Olrik Murach, Balthasar Strunz**, *The EU Court of Justice rules in favour of restrictions on the use of platforms in a selective distribution system (Coty)*, 6 December 2017, *e-Competitions December 2017*, Art. N° 86552.

[11] C-243/83, *SA Binon & Cie v SA Agence et messageries de la presse* EU:C:1985:284.

[12] The Competition and Market Authority has investigated several RPM cases, including:

National Lighting Company Limited (NLC), Case 50343, CMA decision of 03.05.2016.

ITW Ltd, Case CE/9856/14, CMA decision of 24.05.2016. See **Andrzej Kmiecik**, *The UK’s Competition and Markets Authority fines a company for retail price maintenance on online sales (ITW)*, 24 May 2016, *e-Competitions May 2016*, Art. N° 79875.

[13] Bundeskartellamt (2016), *LEGO changes its discount system – Fairer conditions for online*

sales, press release published on 18.07.2016. See **German Competition Authority**, *The German Competition Authority fines a toys manufacturer for resale price maintenance (Lego)*, 12 January 2016, *e-Competitions January 2016*, Art. N° 77585.

[14] E-book MFNs and related matters (Amazon), Case AT.40153, European Commission decision of 04.05.2017. See **European Commission**, *The EU Commission accepts remedies proposed by an electronic commerce company in the e-books case (Amazon)*, 4 May 2017, *e-Competitions May 2017*, Art. N° 84195; **Andrzej Kmiecik**, *The EU Commission accepts commitments to remove most favoured nation clauses from e-book distribution agreements (Amazon)*, 4 May 2017, *e-Competitions May 2017*, Art. N° 84309.

Booking.com, Case 15-D-06, Autorité de la Concurrence decision of 21.04.2015. See **French Competition Authority**, *The French Competition Authority obtains extensive commitments from an online hotel booking company (Booking.com)*, 21 April 2015, *e-Competitions April 2015*, Art. N° 72696.

Booking.com, Case 596/2013, Konkurrensverket (Swedish Competition Authority) decision of 15.04.2015. See **Viktor Wahlqvist**, *The Swedish Competition Authority approves voluntary commitments of an online hotel booking company subject to a fine (Booking.com)*, 15 April 2015, *e-Competitions April 2015*, Art. N° 74668.

[15] Film merchandise, Case AT. 40433, European Commission decision of 30.01.2020. See **European Commission**, *The EU Commission fines several companies for restricting sales of film merchandise products (NBCUniversal)*, 30 January 2020, *e-Competitions January 2020*, Art. N° 93149; **Pauline Van Sande, José Rivas**, *The EU Commission fines €14.3 million several companies for restricting sales of licensed film merchandise (NBCUniversal)*, 30 January 2020, *e-Competitions January 2020*, Art. N° 93697; **Anna Grümmer, Maxime Tecqmenne**, *The EU Commission fines several film companies for implementing territorial, consumer and online sales restrictions through merchandising licence agreements (NBC Universal)*, 30 January 2020, *e-Competitions January 2020*, Art. N° 94655.

[16] Verouden, V. (2008), "Vertical Agreements: Motivation and Impact," *Issues in Competition Law and Policy*, Vol. 3, Chapter 72, 1813-1840.

[17] Spengler, J. (1950), "Vertical Integration and Antitrust Policy," *Journal of Political Economy*, Vol. 58/4, pp. 347-352.

[18] Bishop, S., A. Lofaro, F. Rosati, and J. Young (2005), *The Efficiency-Enhancing Effects of Non-Horizontal Mergers*, Report by RBB Economics. While this report focuses on vertical mergers, many of the pro-competitive motivations described also apply to vertical restrictions.

[19] European Commission (2010), *Guidelines on Vertical Restraints*, Commission Notice and ICN (2015), *Online Vertical Restraints Special Project Report*, prepared by the Australian Competition and Consumer Commission. See **Lucas Peeperkorn, Andrei Gurin, Katja Viertiö, Magdalena Brenning-Louko**, *The EU Commission adopts new block exemption regulation and new guidelines on vertical agreements*, 20 April 2010, *e-Competitions April 2010*, Art. N° 34857; **Gabriele Accardo**, *The EU Commission publishes new block exemption regulations and guidelines on vertical restrictions*, 20 April 2010, *e-Competitions April 2010*, Art. N° 62374; **Filippo Amato, Stefano Macchi di Cellere, Johannes Zöttl**, *The EU Commission adopts new rules on vertical restraints*, 20 April 2010, *e-Competitions April 2010*, Art. N° 33680.

- [20] E-Books, Case AT.39847-E-BOOKS, European Commission decision of 25.07.2013.
- [21] Cooper, J. C., L. M. Froeb, D. O'Brien, and M. G. Vita (2005), "Vertical Antitrust Policy as a Problem of Inference," *International Journal of Industrial Organization*, Vol. 23, No. 7-8, pp. 639-664.
- [22] Lafontaine, F. and M. Slade (2007), "Vertical Integration and Firm Boundaries: The Evidence," *Journal of Economic Literature*, Vol. 45/3, pp. 629-685 and Global Antitrust Institute (2018), *Vertical Mergers*.
- [23] OECD (2018), *Implications of E-Commerce for Competition Policy*, Background Note by the OECD Secretariat. See *OECD, The OECD holds a roundtable on e-commerce, 6 June 2018, e-Competitions June 2018, Art. N° 87511*.
- [24] OECD (2016), *Big Data: Bringing Competition Policy to the Digital Era*, Background Note by the OECD Secretariat. See *OECD, The OECD holds roundtable on dig data, 29 November 2016, e-Competitions November 2016, Art. N° 85501*.
- [25] Buccrossi, P. (2015), "Vertical Restraints on E-Commerce and Selective Distribution," *Journal of Competition Law & Economics*, Vol. 11, No. 3, pp. 747-773.
- [26] Commission Regulation (EU) No 330/2010.
- [27] OECD (2018), *Implications of E-Commerce for Competition Policy*, Background Note by the OECD Secretariat. See *OECD, The OECD holds a roundtable on e-commerce, 6 June 2018, e-Competitions June 2018, Art. N° 87511*.
- [28] European Commission (2010), *Guidelines on Vertical Restraints*, Commission Notice.
- [29] C-439/09, Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi ECLI:EU:C:2011:649. See **Joseph Vogel**, *The EU Court of Justice rules that absolute bans on Internet sales are prohibited (Pierre Fabre Dermo-Cosmetique)*, 13 October 2011, *e-Competitions October 2011, Art. N° 39725*.
- [30] European Commission (2017), *Final Report on the E-Commerce Sector Inquiry*. See **Jay Modrall**, *The EU Commission issues a final report on its e-commerce sector inquiry and updates its digital single market plans*, 10 May 2017, *e-Competitions May 2017, Art. N° 84193*; **Andrzej Kmiecik**, *The EU Commission publishes final e-commerce sector inquiry report*, 10 May 2017, *e-Competitions May 2017, Art. N° 84308*; **Simon Baxter, Frederic Depoortere, Giorgio Motta, Ingrid Vandenborre**, *The EU Commission publishes its final report on the e-commerce sector inquiry*, 10 May 2017, *e-Competitions May 2017, Art. N° 84274*.
- [31] See, for instance, C-230/16, Coty Germany GmbH v Parfümerie Akzente GmbH ECLI:EU:C:2017:941, see **Miranda Cole, Jennifer Boudet**, *The EU Court of Justice finds that a luxury goods supplier may prevent its authorised retailers from using third-party platforms to sell its products, in order to preserve the products' luxury image (Coty Germany / Parfümerie Akzente)*, 6 December 2017, *e-Competitions December 2017, Art. N° 95622*; **Alex Potter, Frank Röhlting**, *The EU Court of Justice rules that suppliers may prohibit the sales of their products via third-party online platforms to preserve the luxury image of their goods (Coty Germany / Parfümerie Akzente)*, 6 December 2017, *e-Competitions December 2017, Art. N° 94389*. And *Action Sport v Nike*, ECLI:NL:GHAMS:2020:2004. See **Andrzej Kmiecik, Anna**

Jorna, *The Amsterdam Court of Appeal upholds the legality for a non-luxury brands to ban resale on third-party platforms (Nike / Action Sport / Amazon)*, 14 July 2020, *e-Competitions July 2020*, Art. N° 97159.

[32] Mandrescu, D. (2017), “Applying EU Competition Law to Online Platforms: The Road Ahead – Part 2, *European Competition Law Review*, Vol. 38, No. 9, pp. 410-422, and Friederiszick, H. W. and E. Glowicka (2016), “Competition Policy in Modern Retail Markets,” *Journal of Antitrust Enforcement*, Vol 4, No. 1, pp. 1-42.

[33] OECD (2013), *Vertical Restraints on Online Sales*, Competition Policy Roundtable. See *OECD, The OECD holds a roundtable on vertical restraints for online sales, 12 September 2013*, *e-Competitions MFC clause*, Art. N° 85600.

[34] OECD (2018), *Rethinking Antitrust Tools for Multi-Sided Platforms*. See *OECD, The OECD holds a roundtable on e-commerce, 6 June 2018*, *e-Competitions June 2018*, Art. N° 87511.

[35] *Skyscanner Ltd v Competition and Markets Authority* [2014] CAT 12 (28 July 2014). See *Tristan Jones*, *The UK Competition Appeal Tribunal quashes commitments in the online booking sector (Skyscanner)*, 26 September 2014, *e-Competitions September 2014*, Art. N° 69260; *Gabriele Accardo*, *The UK Competition Appeal Tribunal quashes an OFT decision to accept commitments for failing to inform itself about the possible impact on price transparency of an obvious and clear restriction on disclosure of price information in the online booking sector (Skyscanner)*, 26 September 2014, *e-Competitions September 2014*, Art. N° 72166.

[36] *Hotel Reservation Service*, Case B9 - 66/10, Bundeskartellamt decision of 20.12.2013. See *German Competition Authority*, *The German Competition Authority forbids the application of a most favoured nation clause and orders its removal from the contracts between hotels and booking portals (HRS / Expedia / Booking.com)*, 20 December 2013, *e-Competitions December 2013*, Art. N° 62122; *Gabriele Accardo*, *The German Competition Authority decides to prohibit a hotel booking portal from continuing to apply its “best price” clause (HRS / Expedia / Booking.com)*, 20 December 2013, *e-Competitions December 2013*, Art. N° 62229.

[37] Article 133 of LOI n° 2015-990 du 6 août 2015 pour la croissance, l’activité et l’égalité des chances économiques.